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11.1 Sentencing principles & sentencing orders

"Juveniles are less mature - less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts, in short they are less responsible and therefore less blameworthy than adults. Their diminished responsibility means that they 'deserve' a lesser punishment than an adult who commits the same crime...Lesser punishment means not only more sparing use of detention but it also means significantly shorter terms of detention, bonds and periods of licence disqualification, because time has a wholly different dimension for children than it does for adults."

Judge Newman (South Australian Youth Court)
South Australian Youth Court Advisory Committee, Annual Report 1983, pp.6-7

"The risk that a period of detention will be counter-productive for an offender – and hence for the community – is never higher than in relation to a young offender who has not previously been in custody. Research to which the Chief Scientist of New Zealand has recently drawn attention has highlighted the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely."

Victorian Court of Appeal in *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 at [77] per Maxwell P, Harper JA & Lasry AJA citing Laurence Steinberg, 'Adolescent Development and Juvenile Justice' (2009) *Annual Review of Clinical Psychology* 47, 65–68, cited in *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence*, Report to Prime Minister of New Zealand by Chief Scientific Advisor (May 2011), 28.

"[S]entencing is not a process that leads to a single correct answer arrived at by some process admitting of mathematical precision."

High Court of Australia in *Pearce v The Queen* (1998) 194 CLR 610, 624 per McHugh, Hayne & Callinan JJ cited with approval in *DPP (Vic) v Yeomans* [2011] VSCA 277 at [66]

Only a small percentage of offences involving accused children are contested and a significant proportion of these are found proved in any event. It follows that the major task for a judge or magistrate in the Criminal Division of the Children's Court is the sentencing of juvenile offenders. In *R v Lanteri* [2006] VSC 225 at [6] Gillard J explained the sentencing process for adult offenders:

"My task is to determine the facts and, applying the principles of sentencing law, to determine in the exercise of my discretion, what is a proportionate and appropriate sentence in all the circumstances. In relation to the sentencing process, I refer to what the Court of Appeal said in *R v Storey* [1998] 1 VR 359 at 366:

"Sentencing is not a mechanical process. It requires the exercise of a discretion. There is no single 'right' answer which can be determined by the application of principle. Different minds will attribute different weight to various facts in arriving at the 'instinctive synthesis' which takes account of the various purposes for which sentences are imposed - just punishment, deterrence, rehabilitation, denunciation, protection of the community - and which pays due regard to the principles of totality, parity, parsimony, and the like."

The process for sentencing juvenile offenders is the same although the weight given by the sentencing judge to the various factors involved in the 'instinctive synthesis' is likely to be quite different in most juvenile cases.

11.1.1 Sentencing models

There are two sentencing models which, in one combination or another, underpin the sentencing of persons, whether adult or juvenile, in most jurisdictions. In his Keynote Address at the Youth Justice Conference in September 2000: "Managing a New World in Transit", the Chief Justice of Singapore said of these models in relation to youth sentencing:

"National responses in many countries to youth offending throughout the 20th century have fluctuated between the 'welfare' and the 'justice' models: broadly whether young offenders are seen as being primarily in need of care and rehabilitation, or deserving of correction or punishment. Both approaches have received their share of criticism."

11.1.2 Sentencing of adults

In sentencing an **adult** offender a court is required, by s.5(1) of the Sentencing Act 1991 (Vic), as far as practicable-

- ❶ to punish the offender;
- ❷ to deter the individual offender ['specific deterrence'];
- ❸ to deter the community generally ['general deterrence'];
- ❹ to rehabilitate the offender;
- ❺ to denounce the offender; and
- ❻ to protect the community.

This is predominantly a 'justice' model, only item ❹ falling squarely within the 'welfare' model. In *R v Tuan Quoc Truong* [2005] VSCA 147 at [17]-[18] the Court of Appeal emphasized that the principle of general deterrence (item ❸) was not to be used to convey a message to a specific ethnic community but to members of the community generally. See also *R v Reth Mao* [2006] VSCA 36 at [38]-[42].

In *R v Merrett & Ors* [2007] VSCA 1 Maxwell P, with whom Chernov JA & Habersberger AJA agreed, said at [49]:

“As I said in *The Queen v Tiburcy* [2006] VSCA 244, the sentencing court looks to the future as well as to the past. There is very great benefit to the community at large, as well as to the individuals themselves and their immediate families, if future criminal activity can be avoided. It is important that this Court, by its own sentencing decisions, recognise and reward efforts at rehabilitation, just as we should support trial judges who do so. It is important to reinforce in the public mind the very considerable public interest in the rehabilitation of offenders. The preoccupation with retribution which characterises much of the public comment on sentencing is understandable, but it focuses on only one part of what the sentencing court does.”

In *DPP v Samarentsis* [2007] VSCA 20 a very experienced judge had sentenced an offender who had demonstrated “a complete turn around” in his life in a way that gave much greater weight to the offender’s prospects of rehabilitation than it did to factors such as denunciation and deterrence. In refusing the DPP appeal Eames JA at [5] and Kellam AJA at [34] approved and applied dicta of King CJ in *R v Osenkowski* (1982) 30 SASR 212 at 212-213:

“Prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended, even to offenders with bad records, when a judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender’s life might lead to reform.”

In *DPP v Milson* [2019] VSCA 55 at [71] Priest & Weinberg JJA said in relation to the 31 year old respondent:

“In a climate when sentences for many (if not most) crimes are increasing, it is easy to forget that the protection of the community ultimately is best served by the rehabilitation of an offender: see Sentencing Act 1991, ss.5(1)(c) and (e). If an offender, whether young or recidivist, can be steered away from a life of crime, the public interest is best served. That notion, it seems to us, informed what Young CJ said about the sentencing of youthful offenders in *AG v Chmil, Zanoni & Ross* (Unreported, 1 August 1977, Vic, CCA):

‘I think it should be remembered that in the long run the community is better served and better protected if a young offender is rehabilitated and led away from a life of crime than if after a short or long gaol sentence, imposed to satisfy a public clamour for retribution, he is taught the ways of the criminal.’

[It] also underpinned the observations that King CJ made in *Osenkowski* (1982) 30 SASR 212 at 212-213 with respect to the sentencing of seasoned offenders. Indeed, although it is often taken for granted that leniency extended by a judge for the purposes of rehabilitation bestows a benefit on the prisoner alone, commentary in social and news media frequently ignores the fact that the community’s interest is best served if well-placed leniency in sentencing may (and often does) lead to reformation: *R v Willisroft* [1975] VR 292, 303 (Starke J).”

See also *Jiaming Gui v The Queen* [2020] VSCA 273 at [29] where Priest & Weinberg JJA repeated the above observations of Sir John Young in *Chmil’s Case*.

11.1.3 Sentencing of children

By contrast, the focus of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA') – like its predecessor the Children and Young Persons Act 1989 (Vic) [No.56/1989] ('the CYPA') – in relation to the sentencing of Victorian **young offenders** is predominantly rehabilitative. In Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed. 1999, Oxford University Press South Melbourne, the authors characterize Victoria's legislative scheme as an attempt to blend the two sentencing models: 'welfare' and 'justice'. In the Second Reading Speech the objectives of the CYPA were said (at p.1150) to include the provision of:

- an adequate and constructive response to children and young people who have been charged with and found guilty of committing offences;
- an extended and more flexible range of dispositions in each of the divisions of the Court, which seek to enable children to remain at home wherever practicable and appropriate.

The rehabilitative focus is reinforced by the requirement (at p.1151) to give priority to child protection where there are both protective and criminal matters in respect of the one child: see s.18(2) of the CYPA [now s.522(2) of the CYFA]. It is clear that when enacting the sentencing principles in s.139 of the CYPA & s.362 of the CYFA, Parliament - like its counterparts in most other countries in the world – did not consider children and young persons merely to be little adults. In *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 at [76] the Court of Appeal – referring to the cases of *Merrett & Tiburcy* – treated the young applicant's rehabilitation as "a primary consideration". See also *R v Azzopardi, R v Baltatzis, R v Gabriel* [2011] VSCA 372 at [34]-[44]; *DPP v McGuigan* [2012] VSCA 121.

The philosophies of "home & family preservation" & "stigma minimisation" differentiate the sentencing of children from that of adults. The philosophies are included in the principles in s.362(1) of the CYFA to which the Court **must** have regard, as far as practicable, in determining what sentence to impose on a child. This is predominantly a 'welfare' model of sentencing, only principles (e), (f), (g) & (h) having a 'justice' component. Principles (a) & (c) have parallels in the Family Division in ss.10(3)(b) & 10(3)(o) of the CYFA.

	PRINCIPLE		MODEL
(a)	STRENGTHENING FAMILIES	The need to strengthen and preserve the relationship between the child and the child's family.	WELFARE
(b)	LIVE AT HOME	The desirability of allowing the child to live at home.	WELFARE
(c)	EDUCATION ETC UNDISTURBED	The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.	WELFARE
(d)	MINIMISE STIGMA	The need to minimise the stigma to the child resulting from a court determination.	WELFARE
(e)	SUITABILITY OF SENTENCE	The suitability of the sentence to the child.	WELFARE/ JUSTICE
(f)	ACCOUNTABILITY	If appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law.	JUSTICE/ WELFARE
(g)	COMMUNITY PROTECTION	The need to protect the community, or any person, from the violent or other wrongful acts of the child- (i) in all cases where the sentence is for a Category A or Category B serious youth offence; or (ii) in any other case, if it is appropriate to do so.	JUSTICE
(h)	GOOD ORDER IN DETENTION FACILITIES	If appropriate, the need to deter the child from committing offences in remand centres, youth residential centres or youth justice centres.	JUSTICE

While – unlike s.5 of the Sentencing Act 1991 and except for s.362(1)(h) – there is no explicit mention in s.362(1) of punishment, denunciation or deterrence (either specific or general), in appropriate cases punishment or specific deterrence may be justified by the "suitability" principle of s.362(1)(e), the "accountability" principle of s.362(1)(f) or the "community protection" principle of s.362(1)(g). However, while stating that "broadly speaking, normal sentencing principles" are also applicable to youthful offenders, the Court of Appeal has emphasised that the sentencing of children is under a very different regime from that of adults. In his judgment in *R v Dwayne Andrew Evans* [2003] VSCA 223 (with which Ormiston & Batt JJA agreed on this issue), Vincent JA said at [44]:

"An elaborate system has been developed to deal with the problem of offending by children and young persons in our community, with a separate court, separate detention facilities, supervision systems and so forth. Whilst broadly speaking, normal sentencing

principles can be said to remain applicable when dealing with youthful offenders, as a matter of law and practice it is recognised that the respective weight to be given to relevant factors will vary. In addition the *Children and Young Persons Act 1989* (Vic.) sets out [in s.139] a number of matters to which a sentence in the Children's Court must have regard and which differ in kind and emphasis from roughly similar provisions in s.5 of the *Sentencing Act 1991* (Vic.). Underlying this system is the attribution of considerable significance to the generally accepted immaturity of the young people who appear before the Children's Court and the need, in the interests of the community and the young persons concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage of their lives: see *R v Homer* (1976) 13 SASR 377. These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals."

See also the judgment of Southwell AJA (with whom Phillips CJ & Callaway JA agreed) in *R v Angus* [unreported, 01/02/1996] at pp.6-7, citing with approval dicta of Lush J in the Court of Criminal Appeal in *R v Wilson* [unreported, 28/02/1983].

In *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 the Court of Appeal (Maxwell P, Harper JA & Lasry AJA) at [38]-[39] summed up the principles involved in sentencing a child under the CYFA:

[38] "[O]ur conclusion [that general deterrence is not applicable] does not depend upon s.362(1) being treated as an exhaustive statement of the sentencing considerations to be applied where a child is being sentenced. Rather, the analysis turns on the singularity of general deterrence as a sentencing consideration and what we see as its incompatibility with the clear objectives and plain language of s.362(1).

[39] We respectfully agree with [the sentencing judge] that a court sentencing a child would – as in any other sentencing process – be required to consider the gravity of the offence, the remorse of the offender, whether or not the offender had pleaded guilty, the offender's character and antecedents and the impact of the offence on the victim. Unlike general deterrence, however, those considerations are all directed at an assessment of the particular offending, and of the particular offender, and they inform the determination of a sentence which is properly reflective of all of those features. The statutory directive in s.362(1) [to take the specified matters into account 'as far as practicable'] is an acknowledgment that the Court's ability to do so may be affected by those various factors."

In *Bradley Webster (a pseudonym) v The Queen* [2016] VSCA 66 the 17 year old offender had been found guilty of seven charges of rape arising from a single episode. A number of other charges were dismissed. BW was sentenced in the Children's Court to a 12 month youth supervision order. On a Director's appeal – in which BW pleaded guilty – he was sentenced in the County Court to 2 years YJC detention. In the Court of Appeal the majority allowed BW's appeal and sentenced him to a 12 month youth attendance order. In dissent, Beach J granted leave to appeal but dismissed the appeal. In their majority judgment Maxwell P & Redlich JA referred with strong approval to the decision of the Court of Appeal in *CNK v The Queen* (2011) 32 VR 641 and the decision of Vincent JA in *R v Evans* [2003] VSCA 223 [44]. At [6]-[10] & [28] their Honours summarized the significant distinction between sentencing of adults and sentencing of young offenders as follows-

"[6] This appeal highlights, once again, the difficult task which confronts a sentencing court when imposing sentence for serious crimes committed by a young offender. In such a case there is – or at least there appears to be – an acute conflict between sentencing considerations. On the one hand, conventional considerations of just punishment and denunciation point towards a custodial penalty, because serious offences are seen to require the uniquely punitive sanction of loss of liberty: See *Boulton v The Queen* [2014] VSCA 342 [104]-[105]. On the other hand, the public interest in the rehabilitation of an offender is never greater than in the case of a young offender.

[7] In fact...the conflict is more apparent than real. **What is so distinctive, and so important, about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive or retributive considerations which are appropriately applied to adults must be largely set aside.**

[8] There are three reasons for this. First, the young offender's immaturity is seen as markedly reducing his/her moral culpability; secondly, custody can be particularly criminogenic for a young person, whose brain is still developing; and, thirdly, the very process of development and maturation which is under way is seen as providing a unique opportunity for rehabilitation and – hence – for minimizing the risk of reoffending.

[9]...[T]he primacy of rehabilitation in the sentencing of young offenders is well established, both at common law and by the principles of the CYFA. In our view, this was a case where BW's culpability was much less than would have been the case for an adult offender, and where the importance of promoting his rehabilitation meant that a non-custodial order was called for.

[10] One of the consequences of this approach to sentencing is that the victim of serious offending like this (and her family) may feel that the harm they have suffered because of the offending is given insufficient weight in the sentencing process. The victim impact statement reveals the profound impact of this offending on J and her family. Our conclusion on resentencing should not be taken as implying that these impacts have been overlooked or undervalued...

[28] The position may be summed up as follows. First, the statutory framework for juvenile justice compels the court sentencing a young offender (almost always the Children's Court) to adopt the offender-centred (or 'welfare') approach, rather than the 'justice' or 'punishment' approach. For an example of this terminology, see K.Richards, 'What makes juvenile offenders different from adult offenders?', *Trends and Issues in Crime and Criminal Justice* No 409 (Australian Institute of Criminology, February 2011) p.6. Secondly, and just as importantly, this strong legislative policy is well supported by the extensive research into adolescent development conducted over the past 30 years: C M Chu and J R P Ogloff, 'Sentencing of Adolescent Offenders in Victoria: A Review of Empirical Evidence and Practice' (2012) 19 *Psychiatry, Psychology and the Law* 32.

The dicta of Vincent JA in *R v Dwayne Andrew Evans* [2003] VSCA 223 at [44] and of Maxwell P & Redlich JA in *Webster v The Queen* [2016] VSCA 66 at [7] was quoted and applied by Judge Chambers in *DPP v SI (a child)* [2018] VChC 3 at [37]-[39].

11.1.4 Some general sentencing principles

In *R v Jongsma* [2004] VSCA 218 Gillard AJA said at [47]: "The sentencing process involves an exercise of a discretionary judgment. The principles have been stated often and I refer to the leading authority of *House v The King* (1936) 55 CLR 499 at 504-5. As it is an exercise of discretion, there is room for difference of opinion as to what is the appropriate sentence...I discussed the principles in *R v. David Matthew Langdon* [2004] VSCA 205 at [60]-[76]." In *Pandevski* [2007] VSCA 84 at [36], Maxwell P reiterated the discretionary nature of sentencing: "It is obvious that on particular matters different judges might come to slightly different views. That is the nature of the sentencing process. That is why it is done by judges, not by machines."

A convenient starting point in the determination of an appropriate sentence for both adult and child offenders is the seriousness of the offence and the level of culpability of the offender, as discussed by Vincent & Weinberg JJA and Mandie AJA in *DPP v Weidlich* [2008] VSCA 203 at [17]-[18]:

[17] "The seriousness to be attributed to a breach of the criminal law in any given case is, of course, dependent upon a number of factors including the intention of the perpetrator and the consequences of its commission: see *Mallinder v R* (1986) 23 A Crim R 179; *R v Pota* [2007] VSCA 198 at [28]; *DPP v Fevaleaki* [2006] VSCA 212 at [15] and *R v Buckle* [2005] VSCA 98 at [25]...

[18] Generally, the measure of culpability of an offender under the criminal law rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences. Little thought is required to appreciate that the greater the level of insight and understanding possessed by him or her concerning the act and its potential harm, the higher becomes the level of culpability for then deliberately engaging in the conduct involved."

In *Muldock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 at [18] French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ said: "At common law the exercise of the sentencing discretion is the subject of established principles. These include proportionality {*Veen v The Queen [No 2]* (1988) 164 CLR 465}, parity {*Lowe v The Queen* (1984) 154 CLR 606}, totality {*Mill v The Queen* (1988) 166 CLR 59} and the avoidance of double punishment {*Pearce v The Queen* (1998) 194 CLR 610}."

The principles of "**proportionality**" & "**totality**" are primarily discussed below in the case law in relation to adults but are equally applicable to children and young persons. The Court of Appeal has held that the principle of "**general deterrence**" has no relevance to the sentencing of young persons under the CYFA.

11.1.4.1 General deterrence is not applicable as a sentencing principle in Children's Court

In *R v Angelopoulos* [2005] VSCA 258 the Court of Appeal raised – without deciding – whether general deterrence was relevant to the sentencing of young offenders under the CYPA even though it is not specifically mentioned in s.139(1): per Callaway JA at [2] & Eames JA at [56]. However in the *Appeal of JD* (unreported, County Court of Victoria, 22/02/2008) Judge Strong held at [12]:

“[T]here is nothing in s.362 which appears to sanction general deterrence as a sentencing consideration. The courts are reluctant to make an example of those under a disability, and children are so regarded. The South Australian courts have said that general deterrence has no part to play in the sentencing of children and, in the absence of specific guidance to the contrary from a superior court in this State, I approach the matter in that way.”

In so holding His Honour adopted two decisions of the South Australian Full Court - *R v S* (1982) SASR 263 and *R v Wilson* (1984) 35 SASR 200 – involving legislation listing factors “very similar” to those in s.362(1) of the CYFA. In his leading judgment in *R v S* at 266 King CJ had made it clear that the principles of general deterrence and retribution have no part to play in the sentencing of children:

“Where it is appropriate to have regard to the protection of the community, it must be the protection of the community ‘from the violent or other wrongful acts of the child’, not the criminal acts of others who might be deterred by the treatment accorded to the child before the court. The legislature has quite clearly eschewed the concept of general deterrence in the treatment of persons under the age of 18 years. Similarly...the concept of retribution, that is to say ‘the observance of a proper proportion between the gravity of the crime and the severity of the punishment’ has no place in the treatment of a person under the age of 18 years.”

In *H v R & Ors* [2008] VSC 369, an unsuccessful appeal against a sentence of the then President of the Children's Court, Forrest J said at [11]-[12]:

“Considerations relevant to a sentence imposed under the CYFA are set out in s.362(1)...

The term ‘rehabilitation’, whilst not appearing within the section, nevertheless underpins those matters set out in s.362(1)(a) to (d). The principle of specific deterrence is incorporated within s.362(1)(g) of the CYFA; general deterrence is not a relevant sentencing principle: see *R v Angelopoulos* [2005] VSCA 258 at [52]-[56].”

In *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 (applied in many cases including *R v JH* [2012] VSC 13 at [7], *Bradley Webster (a pseudonym) v The Queen* [2016] VSCA 66 [12], [24], [27] & [76] and *DPP v SI (a child)* [2018] VChC3 at [37]-[39]) the applicant – who had just turned 15 at the time of the offending – had been tried in the Supreme Court on a count of attempted murder. He was acquitted of that charge but convicted of aggravated burglary, kidnapping, recklessly causing serious injury and reckless conduct endangering a person – all of these being capable of being heard and determined summarily in the Children's Court. On the plea in the Supreme Court, counsel for the applicant submitted – and the sentencing judge accepted – that the sentencing should be done in accordance with the provisions of the CYFA. Counsel submitted that general deterrence was not a factor to be taken into account in sentencing children, alternatively that *CNK* was not an appropriate vehicle for general deterrence. The sentencing judge disagreed. At [7]-[15] the Court of Appeal decided otherwise, saying [emphasis added]:

[7] “**In our view, the language of s 362(1), and the nature of the matters to which regard must be had, are such as to preclude any consideration of general deterrence.** Our reasons are as follows.

[8] We start with the opening words of the subsection. Not only is the language imperative (‘the Court must’) but the words ‘as far as practicable’ operate, in context, as words of emphasis. Since the word ‘practicable’ means ‘feasible’ or ‘able to be done or accomplished,’ the phrase ‘as far as practicable’ means as far as it is possible to go: *Owen v Crown House Engineering Limited* [1973] 3 All ER 618,622-3. Hence the sentencing court must have regard to each of the specified matters to the maximum extent possible. And the statutory obligation to ‘have regard to’ a specific matter requires the Court to give the matter weight ‘as a fundamental element in the decision-making process’: *Commissioner of Police v Industrial Relations Commission of New South Wales* (2009) 185 IR 458, 469 [73] and the authorities there cited. Moreover, as explained below, the specified matters are not matters of fact but statements of policy. They identify the policy objectives which must – to the maximum extent possible – govern the sentencing of young offenders.

[9] Secondly, the matters to which regard must be had are – without exception – directed at a consideration of the effect of the proposed sentence on the child. This is true even of para (g) which, although expressly referring to the need to protect the community, directs attention to what will deter, or prevent, the particular child from engaging in ‘violent or other wrongful acts’.

[10] The language of para (g) is particularly significant. Plainly enough, this paragraph is concerned with the protection of the community through specific deterrence, that is, deterrence of the particular child offender. General deterrence has traditionally been regarded as an important sentencing consideration at common law precisely because it, too, is conducive to community protection. The deliberate use of language in para (g) which deals only with specific deterrence, and which says nothing about the need to deter others from committing ‘violent or other wrongful acts’, is a clear indication of legislative intention, in our view. As will appear, the same conclusion was reached by the Full Court of the Supreme Court of South Australia, in construing almost identical legislation: *R v S (A Child)* (1982) 31 SASR 263.

[11] Thirdly, what s 362(1) obliges the sentencing court to do ‘as far as practicable’ is to impose a sentence which fits the young offender as much as – or perhaps even more than – it fits the crime. Thus the Court must, as far as practicable, impose a sentence which is suitable to the child (para (e)) and must, as far as practicable, impose a sentence which will achieve the following policy objectives:

- strengthen and preserve the child’s relationship with his/her family;
- allow him/her to live at home;
- allow him/her to continue with education, training or employment; and
- result in the minimum stigma to the child.

[12] General deterrence as a sentencing consideration is entirely foreign to a scheme of this character. For, unlike all other sentencing considerations, general deterrence is unconnected with the particular offender. Rather, the principle of general deterrence treats the offender as a means to an end, as an instrument for effecting a broader community interest: Jeremy McGuire, ‘*Deterrence in sentencing: Handle with care*’ (2005) 79 *Australian Law Journal* 448, 457. The Court must ask itself what sentence should be imposed on the offender in order to deter other persons who might be minded to engage in similar offending.

[13] It is accepted that, where the principle of general deterrence applies, it may necessitate the imposition of a higher sentence than would be necessary if that principle were not applicable. (As will appear, the sentencing judge in the present case felt constrained by the need for general deterrence to reject a less stringent sentencing option put forward by the defence.) By contrast, the unambiguous command of s 362(1) is that no greater sentence should be imposed on the child than the nature and circumstances of the child’s offending require. It would, in our view, be wholly inconsistent with this intention were the sentencing court to be obliged – where necessary – to impose a heavier sentence, not because of any aspect of the child’s offending or personal circumstances but because of the need to deter others from engaging in similar conduct.

[14] Put another way, if a sentence were increased – for the purpose of general deterrence – beyond what would otherwise have been imposed on the child, the sentencing court would have breached its obligation to secure ‘as far as practicable’ the objectives set out in s 362(1). More particularly, to treat a child as a vehicle for general deterrence would amount to ‘making an example’ of the child, for the purpose of deterring others. This would, in our view, be in direct conflict with the Court’s obligation under s 362(1)(d) to ‘minimise the stigma to the child’ resulting from the Court’s determination.

[15] For the reasons we have given, the language of the statute conveys a clear legislative intention to exclude general deterrence. Whilst that intention is not made explicit, it is necessarily implied by the terms in which s 362(1) prescribes the sentencing court’s task: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–40.”

The Court of Appeal set aside the sentence of YJC3y and resentenced CNK to YJC194d plus a YSO for 18m, noting at [70] that had it been resentencing him as at the date of sentence it would have released him on a YSO immediately.

In *CDPP v TK* [2018] VChC 4 Stylianou M held that general deterrence had no application in sentencing a young offender under the CYFA for a Commonwealth offence. In *LS (a pseudonym) v CDPP* [2020] VSC 484 Beale J also held that he was not required to take general deterrence into account in sentencing a child for federal offences. For details see 11.1.13 below.

11.1.4.2 Powers of the Supreme Court and County Court in sentencing a child

Section 521 of the CYFA provides:

“Except for the purposes of appeals this Act applies, with any necessary modifications, in relation to an order made by the Supreme Court or the County Court of a type that could be made by the Children’s Court under this Act, whether the order was made on appeal or under s.586 or otherwise, as if it were an order made by the Children’s Court.”

On its face, s.521 does not read like a conferral of sentencing power on the Supreme Court or County Court. Rather, it reads like a deeming provision which would have the effect, for example, of ensuring that the provisions for breach of a sentencing order [see e.g. CYFA/ss.384, 392, 408, 409Q] apply equally whether the order had been made by the Children’s Court or by a higher court.

It is s.586 of the CYFA in combination with s.360 which is a major source of power for the higher courts in sentencing a child. The other source of power is in the Sentencing Act 1991 [‘SA’]. CYFA/s.586 provides:

“(1) The powers that the Supreme Court or the County Court may exercise in sentencing a child for an indictable offence include the power to impose any sentence which the Children’s Court may impose under this Act but an order that the child be detained in a youth residential centre or a youth justice centre must be made in accordance with Subdivision (4) of Division 2 of Part 3 of the Sentencing Act 1991.

(2) In sentencing a child aged 16 years or more but under 18 years at the time of the commission of an indictable offence, the Supreme Court or the County Court must have regard to any requirement in the Sentencing Act 1991 that a specified minimum non-parole period of imprisonment be fixed or a specified minimum term of imprisonment be imposed, had the offence been committed by an adult.”

In *DPP v Anderson* [2013] VSCA 45 the respondent child had pleaded guilty to a count of intentionally causing serious injury and had been sentenced in the County Court to IMP4y/2y. The Children’s Court had found that exceptional circumstances existed which made it appropriate to refuse to hear and determine the charge summarily [see the summary detailed in case **5** in section 10.1.5]. The Court of Appeal (Maxwell P, Neave JA & Kaye AJA) allowed the Director’s Appeal and re-sentenced the respondent to IMP 6y/3y6m. At [45]-[46] the Court said [emphasis added]:

[45] “There was debate on the plea about whether general deterrence was a relevant sentencing consideration. Reference was made to the decision of this Court in *CNK v The Queen* [2011] VSCA 228, {15} where it was held that in a case where a young offender was being sentenced under the provisions of the CYFA, general deterrence was excluded as a sentencing consideration. Where, on the other hand, a person is sentenced in accordance with the *Sentencing Act 1991 (Vic)*, general deterrence is expressly identified by s.5(1)(b) as a purpose for which sentence may be imposed.

[46] **In the present case, her Honour pointed out – correctly – that, once she had concluded that sentencing dispositions under the CYFA were inadequate and that a sentence of adult custody was necessary, the provisions of the CYFA had no application and, accordingly, general deterrence was applicable.** At the same time, her Honour accepted the defence submission that, under these circumstances, general deterrence should play ‘an ameliorated role, taking into account [Anderson’s] youth’, and that rehabilitation was still a significant consideration.”

In *Erik Fuller (a pseudonym) v The Queen* [2013] VSCA 186 the Court of Appeal (Ashley & Hansen JJA) sentenced a boy for an offence of culpable driving when he was 14 years 10 months old, an offence which cannot be heard and determined summarily in the Children’s Court. The sentence on this charge was thus imposed under the *Sentencing Act 1991 (Vic)*. However, the Court was also required to re-sentence EF on associated charges of theft and negligently causing serious injury which the Children’s Court can hear and determine summarily. This gave rise to an interesting question about the applicability of s.362(1) of the CYFA to the sentencing, a question which the Court of Appeal ultimately found unnecessary to decide. At [31]-[35] Ashley JA said [emphasis added]:

[31] “In this case, s.362(1) would have applied had the charges (that is, other than the offence of culpable driving) been dealt with in the Children’s Court.

[32] A question arises whether the preclusion against taking account of general deterrence applies to the charges which might have been dealt with in the Children’s Court, but which were in fact dealt with by the County Court.

[33] Section 362(1) refers to matters to which the Children’s Court is to have regard. But it has been held that, in some circumstances, provisions in the [CYFA] relating to sentences are to be applied when an offender is sentenced in a superior court: *CNK v The Queen* [2011] VSCA 228 [82], *JPR v The Queen* [2012] VSCA 50 [32]-[33] (Hollingworth AJA). Compare *DPP v Anderson* [2013] VSCA 45 [47].

[34] It is not clear to me that s.362(1) will apply to an exercise of jurisdiction by the Supreme Court or the County Court in a case in which the child has objected to the exercise of jurisdiction by the Children’s Court. **Moreover, *Anderson* suggests that the section will not apply once a superior court decides that punishment exceeding that available under the CYFA, or under s.32(3)(b) of the Sentencing Act, is necessary.**

[35] It is unnecessary, however, for me to resolve what I perceive to be that uncertainty in this case. By reason of the appellant’s age at time of offending, his level of intellectual and psychological disability at that time, and the injuries which he sustained, general deterrence cannot be regarded as a factor of any significance in the sentencing synthesis.”

In *Dale Cairns (a Pseudonym) v The Queen* [2018] VSCA 333 the Court of Appeal (Priest, Beach & Weiberg JJA) allowed an appeal against a sentence of IMP8y/5y imposed on the appellant (who had an IQ of 63 and was aged 17 at the time of the offending) on charges of culpable driving causing death and 9 associated offences in circumstances where he was drug affected and was driving at high speed to evade police. He was sentenced in lieu to IMP6y/4y. The sentences of imprisonment imposed at first instance and on appeal are set out in the following table:

Charge	Offence	Sentence at 1 st instance	Cumulation at 1 st instance	Sentence on appeal	Cumulation on appeal
1	Theft	6m	2m	2m	Nil
2	Theft	3m	Nil	7d	Nil
3	Driving dangerously or negligently while pursued by police	6m	2m	3m	Nil
4	Conduct endangering persons	9m	2m	6m	Nil
5	Culpable driving causing death	7y	Base	6y	Nil
6	Failing to stop and render assistance	18m	4m	3m	Nil
7	Theft	6m	2m	2m	Nil
RELEVANT SUMMARY OFFENCES					
9	Failing to stop	7d	Nil	7d	Nil
13	Unlicensed driving	3m	Nil	1m	Nil
17	Dangerous driving	1m	Nil	1m	Nil
TOTAL EFFECTIVE SENTENCE		IMP8y/5y		IMP6y/4y	
DISQUALIFICATION FROM DRIVING		7y		7y	

By way of *obiter dicta* the Court of Appeal in *Cairns* raised a question about the rationale adopted by the Court of Appeal which had decided *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228, stating at [30]:

“In determining that s 362 was applicable, and in construing s 362 so as to exclude general deterrence as a relevant sentencing principle, the Court made no express reference to definition of ‘Court’ in s 3(1) of the CYFA: ‘In this Act ... **Court** means The Children’s Court of Victoria’. And although the Court made distinct reference to s 586 of the CYFA, there was no reference to s 521...”

For the reason stated above, the writer questions whether CYFA/s.521 has any relevance in this context.

In *Cairns*, after discussing *CNK v The Queen*, *R v KMW* [2002] VSC 93 at [57], *JPR v The Queen*, *DPP v Anderson* and *Erik Fuller (a pseudonym) v The Queen*, the Court of Appeal said at [36]-[38]:

[36] “[W]e note that both the CYFA (see e.g. ss.475(3), 477(2)) and the Sentencing Act 1991 (see e.g. s.33(3)) contemplate that a sentence of detention in a youth justice centre may, depending on the circumstances, be served concurrently or cumulatively with a sentence of imprisonment. Plainly, however, once the sentencing judge resolved to impose a sentence of imprisonment on the culpable driving charge in excess of three years — the maximum period of detention in a youth justice centre that the County Court could then impose — it would have been somewhat impractical to have sentenced the applicant to be detained in a youth justice centre on any of the other charges.

[37] [I]n sentencing the applicant on all but the culpable driving charge the judge purported to apply the principles in s 362 of the CYFA. Notwithstanding that this is so, however, he imposed periods of imprisonment on those charges of a length exceeding that of equivalent periods of detention that the Children’s Court might have been expected to impose. Moreover, the imposition of a sentence of imprisonment would appear to us to be incompatible with the application of s 362, since, first, the County Court is not ‘the Court’ as contemplated by s.362; and, secondly, even if it be assumed for the sake of argument that s.521 of the CYFA might in some circumstances pick up a sentencing order made by the County Court (or Supreme Court) — and thus the considerations in s.362 — a sentence of imprisonment is not an order ‘of a type that could be made by the Children’s Court under this Act’ [as to which see s.360 of the CYFA].

[38] It is difficult to conclude other than that the sentencing discretion miscarried in this case. As we have said, the judge purported to sentence on all of the charges apart from charge 5 as if — because of the operation of s 362 — general deterrence was not a relevant sentencing consideration, yet a number of the individual sentences are at odds with that expressed intention. As we have noted, imprisonment is not an option available to the Children’s Court. And we acknowledge that detention in a youth justice centre cannot readily be compared to confinement in an adult prison. But we consider the conclusion inescapable that, had the applicant been sentenced in the Children’s Court on those charges otherwise within that Court’s jurisdiction, he would not have attracted sentences of detention of anything like the same length as the sentences of imprisonment imposed on him by the sentencing judge.”

It is not easy to reconcile some of the dicta in the judgments discussed above or some of the legislative provisions. With respect, it is difficult to see any rationale for prohibiting a higher court from imposing a Children’s Court sentencing order in reliance on the plain words of CYFA/s.586 merely because the matters to be taken into account in CYFA/s.362 are expressed to be an obligation on the Children’s Court. Implying an expanded operation for CYFA/s.362 rather than giving CYFA/s.586 a more restricted operation seems to accord better with long-established notions of child sentencing and with the legislative history of s.362 detailed in *CNK v The Queen* at [16]-[26]. Separate Courts of Appeal in *CNK*, *JPR & Anderson* were untroubled to imply that CYFA/s.362 could also apply in the respective higher sentencing courts. The doubts about this interpretation arose from a fourth Court of Appeal in *Cairns* in dicta which was not central to its determination and from a fifth Court of Appeal in *Fuller* which ultimately found the question unnecessary to decide.

Accordingly, it is likely that CYFA/s.586(1) empowers a higher court sentencing a child to impose any sentencing order referred to in CYFA/ss.360(1)(a) to 360(1)(j) [dismissal, undertaking, bond, fine, probation, YSO, YAO, YCO, YRC or YJC], in which case CYFA/s.362 applies, SA/s.5 does not apply and general deterrence is not a relevant consideration. In this connection it should be noted that a sentence of imprisonment is not an order available under the CYFA, only under the SA.

It seems that in *CNK v The Queen* at [86] the specific exception in CYFA/s.586(1) requiring a YRC or YJC order made by a higher court to be made in accordance with SA/Subdivision (4) of Division 2 of Part 3 rather than under CYFA/ss.410-413 was treated as a purely mechanical provision which does not oust the operation of CYFA/s.362. In that case the sentence imposed by the Court of Appeal was YJC194d plus a YSO for 18m yet it was central to that Court’s extensively reasoned decision that CYFA/s.362(1) applied.

It is clear that a higher court sentencing a child for an indictable offence – whether or not the charge is one for which the higher court has exclusive jurisdiction – may impose any of the sentencing orders available for an adult under the SA. In that event CYFA/s.362 does not apply, SA/s.5 applies and general deterrence is a relevant sentencing consideration. However, it is likely that before turning to the SA the higher court must first have concluded that all available sentencing dispositions under the CYFA were inadequate: see *Anderson* at [46] referred to in *Cairns* at [34] and in *Fuller* at [34].

Where a child is sentenced by a higher court under the SA, general deterrence is one of the five possible purposes for which the sentence may be imposed: see SA/s.5(1)(b). There was discussion in *Anderson & Cairns* about whether general deterrence should play ‘an ameliorated role, taking into account [the child’s] youth’ but that question was not ultimately decided. However, it is noteworthy that in *DPP v Eade* [2012] VSCA 142 at [42] another Court of Appeal (Maxwell P, Neave JA & Lasry AJA) referred with approval to the DPP’s concession that “it is a rare case in which a judge is permitted to materially increase sentence imposed on a young offender by dint of general deterrence”.

There is no legislative bar to a child being sentenced to imprisonment for one indictable offence and a term of detention for another indictable offence. However, in the circumstances of *Cairns* the Court of Appeal described such an outcome as “somewhat impractical”: see [2018] VSCA 333 at [36].

11.1.4.3 Principle of Proportionality

A authoritative statement of the principle of **proportionality** is to be found in *Hoare v The Queen* (1989) 167 CLR 348 at 354 where a 5-member bench of the High Court, led by the Chief Justice, said:

“...a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances.”

The significance of this principle as a common law restraint on excessive punishment had earlier been confirmed by the High Court in *Veen v The Queen [No 1]* (1979) 143 CLR 458 and re-affirmed by that court in *Veen v The Queen [No 2]* (1988) 164 CLR 465. See Fox and Freiberg, *op.cit.*, pp.219-220; *Postiglione v The Queen* (1997) 189 CLR 295 at 308 per McHugh J; *R v Samia* [2009] VSCA 5 at [6]-[15] per Nettle JA; *R v Harris* [2009] VSCA 189 at [19]-[24] per Lasry AJA; *R v Coombes* [2011] VSC 407 at [56]-[58] & [93] per Nettle JA; *Nelson v The Queen* [2020] VSCA 219 at [38]-[39]. The principle applies not only to the offences for which the offender is being sentenced, but also to any offences for which the offender is currently serving a sentence: *R v Berkelaar* [2001] VSCA 143 at [22]; *R v Bakhos* (1989) 39 A Crim R 174; *R v Harrison* (1990) 48 A Crim R 197; *R v Gordon* (1994) 71 A Crim R 459.

In *R v McNaughton* (2006) 66 NSWLR 556 per Spiegelman CJ at [24]-[25], McLellan CJ at CL at [60], Grove J at [76], Barr & Bell JJ at [81], the view was expressed that prior convictions are not part of the objective circumstances of a crime so they cannot inform the upper limits of the sentence. Commenting on this in *DPP v Zucko* [2008] VSCA 270 at [18], Redlich JA, with whom Maxwell P & Nettle JA agreed, said:

“It is true that there is no sentencing principle that requires a more severe sentence to be imposed because of an appalling criminal history. The sentence should never exceed what is proportionate to the gravity of the crime viewed objectively... Be that as it may, the relevance of an extensive criminal history is not confined to denying an offender leniency...An offender’s antecedents provides an indication of moral culpability, prospects of rehabilitation, the existence of any dangerous propensity, the need for community protection, and the increased need for specific deterrence having regard to the failure of previous penalties to moderate his behaviour: see *R v O’Brien & Gloster* [1997] 2 VR 714, 718 per Charles JA.”

11.1.4.4 Principle of Totality

The principle of **totality** allows custodial sentences to be reduced, by applying rules of concurrency or part concurrency, to avoid an offender being subject to a crushing sentence: Fox and Freiberg, *op.cit.*, p.356. The principle is best articulated in the following passage from *Mill v The Queen* (1988) 166 CLR 59 at 62-63:

“The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in *Thomas, Principles of Sentencing, 2nd ed. (1979), pp. 56-57*, as follows (omitting references):

“The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is “just and appropriate”. The principle has been stated many times in various forms: “when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong[”]; “when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences”.”

In *Grant Berry v The Queen* [2019] VSCA 291 the applicant, who was already serving a sentence of IMP 12m imposed in relation to a large number of summary offences, had been sentenced to IMP 4y/20m on two charges of attempted armed robbery. Holding that the sentencing judge was in error in failing to consider totality, the Court of Appeal resented the applicant to IMP3y/18m. At [22]-[24] Maxwell P & Niall JA said:

“As we have said, the respondent conceded that the judge erred in holding that the principle of totality did not apply. That principle requires the sentencing judge to stand back and assess not just the individual sentences but the aggregate sentence and consider whether the aggregate is proportionate to the degree of criminality involved and is ‘just and appropriate’ and ‘not excessive’: *Mill v The Queen* (1988) 166 CLR 59, 63 (Wilson, Deane, Dawson, Toohey and Gaudron JJ), quoting D A Thomas, *Principles of Sentencing* (Heinemann, 2nd ed, 1979) 56–7; *Postiglione v The Queen* (1997) 189 CLR 295, 307–8 (McHugh J); *R v Piacentino* (2007) 15 VR 501, 508 [32] (Eames JA with whom Buchanan JA and Vincent JA agreed).

Relevantly for present purposes, the totality principle applies when the offender being sentenced is already serving a sentence. In *R v Mangelen* (2009) 23 VR 692, 697 [28], Redlich JA said:

‘Historically the principle of totality had been applied in circumstances where an offender fell to be sentenced for multiple offences to ensure that the aggregation of the sentences was a just and appropriate measure of the offender’s criminality. The ambit of the principle was extended to apply where the offences upon which the offender must be sentenced overlap with or will be cumulative upon an existing custodial sentence. In both of these situations the principle requires the court to consider the total criminality involved in all of the offences for which the offender is to be sentenced and the offences for which the offender is currently serving a sentence. The court must evaluate the overall criminality involved in all of the offences so as to ensure that there is an appropriate relativity between the totality of the criminality and the totality of the effective length of the sentences to be and which have been imposed. If the total sentence is an ‘unjust or inappropriate measure of the total criminality involved’ the sentence which the offender is required to serve will be moderated so that the aggregate of sentences imposed by reason of cumulation is not greater than any sentence required to fulfil the totality principle. The principle is to be applied to both the fixing of the head sentence and the non-parole period.’

The concern of the principle is to ensure that a person sentenced for multiple offences receives a sentence that is commensurate with the total criminality involved. It guards against arriving at an unjust sentence derived from the bare accumulation of individual sentences passed on one or more occasion.”

In *Rossi* [unreported, Supreme Court of South Australia, 20/04/1988], King CJ said:

"There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect."

In *R v Beck* [2005] VSCA 11 at [19] Nettle JA discussed the concept of a ‘crushing’ sentence:

“It has been said that the notion of a crushing sentence has never been adequately defined in this State {Fox & Frieberg, *Sentencing*, 2nd Ed. at [9.620]}, although it is generally conceived of as one that is imposed in such a way that it would provoke a feeling of helplessness in the applicant if and when he is released or as connoting the destruction of any reasonable expectation of useful life after release: *R v Cowie*, CCA 02/02/1978 unreported; *R v Yates* [1985] VR 41 at 48. It is also accepted that if multiple sentences are so imposed as to make the totality of the prisoner’s liability to incarceration crushing in that sense, some of the sentences should be modified by appropriate orders for cumulation in the application of the totality principle: *R v Adams* (1979) 3 Crim LJ 302, *D.P.P. v Saville* CCA 02/03/1984 unreported, *R v Bowman* (1993) 69 A Crim R 530 at 539; *R v Everett* (1994) 73 Crim R 550. There are of course no hard and fast rules as to how one is to decide whether the totality of multiple sentences imposed at different times is crushing. As in so much of sentencing, each case depends on its own facts.”

A survey of the totality principle by Wells J in *Attorney-General v Tichy* (1982) 30 SASR 84, 92-3 was approved by Gleeson CJ in *Johnson v R* (2004) 205 ALR 346 at [4] and by the Court of Appeal (Vincent & Weinberg JJA and Robson AJA) in *R v Sebborn* [2008] VSCA 200 at [16]. Wells J stated:

“... [W]hat is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct ... The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty.”

In *Postiglione v R* (1997) 189 CLR 295 at 308 McHugh J described how the principle of totality is to be applied:

“The application of the totality principle therefore requires an evaluation of the overall criminality involved in all the offences with which the prisoner is charged. Where necessary, the Court must adjust the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences. Recent decisions in the Court of Criminal Appeal have extended the ambit of the totality principle. Those decisions hold that, in order to comply with the totality principle, a sentencing judge must consider the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence.”

In *R v Sullivan* [2005] VSCA 286 at [20] Eames JA, with whom Charles & Buchanan JJA agreed, applied this dicta of McHugh J. In *R v Hunter* [2006] VSCA 129 at [28]-[31] the Court of Appeal referred with approval to *R v Sullivan* in holding that the principle of totality required:

- the sentencing judge to take into account periods of imprisonment consequent upon cancelled parole: see *R v Masterson* (unreported, Court of Criminal Appeal, 31/08/1982); *R v Youil* (1995) 80 A Crim R 1; *R v Cutajar* (unreported, Court of Appeal, 20/07/1995); *R v Brock* (unreported, Court of Appeal, 22/02/1996); *R v Gorman* (unreported, Court of Appeal, 10/08/1995); *R v Ulla* (2004) 148 A Crim R 356 at 366; *R v Berkelaar* [2001] VSCA 143; and
- a period of imprisonment being served at the time of sentencing to be taken into account in the exercise of the sentencing discretion: *R v Renzella* [1997] 2 VR 88 at 98 per Winneke P with whom Charles & Callaway JJA agreed; *R v Stares* (2002) 4 VR 314 at 321, 324 per Charles JA with whom Phillips CJ & Chernov JA agreed; *R v Smith* [2006] VSCA 23 at [8] per Chernov JA with whom Warren CJ & Charles JA agreed.

In addition, the Court of Appeal noted at [29] that “the judge was bound to assume that the full term of the original sentence would be served. Any possibility that Hunter might again be released on parole had to be disregarded.”

In *R v Piacentino; R v Ahmad* (2007) VR 501; [2007] VSCA 49 Eames JA, with whom Buchanan, Vincent, Nettle & Redlich JJA agreed, said at [37]:

“The totality principle, then, is concerned to ensure that sentencing for an offender facing multiple offences is, as McHugh J held in *Postiglione*, a ‘just and appropriate measure of the total criminality involved’. As Fox and Freiberg observe {“*Sentencing – State and Federal Law in Victoria*” 2nd Ed, at 725 [9.623]}, the principle will generally apply, unless denied by statute.”

In his judgment in *H v R & Ors* [2008] VSC 369, affirming on appeal a sentence of the President of the Children’s Court, Forrest J applied *R v Piacentino; R v Ahmad* in saying at [83]: “I have also taken into account the totality of the offending in the light of the total effective term. In my view, a period of 27 months’ detention is appropriate to H’s overall criminality over a period of two years.”

In *R v Piacentino; R v Ahmad* the 5 bench Court of Appeal also made it clear - disapproving a contrary decision of a 3 bench Court of Appeal in *R v Orphanides* (2002) 130 A Crim R 403; [2002] VSCA 86 – that where an adult offender falls to be sentenced for offences constituting breach of parole but is to be sentenced at a time when he has not had his parole revoked by the Adult Parole Board, then the sentencing judge may not have regard to the possibility that he might be later called upon by the Parole Board to serve some or all of the balance of his parole sentence.

In *R v Harrison* [2008] VSCA 65 Forrest AJA, with whom Buchanan & Ashley JJA agreed, said at [34]:

“It is settled that the principle of totality applies to both the head sentence and the non-parole period. It also applies where a sentence has been imposed by a different court to that which later sentences the offender [*Mill v The Queen* (1988) 166 CLR 59].”

There is a good deal of case law providing guidelines as to how concurrency and/or cumulation ought generally be applied in order to achieve an outcome which is in accord with the principle of totality. Though any case law based on the Sentencing Act 1991 does not strictly apply to children sentenced under the CYFA, it nevertheless may provide a useful guide in an appropriate case.

In *R v VN* [2006] VSCA 111 Redlich JA, with whom Maxwell P & Buchanan JA agreed, said at [144]:

“In the recent decision of *R v Flavall* [2006] VSCA 32 at [6] per Chernov JA this Court had occasion to refer again to the approach required when making an order for cumulation. Ordinarily cumulation is ordered to reflect separate events, episodes or transactions: *DPP v Grabovac* [1998] 1 VR 664 at 676 per Ormiston JA. That is not to say that an order for cumulation cannot be supported when there are two consequences of a single event: *R v Musson* [1997] 1 VR 656 at 660. When an offence arises out of substantially the same act, circumstance or series of occurrences, the presumption at common law was that concurrency should run its course: Fox & Freiberg, *Sentencing State and Federal Law in Victoria* (2nd ed., para. 9.612). Such a principle is in harmony with s.16 of the Sentencing Act 1991 which establishes a prima facie rule that any terms of imprisonment imposed on a person ought be concurrent: *R v Mantini* [1998] 3 VR 340 at 348 per Callaway JA. Total cumulation is not the normal rule at common law even between different episodes: *R v Fuller-Cust* (2002) 6 VR 496 at 510; *R v Jongasma* (2004) 150 A Crim R 386 at [20] per Batt JA.”

In *R v Hunter* [2006] VSCA 129 at [29] the Court of Appeal stated:

“[T]here must in the absence of exceptional circumstances be cumulation in respect of offences committed whilst on parole. See s.16(3B) *Sentencing Act* 1991. At the same time, viewed as a whole the aggregate of sentences imposed by reason of cumulation cannot be greater than any sentence required to fulfil the totality principle and all the appropriate aims of sentencing in the case: *R v Greenslade* [2004] VSCA 213 per Batt JA at [30]; *R v Hennen* [2004] VSCA 42 per Bongiorno AJA at [31]. There must be relativity between the totality of the criminality and the totality of sentences (*R v Holder* [1983] 3 NSWLR 245 at 260), not only for the offences for which the person is being sentenced, but for the sentence which the person is currently serving (*R v Bakhos* (1989) 39 A Crim R 174; *R v Harrison* (1990) 48 A Crim R 197 and *R v Gordon* (1994) 71 A Crim R 459).”

In *DPP v Grabovac* [1998] 1 VR 664 the Court of Appeal, referring *inter alia* to *Mill v R* (1988) 166 CLR 59, *Ryan v R* (1982) 149 CLR 1 & *R v Lomax* [1998] 1 VR 551, held:

[p.680] “In general a court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. In other words, as the High Court said [in *Mill's Case* at 62-63], where practicable when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable. In particular, though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a 'crushing' sentence.”

[p.683] “What the judge should have done was to fix the appropriate term for each offence, then to direct such accumulation and concurrency as would likewise reflect the criminality of each episode of offending and finally to look at the end result to see if the principle of totality had been breached and to see otherwise whether it was a crushing head sentence. I would not suggest that this should be a mechanical process. Obviously a judge could fairly fix on a degree of concurrency and cumulation with an eye to what would not offend against the principle of totality; after all that is the object of the rules relating to both concurrency and cumulation. But the starting point should be sentences which are proportionate to and appropriate for each offence.”

In *DPP v Eagles* [2012] VSCA 102 at [61] the Court of Appeal described how a total sentence was to be constructed in accord with the principle of totality:

“If the total sentence is too severe, a more appropriate sentence can be constructed either by altering the orders for cumulation and concurrency, or by lowering the sentences for individual counts. In *Mill*, the High Court approved either approach, but expressed preference for the former; that accords with the approach of this court in *DPP v Grabovac*.”

In *R v Hogan* [2008] VSCA 279 the Crown conceded and the Court of Appeal found sentencing error in a case in which the sentencing judge had ordered full cumulation on one count and no order for cumulation on others. At [24]-[29] the judgment of Maxwell P, Redlich JA & Robson AJA referred with approval to the latter afore-mentioned dicta of Ormiston JA in *DPP v Grabovac* [1998] 1 VR 664, 683 and to dicta of the Court of Appeal in *R v Izzard* (2003) 7 VR 480, *R v McCorrison* [2000] VSCA 200 and *R v Coukoulis* (2003) 7 VR 45 and said:

[27] “In our opinion, the sentencing approach discussed in both *R v Izzard* and *DPP v Grabovac* means that, where there are a number of counts each of which should properly be the subject of partial cumulation, full cumulation should not be arbitrarily ordered on only one count to produce a total effective sentence which satisfies the totality principle. There should ordinarily be partial cumulation where discrete episodes are involved in the various counts. The extent of the cumulation on a particular count may have to be tailored, bearing in mind the need for cumulation on other counts, so as to ensure that the totality principle is observed and a crushing effective sentence is not imposed.

[28] There can be no inflexible rules as to how this is done. What is important is that whether or not cumulation is imposed must reflect the criminality of the offences and episodes involved, subject always to the due observance of the totality principle.

[29] The discretion to order cumulation between counts is a very broad one. It should not be unnecessarily circumscribed. Reasonable minds will differ as to whether cumulation should be ordered and if so in what amount.”

In *Hung Anh Vu v The Queen* [2020] VSCA 59, the Court of Appeal upheld sentences of IMP12y for manslaughter and IMP6y for recklessly causing serious injury but held that the period of 3y cumulation was manifestly excessive and breached the principle of totality. In lieu a total effective sentence of IMP13y6m/10y was set. At [52]-[53] Kaye, T Forrest & Osborn JJA said:

“Given our assessment that the sentences on the manslaughter charge and the recklessly causing serious injury charge are both at or close to the top of the available range, we consider that up to this point, the principle of totality has not weighed substantially in the sentencing mix. And yet, it had work to do. Having fixed upon the stern sentences for the individual charges, his Honour then turned to a consideration of a just and appropriate aggregate sentence as an appropriate measure of the total overall criminality. In *DPP v Grabovac* [1998] 1 VR 664, Ormiston JA, with whom Winneke P and Hedigan JA agreed, explained the various ways a sentence for multiple charges could be structured to reflect the sentencing principles of totality and proportionality. The sentences on individual charges could be moderated so as to reach an appropriate total effective sentence, or alternatively, unmoderated sentences could be imposed on individual charges, and moderation (reflecting the principles of totality and proportionality) could be achieved through the moderation of orders for cumulation. Ormiston JA considered that this latter approach was preferable. This Court has agreed with that preference on several occasions {see, eg, *DPP v Green* [2020] VSCA 23, [94]; *DPP v Drake* [2019] VSCA 293, [25]; *Lim v The Queen* [2018] VSCA 64, [25]; *DPP v West* [2017] VSCA 20, [48]-[49]} as do we. After some anxious consideration, we have concluded that the order for cumulation is manifestly excessive and has resulted in a head sentence that is manifestly excessive.”

For further discussion of the principle of totality and the rules in relation to cumulation see *Pearce v The Queen* (1998) 194 CLR 610 at 623-624 per McHugh, Hayne & Callinan JJ; *DPP v GJL* [2004] VSCA 35 at [29]-[30]; *R v Truong* [2004] VSCA 172 at [18]; *R v McDonald* [2004] VSCA 196 at [21]-[22]; *R v Ly* [2004] VSCA 45 at [28]; *R v Stanisavljevic* [2004] VSCA 144 at [15]; *R v Zaydan & Others* [2004] VSCA 245 at [43]; *R v WMR* [2005] VSCA 59 at [17]-[25]; *R v McIntosh* [2005] VSCA 106 at [16]-[21]; *R v Mann* [2005] VSCA 141 at [7]; *R v Glennon (No.3)* [2005] VSCA 262 at [44]; *R v Verdins* [2005] VSC 479 at [38]-[39]; *R v Welsh* [2005] VSCA 285 at [32]-[35]; *R v Carne* [2006] VSCA 2 at [27]; *DPP v Gany* [2006] VSCA 148 at [30]; *R v Clarke* [2006] VSCA 174 at [64]; *R v Fadisarkis* [2006] VSCA 303 at [22]-[24]; *DPP v Pau* [2007] VSC 4 at [51]; *R v Abela* [2007] VSCA 22 at [85], [87]-[92];

R v Piacentino - R v Ahmad [2007] VSCA 49; *R v Cardamone* [2007] VSCA 77 at [43]-[47]; *R v Latina* [2007] VSCA 78 at [20]-[21] & [40]-[42]; *DPP v Mirik* [2007] VSCA 150 at [56]-[57]; *R v DM* [2007] VSCA 155 at [27]; *R v Alashkar – R v Tayar* [2007] VSCA 182; *R v Norris* [2007] VSCA 241 at [48]-[49]; *R v Scholes* [2007] VSCA 303 at [38]-[43]; *R v Ahmed Mourad* [2008] VSCA 4 at [10]-[16]; *DPP v Rout* [2008] VSCA 87; *R v Rule* [2008] VSCA 154; *DPP v Towle (Sentence)* [2008] VSC 101 at [24]-[28]; *R v AB (No.2)* [2008] VSCA 39 at [53]-[60]; *R v Bult* [2008] VSCA 227 at [22]-[24]; *R v Franklin* [2008] VSCA 249 at [34]-[36]; *R v Rousetty* [2008] VSCA 259 at [50]; *R v Brown* [2009] VSCA 23 at [19]-[27] & [36]-[41] {see also (2004) 10 VR 328}; *R v Wright* [2009] VSCA 27 at [45]-[54]; *R v Samia* [2009] VSCA 5 at [16]-[20]; *R v Yi Yi Wang* [2009] VSCA 67 at [14] & [24]; *R v Franklin* [2009] VSCA 77 at [23]-[33]; *R v Waugh* [2009] VSCA 92 at [23]-[25]; *R v Alexopoulos* [2010] VSCA 52 at [59]-[66]; *R v Malikovski* [2010] VSCA 130 at [40]-[42]; *R v Bentley* [2010] VSCA 217 at [12]; *R v Scott* [2010] VSCA 320 at [13]; *R v Minotto* [2010] VSCA 310 at [14]-[20] & [29]; *R v Davy* [2011] VSCA 98 at [36]-[47]; *R v Marino* [2011] VSCA 133 at [48]-[55]; *R v Samac* [2011] VSCA 171; *R v Cook* [2011] VSCA 187 at [11]-[17]; *DPP v Clifford* [2011] VSCA 199 at [29]-[39]; *DPP v Farrugia* [2011] VSCA 201 at [26]-[28]; *DPP v Dickson* [2011] VSCA 222 at [11]; *R v Tran* [2011] VSCA 363 at [26]-[28]; *R v Charles* [2011] VSCA 399 at [177]-[186]; *R v DHC* [2012] VSCA 52 at [85]-[98]; *R v Arnautovic* [2012] VSCA 112; *DPP v McGuigan* [2012] VSCA 121; *DPP v Gangur* [2012] VSCA 139; *DPP v TP* [2012] VSCA 166 at [82]-[84]; *DPP v CA* [2012] VSCA 199 at [14]-[18]; *R v Contin* [2012] VSCA 247; *R v Kasey McCartney* [2012] VSCA 268 at [92]-[101]; *R v Buck & Willcocks* [2012] VSC 489; *DPP v Roberts* [2012] VSCA 313 at [95]-[119]; *Waugh v The Queen* [2013] VSCA 36 at [14]-[35]; *R v Gavanas* [2013] VSCA 178 at [102]-[105]; *John Gordon v The Queen* [2013] VSCA 343 at [44]-[67]; *Berry v The Queen* [2013] VSCA 349 at [6]-[14]; *Bowden v The Queen* [2013] VSCA 382 at [17]; *Pasinis v The Queen* [2014] VSCA 97 at [41]-[42] & [62]-[78]; *Zotos v The Queen* [2014] VSCA 324 at [19]; *Fridey v The Queen* [2014] VSCA 271 at [31]-[59]; *DPP v Charlie Dalgleish (a pseudonym)* [2016] VSCA 148 at [59]; *Sovolos v The Queen* [2018] VSCA 149 at [34] & [39]; *Mendelle v The Queen* [2018] VSCA 204 at [12]-[13]; *Oliver Harlow (a pseudonym) v The Queen* [2018] VSCA 234 at [96]; *Wheeldon v The Queen* [2018] VSCA 344 at [21]-[25]; *Arnautovic v The Queen* [2019] VSCA 31 at [37]-[44]; *DPP v Drake* [2019] VSCA 293 at [18]-[24]; *DPP v Green* [2020] VSCA 23 at [94]-[97]; *Lachlan Pitt (a pseudonym) v The Queen* [2020] VSCA 73; *Zampatti v The Queen* [2020] VSCA 285; *Byrne v The Queen* [2020] VSCA 289; *Julian Lockyer (a pseudonym) v The Queen* [2020] VSCA 321.

In *R v Izzard* (2004) 7 VR 480; {[2003] VSCA 152} the applicant and a co-offender had attacked a series of 4 victims. The applicant had pleaded guilty to one count of armed robbery, one count of attempted armed robbery, one count of attempted robbery, one count of recklessly causing injury and one count of theft. He had been sentenced to 5 years imprisonment on the count of armed robbery and various terms of imprisonment to be served concurrently on the other counts. A non-parole period of 3½ years was fixed. Callaway JA, with whom Winneke P & Vincent JA agreed, was critical of this method of structuring the sentence. After referring to *R v O'Rourke* [1997] 1 VR 246, *R v Mai* [2000] VSCA 184 & *R v McCriston* [2000] VSCA 200 at [13], Callaway JA said at [22]-[23]:

"A moderate sentence may, of course, be lengthy. Moderation takes its content from the circumstances and each individual sentence should still be appropriate for the relevant count.

There are at least three reasons why, within the limits of common sense, judges are well advised to moderate and cumulate in appropriate cases. First, moderation is a virtue in itself. Secondly, other victims are not left to feel that the offences committed against them are 'meaningless statistics'. Thirdly, a sentence structured in this way is less vulnerable on appeal. Attention is focussed on the merits and the discretion is not re-opened simply because the total effective sentence, imposed on one count, was manifestly excessive for the offence the subject of that count considered on its own."

In *R v MDB* [2003] VSCA 181 at [14] Batt JA - with whom Ormiston & Vincent JJA agreed - said in relation to sentences of imprisonment: "At least in general, it is preferable for judges to cumulate upon the most serious count, as otherwise the effective sentence for it appears to be reduced: *DPP v Grabovac* [1998] 1 VR 664 at 689; *R v Reid* [Court of Appeal, unreported, 16/11/1998] at p.15 and *R v Birnie* (2002) 5 VR 426 at 436." In *DPP v Adams* [2006] VSCA 149 at [3] the Court of Appeal reiterated: "There must always be a base term specified which will provide the point of reference for all directions relating to concurrency or cumulation." See also *R v Yi Yi Wang* [2009] VSCA 67 at [10]. Presumably, however, no base sentence need be specified if the sentences on all of the offences are to be served concurrently. See also *R v Nikodjevic* [2004] VSCA 222 at [34]-[42] where the Court of Appeal reiterated the principle in *R v MDB* in overturning a sentence in which the judge had failed to nominate a base sentence upon which various other sentences were to be partly cumulated and *R v Seiler* [2005] VSCA 146 at [3]-[4] where the Court of Appeal referred to *R v Nikodjevic* in overturning a sentence for the same reason.

11.1.5 Sentencing orders - Sentencing hierarchy

The Second Reading Speech for the CYPA referred (at p.1155) to "a new and broader hierarchy of sentencing orders in the Criminal Division, which will provide the Court with greater flexibility in sentencing...[A]dditional non-custodial options have been created". And (at p.1154): "Consistent with the philosophy of the [CYPA], a 'guardianship to the Director-General' order, formerly known as wardship, will no longer be available as a sentencing option in the Criminal Division."

Eleven sentencing orders are available under s.360(1) of the CYFA when the Court finds a child guilty of an offence, whether summary or indictable. These form a sentencing hierarchy: s.361 provides that the Court must not impose a sentence unless it is satisfied that it is not appropriate to impose a sentence referred to in any preceding paragraph of s.360(1). This is the principle of **parsimony**.

The detention orders - Youth Residential Centre orders under ss.410-411 of the CYFA & Youth Justice Centre orders under ss.412-413 of the CYFA - are not to be confused with youth justice centre detention sentences for young adults under ss.3 & 32 of the Sentencing Act 1991. Victoria is unique in Australia in providing the option to adult courts of sentencing immature, vulnerable 18-20 year old offenders to custody in the juvenile system rather than prison.

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THE PRESCRIBED FORMS/WARRANTS ARE IN ORDERS 4 & 5 OF THE <i>Children's Court Criminal Procedure Rules 2009 [S.R. 189/2009]</i>			
SENTENCING ORDER		CYFA	NOTES
(a) [DIM]	DISMISSAL	s.360(1)(a)	<ul style="list-style-type: none"> Without conviction A fairly uncommon order
(b) [UUT]	NON-ACCOUNTABLE UNDERTAKING	ss.363-364 [Form 7]	<ul style="list-style-type: none"> AS FOR AN ACCOUNTABLE UNDERTAKING EXCEPT IT MAY NOT BE BREACHED [s.364] A very rare order
(c) [AUT]	ACCOUNTABLE UNDERTAKING	ss.365-366 [Form 8]	<ul style="list-style-type: none"> Without conviction Charge(s) dismissed May be ordered in relation to 1 or more offences Maximum period 6 months (12 months in exceptional circumstances) Accountable undertaking may be breached [s.366]
Undertaking by child (and if required by parent) with or without conditions to do or refrain from doing the act or acts specified in the undertaking.			
(d) [GBB]	GOOD BEHAVIOUR BOND	ss.367-372 [Form 10]	<ul style="list-style-type: none"> Without conviction Charge(s) adjourned for period of bond May be ordered in relation to 1 or more offences Maximum period 12 months (18 months in exceptional circumstances and if the child is aged 15 or more on the day of sentencing) Bond must be in "an amount less than one half of the maximum fine that may be imposed on the child under s.373" Court must dismiss charge(s) on the adjourned date if child has observed the conditions of the bond [s.368] Bond may be breached [ss.371-372] Optional special conditions [s.367(3)(d)]
Court may order GBB if it appears expedient to do so, having regard to all the circumstances, including: (a) the nature of the offence; (b) the character & antecedents of the child; (c) whether or not the child pleaded guilty.			
<ul style="list-style-type: none"> Mandatory conditions: To appear if required during the period of or at the end of the adjournment and to be of good behaviour during the period of the adjournment [s.367(3)(a), (b) & (c)] 			
(e) [FIN]	FINE	ss.373-379	<ul style="list-style-type: none"> If the Court finds a child guilty of an offence, whether indictable or summary, it may impose a fine with or without conviction Maximum fine is the lower of the maximum prescribed and: <u>Per offence:</u> 1 penalty unit if child < 15, otherwise 5 penalty units <u>Per case:</u> 2 penalty units if child < 15, otherwise 10 penalty units The value of 1 penalty unit for the 2019-2020 financial year is \$165.22
A Court imposing a fine on a child must take into consideration, among other things, the financial circumstances of the child when determining the amount of the fine [s.374].			
<ul style="list-style-type: none"> May only be ordered in relation to 1 offence. No power to order an aggregate fine. Instalment Orders/Time to pay [ss.375-377] Orders in default of payment of fine/instalment [ss.378-379] 			
(f) [PRO]	PROBATION	ss.380-386 [Form 11]	<ul style="list-style-type: none"> With or without conviction. In <i>R v P & Ors</i> [2007] VChC 3 at [51] & [54] Judge Grant distinguished between two co-offenders, convicting one and not convicting the other. May be ordered in relation to 1 or more offences Maximum period 12 months (or 18 months if one of the offences is punishable by imprisonment > 10 years) If, on the same day or in the same proceeding, multiple probation orders are imposed on the child, their maximum aggregate period is 18 months May not extend beyond child's 21st birthday
Probation involves the lowest level of supervision of the 4 supervisory orders. The frequency of contact is entirely at the discretion of the youth justice officer. A rough average is one contact per week.			
<ul style="list-style-type: none"> May be ordered concurrently in whole or part or cumulatively on an uncompleted probation order [s.382] Cannot be ordered without child's consent [s.380(2)] Mandatory conditions [s.381(1)] 			

<ul style="list-style-type: none"> Optional special conditions (reasons required) [ss.381(2)-(4)] 			<ul style="list-style-type: none"> May be breached [s.384] May be varied or revoked [ss.381(5) & 421]
(g) [YSO]	YOUTH SUPERVISION ORDER	ss.387-395 [Form 12]	<ul style="list-style-type: none"> With or without conviction: see <i>R v P & Ors</i> [2007] VChC 3 at [39], [41], [43], [45], [47] & [49]. May be ordered in relation to 1 or more offences Maximum period 12 months (or 18 months if one of the offences is punishable by imprisonment > 10 years): see <i>DPP v SI (a child)</i> [2018] VChC 3 May not extend beyond child's 21st birthday If, on the same day or in the same proceeding, multiple YSOs are imposed on the child, their maximum aggregate period is 18 months May be ordered concurrently in whole or part or cumulatively on an uncompleted YSO [s.388] Cannot be ordered without child's consent [s.387(2)(b)] Mandatory conditions [s.389(1)] Optional special conditions (reasons required) [ss.381(3)+(4) & 389(3)] May be breached [s.392] May be varied or revoked [ss.389(4) & 421]
<p>YSO involves a middle level of supervision. The frequency of contact & attendance is at the discretion of the Secretary DJCP ['the Secretary']. Although this is not the norm, the person may also be directed by the Secretary to participate in a community service program or other program [s.389(6)].</p>			
<p>YSO may be suspended by the Secretary if the person is ill or there are other exceptional circumstances [s.422(1)] or if the person is in custody at the time the YSO is made or subsequently [s.390(1)].</p>			
<p>Section 390(3) permits the Secretary, with the consent of the parole board, to direct a term of operation of a YSO be served concurrently with a period of parole.</p>			
(h) [YAO] 15+	YOUTH ATTENDANCE ORDER	ss.396-409 [Form 13]	<ul style="list-style-type: none"> Mandatory conviction May be ordered in relation to 1 or more offences, at least one of which must be such that the child would otherwise be sentenced to detention Child must be at least 15 on day of sentencing Maximum period 12 months May not extend beyond child's 21st birthday Cannot be ordered without enquiries of the Secretary as to suitability of child [s.398(b)] and without child's consent [s.398(c)] May be ordered concurrently in whole or part or cumulatively on an uncompleted YAO [s.400] Mandatory conditions [s.399(1)] Optional special conditions (reasons required) [ss.381(3)+(4) & 399(2)+(3)] May be breached [s.408] May be varied or revoked [s.409] Objects of YAO [s.405]
<p>YAO involves an intensive level of supervision & attendance. The frequency of contact & attendance is set out in s.402(1): As directed by the Secretary the person must, in every week during the term of the YAO-</p> <p>(a) attend a youth justice unit for a maximum of 3 attendances;</p> <p>(b) such attendances to be for a maximum of 10 hours of which no more than 4 hours may be spent in community service activities under s.407.</p>			
<p>YAO may be suspended by the Secretary if the person is in custody at the time the YAO is made or subsequently [s.403].</p>			
<p>YAO is an alternative to YJC for a child aged 15 or more on date of sentencing for an offence for which the child would otherwise be sentenced to detention in YJC as a result of the gravity or habitual nature of the child's unlawful behaviour [s.397(1)].</p>			

SENTENCING ORDER		CYFA	NOTES
(ha) [YCO]	YOUTH CONTROL ORDER	ss.409A-409Z [Form 13A]	<ul style="list-style-type: none"> • Mandatory conviction • May be ordered in relation to 1 or more offences, at least one of which must be such that the child would otherwise be sentenced to detention as a result of the gravity or the habitual nature of the child's unlawful behaviour • Maximum period 12 months - if, on same day or in the proceeding, multiple YCOs are made the maximum aggregate period is 12 months • May not extend beyond child's 21st birthday • Cannot be ordered without (b) enquiries of the Secretary as to the suitability of the child (c) the child's consent and (d) a YCO plan [s.409C] • May be ordered concurrently in whole or part or cumulatively on an uncompleted YCO [s.409I] • Mandatory requirements [s.409F(1)] • Optional requirements [s.409F(2)] • Mandatory judicial monitoring [s.409L] • May be varied [s.409N]
YCO is the most onerous community supervision sentencing order for a child. It involves judicial monitoring and is modelled on the Community Corrections Order available for an adult pursuant to the Sentencing Act 1991.			
YCO may be suspended by the Secretary if the child is in custody at the time the YCO is made or subsequently [s.409M].			
Mandatory revocation on application by child or if child breaches the YCO or commits an offence punishable by IMP 5 years or more while YCO in force [s.409Q] -> The consequence is detention for up to the uncompleted balance of YCO term unless inappropriate because of exceptional circumstances [s.409R].			
<p>YCO OBJECTS The objects of a YCO, set out in s.409A of the CYFA, are:</p> <p>(a) to provide a judicially supervised, intensive supervision regime for the child; and</p> <p>(b) to penalise the child by imposing restrictions on his or her liberty; and</p> <p>(c) to provide intensive, targeted supervision to the child, to help him or her to develop an ability to abide by the law; and</p> <p>(d) to engage the child in education, training or work (whether paid or unpaid); and</p> <p>(e) to give the child an opportunity to demonstrate a desire to cease offending.</p> <p>YCO PLANNING MEETING The Court must order that a YCO planning meeting be held if the Court is considering making a YCO [s.409D(1)] else the Court has no power to make a YCO [s.409C(d)]. The Court may order a further YCO planning meeting be held if a YCO is already in force and the Court considers that such a meeting is necessary [s.409D(2)]. The purpose of a YCO planning meeting is to develop, through discussion, a YCO plan for the child and to review or vary a YCO plan that is in force [s.409S]. See ss.409T to 409Z for provisions regulating YCO planning meetings and YCO planning meeting reports.</p> <p>MATTERS TO WHICH COURT MUST HAVE REGARD IN DECIDING IF TO MAKE A YCO</p> <p>Section 409E provides that in determining whether to make a YCO the Court must have regard to:</p> <ul style="list-style-type: none"> • the child's behaviour on any bail supervision program and on remand if applicable; • the extent to which the child has acknowledged responsibility for his or her offending; • the availability of education, training or work opportunities (paid or unpaid) for the child and the child's willingness to engage in those opportunities; • the report of the YCO planning meeting; and • any other matter that the Court considers relevant. <p>NON-ACCOUNTABLE PARENTAL UNDERTAKING The Court may order that the child's parent give a non-accountable undertaking, with or without conditions, to support the child to comply with the YCO [ss.409G+409H].</p> <p>REPORTING AND JUDICIAL MONITORING Section 409L provides that a child in respect of whom a YCO is in force must attend the Court from time to time (at least monthly for the first half of the order) as directed by the Court, for the Court (constituted by the same magistrate who sentenced the child except in the circumstances detailed in s.409L(7)) to consider-</p> <p>(a) the child's compliance with the YCO; and</p> <p>(b) the ongoing suitability of the requirements of the YCO.</p> <p>The Secretary must provide a report about the child's compliance before each attendance at least 3 working days before the attendance or otherwise as directed by the Court. When the child attends Court, the Court must consider whether the YCO should be varied under s.409N.</p> <p>If a higher court makes a YCO, s.409K requires it to remit to the Children's Court the responsibilities for reporting and monitoring [s.409L], variation [s.409N] and –subject to s.423– revocation [s.409Q].</p>			

SENTENCING ORDER		CYFA	NOTES
(i) [YRC] 10-14	DETENTION IN YOUTH RESIDENTIAL CENTRE	ss.410-411 [Warrant - Form 18]	<ul style="list-style-type: none"> • Mandatory conviction • The maximum term is the lower of that prescribed and: <u>Per offence:</u> 1 year <u>Per case:</u> 2 years • The prescribed maximum is highly relevant: see <i>R v AB (No.2)</i> [2008] VSCA 39 at [40] & [51]. • May be concurrent, partly concurrent or cumulative with sentences for any other offences or sentences currently being served (default is concurrent) [s.411(2)(a)] • No power to order a non-parole period • YRC cannot be ordered unless a pre-sentence report has been received [s.410(1)(e)].
<p>YRC is a sentence of last resort for an offence (whether indictable or summary) which is punishable upon a finding of guilt by imprisonment (other than for default in payment of a fine) for a child aged 10-14 on the date of sentencing [ss.410(1)(b)-(d)]. An aggregate YRC sentence can be ordered if a child is convicted of 2 or more offences which-</p> <p>(a) are founded on the same facts; or (b) form, or are part of, a series of offences of the same or a similar character [s.362B].</p>			
(j) [YJC] 15-20	DETENTION IN YOUTH JUSTICE CENTRE	ss.412-413 [Warrant - Form 18]	<ul style="list-style-type: none"> • Mandatory conviction • The maximum term is the lower of that prescribed and: <u>Per offence:</u> 3 years <u>Per case:</u> 4 years • The prescribed maximum is highly relevant: see <i>R v AB (No.2)</i> [2008] VSCA 39 at [40] & [51]. • May be concurrent, partly concurrent or cumulative with sentences for any other offences or sentences currently being served (default is concurrent) [s.413(3)(a)] • No power to order a non-parole period • YJC cannot be ordered unless a pre-sentence report has been received [s.412(1)(e)].
<p>YJC is a sentence of last resort for an offence (whether indictable or summary) which is punishable upon a finding of guilt by imprisonment (other than for default in payment of a fine) for a child aged 15-20 on the date of sentencing [ss.412(1)(b)-(d)]. An aggregate YJC sentence can be ordered if a child is convicted of 2 or more offences which-</p> <p>(a) are founded on the same facts; or (b) form, or are part of, a series of offences of the same or a similar character [s.362B].</p>			
<u>DETENTION CENTRES FOR YOUNG OFFENDERS/REMANDEES</u>			
<p>The website of the Department of Justice and Community Safety states that it manages two youth justice custodial precincts in Victoria:</p> <p>❶ <u>Parkville Youth Justice Precinct</u> which comprises two youth justice centres and accommodates:</p> <ul style="list-style-type: none"> • 10-14 year old males (remanded or sentenced); • 15-18 year old males (remanded or sentenced); • 10-17 year old females (remanded or sentenced); • 18-21 year old women sentenced to a YJC order by the Magistrates, County & Supreme Cts. <p>❷ <u>Malmsbury Youth Justice Precinct</u> which comprises two youth justice centres and accommodates young men aged 15-20 years when remanded or sentenced to a YJC order by any court.</p>			

In *R v Ford (a pseudonym)* [2018] VSC 491 Tinney J held that the Court had power to make a YJC order in sentencing an 18 year offender for contempt of the Chief Examiner pursuant to s.49(1) of the Major Crimes (Investigative Powers) Act 2014.

In determining the period of a sentence of detention in YRC or YJC the prescribed maximum sentence is highly relevant. In *R v AB (No.2)* [2008] VSCA 39 at [40] & [51] the Court of Appeal (Warren CJ, Maxwell P & Redlich JA) said:

[40] "The maximum sentence provides a guide as to the seriousness with which a particular offence should be viewed: *Hansford v His Honour Judge Neesham* [1995] 2 VR 233, 236; *R v Sibic* (2006) 168 A Crim R 305, [14]-[17] (Redlich JA). It serves as a directive to the courts on how to weigh the gravity of such criminal conduct, the maximum penalty itself being prescribed for the worst class of offence in question: *R v Sibic* (2006) 168 A Crim R 305, [14]-[17] (Redlich JA); *Ibbs v R* (1987) 163 CLR 447; *R v Dumas* [1998] VR 65, 71-2. Recently in *R v Sibic* at [14], this court referred to the following

passage from the decision of the High Court in *Markarian v R* (2005) 228 CLR 357 at [31] where the majority said:

‘[C]areful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.’”

[51] “Whenever Parliament increases the maximum sentence for any criminal offence, that increase has potential significance for all sentences to which the new maximum applies. As the present case illustrates, the increase will have very substantial implications for any sentence for an offence that is placed within the worst category of that offence: *Ibbs v R* (1987) 163 CLR 447; *R v Sibic* (2006) 168 A Crim R 305 at [16]. Even where the offence to which the increase applies is nowhere near the worst category, the increase remains of relevance since, in the usual case, the increase shows that Parliament regarded the previous penalties as inadequate. Even where the new maximum may only be of general assistance [see *DPP v Aydin & Kirsch* [2005] VSCA 86 at [10]-[12] (Callaway JA) as to the variable factors that bear upon the significance of an increased maximum], it becomes the ‘yardstick’ which must be balanced with all other relevant factors: *Markarian v The Queen* (2005) 228 CLR 357 at [31] (Gleeson CJ, Gummow, Hayne & Callinan JJ).”

See also *R v Stratton* [2008] VSCA 130 at [126]-[130]; *R v Gonzalez* [2011] VSCA 175 at [28]-[31].

11.1.6 The community supervisory orders detailed and compared

Four of the sentencing orders involve supervision of the child in the community by an officer of the Youth Justice Division of the Department of Human Services or alternatively, in the case of probation, by an assigned honorary youth justice officer [s.3 of the CYFA].

SENTENCING ORDER		SUPERVISION, CONTACT, ATTENDANCE & CONDITIONS
(f) [PRO]	PROBATION	Probation involves the lowest level of supervision. The frequency of contact is entirely at the discretion of the assigned youth justice officer. A rough average is one contact per week.
MANDATORY CONDITIONS [s.381(1)]		
The person placed on probation must-		
<ul style="list-style-type: none"> (a) report to the Secretary within 2 working days after the order is made; (b) during the period of the order, report to the assigned youth justice officer as required by the officer; (c) not re-offend during the period of the order; (d) not leave the State without the written permission of the Secretary; (e) notify the assigned youth justice officer of any change of residence, school or employment within 48 hours after the charge; (f) obey the reasonable and lawful instructions of the assigned youth justice officer. 		
OPTIONAL SPECIAL CONDITIONS [ss.381(2)-(4)]		
The Court may order the person to observe any condition for the whole or any specified part of the period of the order. Any such condition must relate to the offence and the Court must, in its statement of reasons for the sentence, give its reason for ordering the special condition(s). Special conditions may include:		
<ul style="list-style-type: none"> • attendance at school if under school-leaving age; • abstinence from alcohol and/or illegal drugs; • specified residence and/or curfew; • medical, psychiatric, psychological or drug counselling or treatment; • participation in a justice plan if eligible. 		
SENTENCING ORDER		SUPERVISION, CONTACT, ATTENDANCE & CONDITIONS
(g) [YSO]	YOUTH SUPERVISION ORDER	YSO involves a middle level of supervision. The frequency of contact & attendance is at the discretion of the Secretary. In addition the person may be directed by the Secretary to participate in a community service program or other program [see s.389(6)].

MANDATORY CONDITIONS [s.389(1)]

The person placed on a youth supervision order must-

- (a) report to the Secretary within 2 working days after the order is made;
- (b) during the period of the order, report to the Secretary as required by the Secretary;
- (c) not re-offend during the period of the order;
- (d) not leave the State without the written permission of the Secretary;
- (e) notify the Secretary of any change of residence, school or employment within 48 hours after the charge;
- (f) attend a youth justice unit or any other place specified in the YSO;
- (g) participate in a community service program or any other program, if so directed by the Secretary [see s.389(6)];
- (h) obey the reasonable and lawful instructions of the Secretary.

OPTIONAL SPECIAL CONDITIONS [ss.389(2)-(3) & 381(2)-(4)]

Same requirements and same list of conditions as for probation.

SENTENCING ORDER

SUPERVISION, CONTACT, ATTENDANCE & CONDITIONS

(h)	YOUTH ATTENDANCE ORDER	YAO involves an intensive level of supervision & attendance. The frequency of contact & attendance is set out in s.402(1): the person must, every week during the term of the YAO- (a) attend a youth justice unit for a maximum of 3 attendances; (b) such attendances to be for a maximum of 10 hours of which no more than 4 hours may be spent in community service activities under s.407. The objects of a YAO are set out in s.405 of the CYFA.
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MANDATORY CONDITIONS [s.399(1)]

The person placed on a youth attendance order must-

- (a) not re-offend during the period of the order;
- (b) attend at a youth justice unit for the number of weeks specified in the order;
- (c) report to the Secretary within 2 working days after the order is made whether he or she is in custody or not;
- (d) not leave the State without the written permission of the Secretary;
- (e) notify the Secretary of any change of residence, school or employment within 48 hours after the charge;
- (f) comply with the provisions of a notice under s.402 (specifying the times of attendance) and with the requirements for attendance in ss.402(1)(a) & (b);
- (g) attend at any alternative day & time fixed under s.402(5) or any extension of the YAO fixed under s.402(6);
- (h) carry out the reasonable and lawful directions of the Secretary or any person acting under the authority of the Secretary under ss.406 & 407(1).

OPTIONAL SPECIAL CONDITIONS [ss.399(2)-(3) & 381(2)-(4)]

Same requirements and same list of conditions as for probation.

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SENTENCING ORDER		SUPERVISION, CONTACT, ATTENDANCE & CONDITIONS
(ha) [YCO]	YOUTH CONTROL ORDER	YCO involves an intensive level of supervision & attendance plus judicial monitoring. The objects of a YCO are set out in s.409A.
MANDATORY REQUIREMENTS [s.409F(1)]		
The person placed on a youth control order must- (a) not re-offend during the period of the order; (b) report to the Secretary within 2 working days after the order is made whether he or she is in custody or not; (c) report to the Secretary as required by the Secretary during the period the order is in force; (d) comply with any lawful and reasonable directions given by the Secretary; (e) attend Court as directed by the Court for judicial monitoring under s.409L; (f) participate in education, training or work (whether paid or unpaid) for some or all of the period that the order is in force; (g) notify the Secretary of any change of residence, school or employment within 2 working days after the charge; (h) not leave the State without the permission of the Secretary.		
OPTIONAL SPECIAL REQUIREMENTS [s.409F(2)]		
Having regard to the person's YCO plan and personal circumstances, the Court may impose on the person any of the following requirements and any other requirement that the Court considers appropriate:		
(a) participate in one or more community service activities;	(g) attend & participate in a group conference;	(h) participate in cultural programs or attend culturally specific community supports;
(b) undergo treatment for drug or alcohol dependence;	(i) not use specified social media if so required for the protection of the community;	(j) not visit particular places or areas or only visit them at specified times;
(c) attend a counselling or treatment service;	(k) participate in disability services as directed by the Secretary (if child has Int. Disability).	
(d) reside at a specific address;		
(e) not leave residence between specified hours on specified days;		
(f) not contact specified persons;		

11.1.7 Power to impose an aggregate sentence of YRC/YJC detention under the CYFA

As and from 27/03/2018 the Children's Court has had power to impose an aggregate sentence of detention in YRC or YJC in lieu of separate sentences in certain circumstances. Section 362B of the CYFA provides that if a child is convicted by the Court of 2 or more offences (including offences the subject of a rolled-up charge or a representative charge) which –

- (a) are founded on the same facts; or
- (b) form, or are part of, a series of offences of the same or a similar character –

the Court may impose an aggregate sentence of detention in respect of those offences in place of a separate sentence of detention in respect of all or any 2 or more of them. The term of the aggregate sentence must not exceed the total effective period of detention that could be imposed had the Court imposed a separate sentence of detention in respect of each offence. Compare s.9 of the Sentencing Act 1991 (Vic) and see *R v Grossi* [2008] VSCA 51, *DPP v Felton* [2007] VSCA 65, *R v Rodgers* [2008] VSCA 52, *Oleyar v R* [2015] VSCA 134 & *Finn v Wallace & Stewart* [2016] VSC 10; *Jiaming Gui v The Queen* [2020] VSCA 273 at [15]-[16] & [23]-[25].

11.1.8 Restitution/Compensation/Costs

In addition to any other sentencing order, s.360(3) of the CYFA empowers the Court to order a child:

- (a) to make restitution or pay compensation in accordance with s.417 of the CYFA;
- (b) to pay costs.

Section 360(4) prohibits the Court from making an order referred to in s.360(3) a special condition of another sentencing order.

Section 417, read in conjunction with ss.85H(1), 86(2) & 87J(1) of the Sentencing Act 1991 (Vic), requires the Court to take into account, among other things, the child's financial circumstances and the nature of the burden which would be imposed by an order under:

- s.85B(1) to pay compensation for pain and suffering etc.;
- s.86(2) to pay compensation for property loss, destruction or damage; or
- s.87D(1) to pay costs reasonably incurred by an emergency service agency as a result of an offence of criminal contamination of goods or bomb hoax.

Since a child rarely has the means and ability to pay anything other than a small sum of money, if that, applications for restitution/compensation/costs are commonly refused.

The reference to s.87J(1) of the Sentencing Act 1991 (Vic) was added to s.191 of the CYPA on 01/07/2005 [now s.417(1) of the CYFA]. However, no reference to s.87A(4) has been added. The latter provision requires a court dealing with an application under s.87A(1) - for repayment to the State of the whole or a part of assistance and costs awarded to a victim under the Victims of Crime Assistance Act 1996 - to have regard to the defendant's financial resources and financial needs. In the absence of express reference to s.87A(1) in the CYPA, the writer wonders whether s.87A has any application in the Children's Court. However, the question remains moot.

Money unpaid under a restitution or compensation order is a judgment debt, said by ss.85M, 87 & 87N of the Sentencing Act 1991 (Vic) to be able to be "enforced in the court by which it was made". Prior to 01/07/2005 enforcement of such orders had not been possible as the Children's Court had no relevant civil jurisdiction, Part 5 of the Magistrates' Court Act 1989 (Vic) – the Part dealing with civil proceedings generally – is expressly excluded by s.528(2) of the CYFA from having operation in the Children's Court. Further, s.357(1) of the CYFA expressly excludes a sum of money payable by way of restitution or compensation from the fine default procedures. But a recovery mechanism has now been provided by s.418 of the CYFA, which provides that-

- A person in whose favour a compensation, restitution or cost recovery order is made under s.417 may enforce the order during the period of 5 years following the making of the order by filing in the appropriate court [namely a court with jurisdiction to enforce a debt of the amount of the order]-
 - (a) a copy of the order certified by the principal registrar to be a true copy; and
 - (b) that person's affidavit as to the amount not paid under the order.
- No charge is to be made for such filing.
- Upon filing, the order must be taken to be an order of the appropriate court and is able to be enforced accordingly save that-
 - (a) no order may be made under s.19 of the Judgment Debt Recovery Act 1984; and
 - (b) no order of imprisonment may be made under the Imprisonment of Fraudulent Debtors Act 1958.

Section 417(2) of the CYFA – based on s.36 of the Children (Criminal Proceedings) Act 1987 [NSW] - provides: "The maximum amount that the Court may order an offender to pay under Part 4 of the Sentencing Act 1991 is \$1000."

It is not clear on the face of the legislation whether s.417(2) of the CYFA caps restitution/compensation/costs at \$1000 per case or \$1000 per charge. In favour of the "per case" interpretation is that s.417(2) uses the word "offender" rather than the word "offence". In favour of the "per charge" interpretation is that ss.85B(1) & 86(1) of the Sentencing Act 1991, two of the substantive powers to award compensation, use the word "offence". The latter provides:

"If a court finds a person guilty of, or convicts a person of, an offence it may, on the application of a person suffering loss or destruction of, or damage to, property or pain and suffering as a result of the offence, order the offender to pay any compensation for the loss, destruction or damage (not exceeding the value of the property lost, destroyed or damaged) or for the pain and suffering that the court thinks fit."

Thus, looking only at the legislation, one could make a respectable argument either way. However, it appears from Hansard that parliament intended s.417(2) to cap restitution/compensation/costs at \$1000 per case. In the debate on the predecessor s.191(2) of the CYFA, which is in identical terms, in the Legislative Council on 25/05/2005 Hon J M Madden said:

"It is not appropriate for the Children's Court when sentencing a young person to conduct the truncated civil proceeding for an amount that exceeds the amount that the Court can impose as a financial penalty by way of sentence.

This is especially so given that the Court has no general civil jurisdiction, and given the requirement for the court to conduct inquiries into a young person's financial circumstances. The Children's Court, when sentencing a child, is not in a position to conduct this type of inquiry to determine the children's financial capacity with respect to a large civil debt. It is therefore appropriate for such inquiries to be done in proper civil proceedings as is envisaged in sections 85L, 86(10) and 87M of the Sentencing Act 1991 which preserves the right to sue.

Further, there is no point making orders that raise the victim's expectation. As Mr McIntosh, the member for Kew in the other house, said, 'You can't get blood out of a stone'. Alternative restorative processes such as the Koori court or through group conferencing are more appropriate in ensuring the necessary balance between the rights

of the victim, the needs of the young person and the concerns and expectations of the community.

There is currently divergent practice across the state with respect to these orders in the Children's Court. Clause 41 seeks to impose a level of consistency. Clause 41 does not extend to serious cases dealt with in the County Court or the Supreme Court."

But under s.150 of the CYPA [now s.373 of the CYFA] the maximum amount of any fine that the Court can impose on a child is 5 penalty units per charge and 10 penalty units per case. Applying Minister Madden's reasoning, it is clear that the \$1000 cap is the maximum amount of compensation etc. that the Children's Court may impose in any case, irrespective of the number of charges on which compensation has been awarded, just as 10 penalty units is the maximum financial penalty that the Court can impose by way of sentence.

In *DPP v Esso Australia Pty Ltd* [2004] VSC 440 at [7]-[8] Cummins J referred to some of the principles involved with s.85B of the Sentencing Act 1991 (Vic) - relating to compensation for pain and suffering - and like legislation, noting *inter alia* at [7]: "Compensation is not punishment and proceeds according to common law criteria: *McDonald* (1979) 1 NSWLR 451 and *In Re Poore* (1973) 6 SASR 308." At [8] his Honour said:

"There are a number of incidents of s.85B compensation proceedings. First, the proceedings are under the *Sentencing Act* 1991, a criminal statute. The proceedings are heard in the Criminal Division by the sentencing Judge. Second, a condition precedent to the institution of s.85B proceedings is the recording of a criminal conviction [or a finding of guilt]. Third, the respondent to an application under s.85B is a party by reason of his, her or its character of being an offender. Fourth, the applicant has to be a victim of a crime. Fifth, there is an intimate connection between the antecedent criminal trial and the application. The documents the application proceeds upon are criminal trial documents, including committal depositions before the trial and victim impact statements after conviction: s.85F(2). Sixth, unlike ordinary civil process where the impecuniosity of the defendant is irrelevant, in s.85B applications the Court may take into account the financial circumstances of the offender and the nature of the burden that the payment ordered will impose: s.85H(1). Seventh, by s.85H, the rehabilitation of the offender, always an important matter in sentencing, should not be deflected or defeated by a compensation order. Eighth, by s.85C(1)(b)(iii) a section 85B application may be made on the victim's behalf by the Director of Public Prosecutions. Ninth, s.85L preserves the applicant's right to recover civil damages separate and apart from, or in addition to, s.85B proceedings. And finally and importantly, pursuant to s.85B compensation can be awarded not only for injury constituted by 'actual physical bodily harm' (s.85A(1)(a)) but also (amongst other heads) by 'grief, distress, trauma, or other significant adverse effect'. Compensation can also be awarded for hospital, medical psychological and other expenses."

In *DPP v Esso Australia Pty Ltd* [2004] VSC 440 at [17]-[22] Cummins J also rejected, "at three levels: statutory, elemental and chronological", an argument by the defendant that a s.85B claim for compensation is subject to the threshold requirements of Part VBA *Wrongs Act* 1958 which came into operation in May 2003 and subject to the quantum limitation provisions of Part VB *Wrongs Act* 1958 which came into operation in October 2002. On appeal His Honour's decision was upheld: "[A] s.85B claim does not fall within the ambit of Part VBA." {*Esso Australia Pty Ltd v Robinson* [2005] VSCA 138 at [21]-[30]}. At [32] the Court of Appeal also discussed the way in which a legislative "cap" on compensation was to be treated, referring with approval to dicta:

- in *H v Crimes Compensation Tribunal* [1997] 1 VR 608 where it was said that an award of compensation under s.18 of the Criminal Injuries Compensation Act 1983 (Vic) was to be made on the basis that the prescribed pecuniary limit represented a jurisdictional limit only and did not reflect the top of a graduated scale; and
- in *Eccles v Taylor* [1995] 2 VR 482 at 493 where Ashley J held that in conducting an assessment for the purpose of determining the amount to be awarded as compensation, the court does not assume the limit fixed by statute to be an appropriate amount for a 'worst case' and then award 'a proportionately lesser sum for anything but that worst case'.

In *Kortel v Mirik & Mirik* [2008] VSC 103 at [11] Bell J said: "It is axiomatic, under both s.85G(2) of the *Sentencing Act* and the common law, that when an application is made for compensation under s 85B, the court owes a duty to all parties to the proceeding to observe the rules of natural justice."

In *RK v Mirik & Mirik* [2009] VSC 14 Bell J discussed in detail and applied the principles in ss. 85B(1)-(4), 85C, 85F, 85G, 85H(1)-(2) of the Sentencing Act 1991, awarding substantial sums of compensation (\$113,600 & \$26,525) against two imprisoned adult offenders having no capacity to pay and holding that the victim's interests should have greater priority than the offenders' rehabilitation.

In *Ioannou v Catania* [2008] VSC 302 Bell J awarded the adult applicant compensation of \$32,051.33 under s.85B for serious burn and related injuries caused when the adult respondent set fire to him. The quantum of compensation (taking into account the matters in s.85H) represented the proceeds from the sale of the sole asset of the respondent who was considered unlikely to have the means to satisfy an order in excess of that amount at any time after his release from custody.

In *DPP (Vic) v Energy Brix Australia Corporation Pty Ltd* (2006) 14 VR 345, 356-7 [50], Neave JA said that the factors which should be taken into account in assessing compensation for a person's grief or trauma under s.85B include:

- the circumstances in which the death occurred;
- the effect on the person of hearing of the event causing loss;
- the closeness of the relationship between the person and the victim;
- the age of the person; and
- the extent of the grief and psychological suffering experienced as a result of the loss.

See also dicta of Vincent JA (with whom Buchanan JA agreed) at [30] & [36] in the same case. This dicta of Neave JA & Vincent JA was approved and applied by the Court of Appeal in *Chalmers v Liang & Zhu* [2011] VSCA 439.

In *Shepherd & anor v Kell & anor* [2012] VSC 80 Lasry J relied on dicta of Cummins J in *Robertson v Esso (Australia) Pty Ltd* [2004] VSC 101 at [4] in granting leave pursuant to s.85D to applicants for compensation for an extension of time in which to file their applications. In *Shepherd & anor v Kell & anor* [2013] VSC 24 his Honour analysed s.85H of the Sentencing Act in the course of holding at [32] that "the offenders' financial circumstances would be relevant: the offenders are young and their prospects for rehabilitation are good".

In *Koeleman v Nolan* [2012] VSC 128 the appellant had stolen a motor vehicle which was not subsequently recovered. A magistrate made a restitution order under s.84(1)(b) of the Sentencing Act 1991 requiring the offender to transfer his own motor vehicle to the victim. On appeal the order was set aside, Almond J holding that the offender's motor vehicle did not fall within the category of "goods that directly or indirectly represent the stolen goods".

11.1.9 Additional orders including disqualification & forfeiture

Section 360(5) of the CYFA provides that if under any Act other than the CYFA a court is authorised on conviction for an offence-

(a) to make an order with respect to any property or thing the subject or in any way connected with the offence; or

(b) to impose any disqualification or like disability on the person convicted-

then the Court may, if it finds a child guilty of that offence, make any such order or impose any such disqualification or disability despite the child not being convicted of that offence. For the meaning of "conviction" as used in the Confiscation Act 1997 (Vic) see the judgment of Smith J in *DPP v Nguyen* and *DPP v Duncan* [2008] VSC 292. For analysis of the phrase "used in connection with the commission of the offence" as contained in the definition of "tainted property" in section 3(1) of the Confiscation Act 1997 (Vic) see the judgment of the Court of Appeal in *R v Chalmers* [2011] VSCA 436. For analysis of the phrase "lawfully acquired" in s.22 of the Confiscation Act 1997 (Vic), see the judgments of the Court of Appeal in *Markovski v DPP* [2014] VSCA 35.

11.1.9.1 Disqualification

An issue which arises from time to time in sentencing in the Children's Court is whether the disqualification provisions (whether mandatory or discretionary) in the Road Safety Act 1986 (Vic) [the RSA] – for example s.28 & Schedule 5 or s.50(1A) & Schedule 1 – apply to a child convicted or found guilty of an offence against that Act or of any other offence in connection with the driving of a motor vehicle.

There is no Supreme Court case law on the point, an appeal to the Supreme Court against a magistrate's decision that s.50(1A) did apply in the Children's Court having unfortunately been abandoned some years ago. However, in *Victoria Police v FT* [2018] VChC 2 [Children's Court of Victoria, 06/03/2018] Magistrate Bowles held at [20] that having regard to-

- the provisions of the CYFA;
 - statutory interpretation of the RSA;
 - the public policy provisions underpinning the RSA; and
 - the specific licensing regime in the RSA and the relevant Regulations-
- the mandatory provisions in the RSA do apply to children and young persons who have been found guilty in the Children's Court of relevant offences contrary to the RSA.

FT, aged 17.6 years old at the time of the offending, had pleaded guilty to three offences:

- driving a motor vehicle with more than the prescribed concentration of alcohol in her breath contrary to s.49(1)(f) of the RSA [0.039%], an offence which under amendments to s.50 introduced by the Road Safety Amendment Act 2014 (Vic) included mandatory licence/permit cancellation, disqualification and interlock provisions on persons in FT's position; and
- driving a vehicle without an experienced driver sitting beside her and failing to display "L" plates contrary to the Road Safety (Drivers) Regulations 2009 (Vic), offences which did not require mandatory cancellation and disqualification either pursuant to the Regulations themselves or pursuant to the general provision of s.28 of the RSA.

On its plain reading s.360(5) of the CYFA only applies to remove conviction as a pre-requisite for disqualification for a child. It does not apply the other way around, namely to require conviction as a pre-requisite for disqualification. A difficulty with this plain reading is that it makes the disqualification provisions potentially operate more harshly for a child than for an adult. In so doing it might be argued to be in conflict with the principles of sentencing generally as well as with the matters set out in s.362(1) of the CYFA. These include the requirement in s.362(1)(c) for the Court "as far as practicable [to] have regard to the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance". It is not hard to envisage circumstances where the suspension or cancellation of a child's learner permit or driver licence will have a significantly disturbing effect on a child's education, training or employment. In particular in FT's case the Court accepted that FT had no criminal history, had completed Year 12 and had been accepted into a tertiary course, works part-time in food retailing, had been intercepted by police on a routine basis and not as a result of bad driving, had completed 100 hours of driving and lived at home with her parents, one of whom was wheelchair-bound.

In her statutory interpretation of the RSA, Magistrate Bowles held, *inter alia*-

[28] "The language in s.49 and s.50 refers to 'the person', 'a person', 'the offender' and 'the accused'. The words 'person', 'offender' and 'accused' are not defined in the definition sections in s.3(1), s.47A in Part 5...nor in the interpretative provisions in s.48 RSA.

[29] Unlike other provisions in the RSA, the words are not qualified by age [cf. s.84F], for example, restricting these provisions to only apply to persons 18 years and older or specifying that they do not apply to those persons under the age of 18 years. The words therefore bear their ordinary meaning. A child or young person appearing before the Children's Court who is guilty of an offence pursuant to s.49 RSA is 'a person', an 'offender' and an 'accused'."

At [30]-[38] her Honour discussed the public policy provisions underpinning the RSA and concluded:

- The RSA is legislation the purposes of which "include promoting safety on the roads and responsible road use".
- When the relevant mandatory cancellation provisions in s.50 were introduced by the Road Safety Amendment Act 2014 (Vic), the the Minister for Roads tabled a statement in accordance with the Charter of Human Rights and Responsibilities Act 2006 (Vic) which included the following: "*The rationale for imposing stronger licence sanctions on drink-driving offenders under 26 years of age is that this group of offenders is more vulnerable due to inexperience compared with other driver groups and is overrepresented in traffic crashes resulting in serious injuries and deaths.*" This statement and the associated Second Reading Speech "highlight the overriding public policy principle of community safety. The requirement for the mandatory provisions to apply to young offenders is consistent with and furthers the public policy objective of community safety in the RSA."

At [41]-[44] Magistrate Bowles discussed the licensing regime in the RSA and the relevant Regulations, noting that a specific licensing regime is provided for in regs 21, 22 & 31 of the Road Safety (Drivers) Regulations 2009 [S.R. 95/2009] “which places a more onerous obligation on younger applicants than others when seeking to obtain their driver’s licences”. Her Honour concluded:

“The impact of the mandatory provisions in the RSA can operate more onerously on a young person than on an adult, for example, the requirement in Regulation 21(1)(a) for a person under the age of 21 to hold a learner’s permit for a continuous period of 12 months before being eligible to apply for a driver’s licence. If a person under the age of 21 has their learner’s permit cancelled for 3 months, that person would be precluded from applying for their driver’s licence for 15 months, not just for 3 months.”

In light of the sentencing principles to be applied in the Children’s Court pursuant to s.362, Magistrate Bowles conceded at [45] that it “would ordinarily be counterintuitive...for a young person to potentially be more harshly penalised than an adult”, a consequence flowing from a plain reading of s.360(5) of the CYFA. However at [25] her Honour said:

“One interpretation of s.360(5) CYFA could be that the mandatory provisions in another Act do not apply to children appearing before the Children’s Court. Section 360(5) includes the word ‘may’. However, in my view s.360(5) CYFA means that the Children’s Court is not required to record a conviction when making an order, for example, disqualifying a person from obtaining a licence. This interpretation is consistent with s.362(1)(d) CYFA, namely the need to minimize the stigma to the child resulting from a court determination.”

And at [46]-[47] her Honour concluded:

“[I]n my view, the specific licensing regime in the Regulations and the purposes of the RSA evince an intention by Parliament to override the general sentencing principles applicable to young people.

[Accordingly] the mandatory provisions of the RSA apply when children and young people are guilty of relevant RSA offence/s and are being sentenced in the Children’s Court of Victoria.”

The principles surrounding licence disqualification were discussed by the Court of Appeal in *R v Franklin* [2009] VSCA 77 at [34]-[39]. In that case the adult appellant had been convicted of culpable driving and disqualified from driving for 8 years. This was effectively for 12 months after the appellant’s earliest release date. In dismissing the appeal on this issue, Warren CJ (with whom Redlich JA & J Forrest AJA) said at [34]-[39]:

“The principles and considerations surrounding licence disqualification are similar to those for other sentences. In determining for how long a licence is to be cancelled, this Court has held:

‘the Court should have regard to two separate considerations. They are first the need for the period of cancellation itself to serve its part as a punitive element in the context of the total punishment imposed, and secondly, the need to provide protection to the public from the dangers of possible future lawless motor vehicle driving by the offender. Those two considerations have each to be given such weight as the Court considers is appropriate bearing in mind it is their combined effect which will determine the ultimate length of the disqualification: *R v George* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, 21 September 1989, Crockett, O’Brian and Gray JJ).’

Imposing a disqualification period only for the period of imprisonment adds little to the punishment of the offender and nothing to the protection of the public, if it is determined that such protection is required. It is only after release that ‘the disqualification will ‘come home’ to the offender’: *R v Birnie* (2002) 5 VR 426, [30]. It will be a matter to be assessed in each case in accordance with sentencing principles including due consideration of the rehabilitation of the offender. Given that disqualification is mandatory in culpable driving cases, the legislature must have intended for it to continue beyond the term of imprisonment where the sentencing court thought it appropriate: *R v Wootton* [2002] VSCA 165, [27].

That said, the disqualification should not inhibit the offender’s rehabilitation too greatly [*R v Tantrum* (1989) 11 Cr App R (S) 348, 349; *R v Tran* (2002) 4 VR 457], particularly where it is determined that there is no need to protect the public [*R v Bazley* (Unreported, Supreme Court of Victoria, Court of Appeal, 21 August 1997, Phillips CJ, Batt JA and Vincent AJA)]. That rehabilitation is heavily dependent upon the offender’s ability to obtain employment. When the appellant leaves prison, and due to the nature of his trade, he will doubtless

need to have a driver's licence to gain employment which in turn would be important to his rehabilitation.

In this case, the appellant's licence was cancelled as a condition of his bail and as such it may be considered that this element to the punishment has to some extent been endured.

The sentencing judge found the appellant to be genuinely remorseful, with good prospects of rehabilitation and employment after imprisonment. I do not consider there is a high risk of re-offending. Therefore given the particular characteristics and circumstances of the appellant, the pre-sentence disqualification, the significant period of imprisonment and the importance of facilitating the appellant's rehabilitation, it may well be arguable that the appellant should be allowed to apply for his driver's licence upon release on parole. However, the question is whether error has been made out. In my view, no error is revealed. The sentencing judge was entitled to order as he did. I do not find this ground made out."

In *R v Nguyen* [2009] VSCA 64 the 28 year old appellant had been sentenced to 3y3m imprisonment with a non-parole period of 2y6m on charges of attempted armed robbery and theft and had been disqualified from driving for 3y. The Court of Appeal allowed his appeal, reducing the sentence to 3y1m imprisonment with a non-parole period of 2y. It also amended the disqualification period in relation to which Williams AJA (with whom Dodds-Streeton & Weinberg JJA agreed) said:

[70] "In *Lefebure* (2000) 112 A Crim R 41 the Court held that the disqualification has a punitive element which requires an assessment of the extent to which, in the context of the overall punishment, it is needed to reflect the community's dissatisfaction with the offence. The length of any period of imprisonment is relevant and sometimes the disqualification period should be longer to achieve its objectives. The convicted person's dependency on a driving licence is also relevant in order not to undermine prospects of rehabilitation: (2000) 112 A Crim R 41, 44, [7]-[8] (Tadgell JA, Chernov and Hedigan JJA agreeing).

[71] Whilst there was no direct evidence as to the appellant's future need for a licence or as to whether he would have any access to a car, I assume the likelihood that his rehabilitation prospects would be enhanced by the ability to obtain a licence once he is released on parole.

[72] Bearing in mind the punitive nature of the order, I consider that he should be disqualified from obtaining a driver's licence for the period commencing on 20 September 2007 and ending two months after the date of his release from custody on parole or at the expiration of his sentence."

See also *R v Charles* [2011] VSCA 399 at [196]-[209]; *Koukoulis v The Queen* [2020] VSCA 19 at [17]-[24] applying *Lefebure v The Queen* (2000) 112 A Crim R 41; [2000] VSCA 79, *Rodi v The Queen* [2011] VSCA 48 and *R v Tran* (2002) 4 VR 457; [2002] VSCA 52.

11.1.9.2 Incompatibility of diversion and licence cancellation/suspension

As discussed in section 10.7 of these Research Materials, it is clear from s.356B(1) of the CYFA that diversion is not available in the Children's Court on a charge which relates to-

- (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or
- (b) an offence against s.49(1) of the Road Safety Act 1986 not referred to in paragraph (a).

While it follows from this that diversion is available in the Children's Court on a charge which is not punishable by a fixed sentence or penalty, it is the writer's view that if diversion is granted on such a charge, the Children's Court has no power to impose a discretionary cancellation or suspension of the child's driver licence or permit. In the first place, despite the words "or the Sentencing Act 1991" in s.356B(1)(a), s.4 of the Sentencing Act makes it clear that ss.89 & 89A of that Act do not apply to the Children's Court. In the second place, the general power of suspension or cancellation of a driver licence or permit contained in s.28 of the RSA has as a pre-condition to its exercise that the court "convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle". But diversion does not involve either a conviction for an offence or a finding by the court that the child is guilty of the offence. Under s.356E(1)(a) the pre-condition for diversion is not a plea of guilty by the child. It is merely an

acknowledgement by the child "of responsibility for the offence". And s.356E(2) specifically states that such acknowledgement does not constitute a plea.

11.1.9.3 Forfeiture & other orders

The Criminal Division of the Children's Court has jurisdiction under the Confiscation Act 1997 (Vic) to make forfeiture, restraining and/or pecuniary penalty orders in relation to certain property in which a defendant has an interest: see e.g. ss.3 & 12 and Parts 2, 3 & 8 of that Act. There are no reported decisions involving such applications in respect of the property of child defendants.

The approach to be taken in respect of adult defendants has been discussed in a number of cases, including *R v Tran* [2004] VSC 218 at [9]-[11] per Warren CJ; *R v Galek* (1993) 70 A Crim R 252 at 258; *R v Wealand* (2002) 136 A Crim R 159; *Taylor v Attorney General of South Australia* (1991) 53 A Crim R 166 at 175-179 per DeBelle J; *DPP v Smith* [2007] VSC 98 per Mandie J; *DPP v Phan Thi Le* [2007] VSCA 18; *Winand* (a decision of the Victorian Court of Criminal Appeal referred to in *R v Tran* at [12]-[13]); *DPP (Vic) v Nikolaou* [2008] VSC 111 per Kaye J; *DPP v Nguyen*; *DPP v Duncan* [2009] VSCA 147; *DPP v Khoda Ali & Dounia Ali* [2009] VSCA 162; *Re Moran, Armour and Environmental Concrete Constructions Pty Ltd* [2011] VSC 377.

In *DPP v Phan Thi Le (No.2)* [2007] VSCA 57 the Court of Appeal held, citing *Rose v Hvrlic* (1963) 108 CLR 353, that the Court is not precluded by s.133A of the Confiscation Act 1997 (Vic) from awarding costs to a successful applicant for an order excluding property from automatic forfeiture.

11.1.10 Struck out

It is common for a prosecuting agency to apply to withdraw one or more charges, informations or notices to appear. However, an order striking out an initiating document is not a sentencing order for it is not a curial determination of the merits of the case and therefore does not put an end to the proceedings. Until such time as the court determines the case on its merits and records an order finding the defendant guilty or dismissing the case, a striking out order is no more than a direction to remove the case from the list of matters for hearing and determination by the Court: see *R v McGowan & Another; ex parte Macko & Sanderson* [1984] VR 1000 at 1002 per Kaye J; *Willis v Magistrates' Ct Vic & Buck* [Sup Ct Vic, {MC9/97}, 02/12/1996] per Smith J; *DPP v Sabransky* [2002] VSC 143 at [33]-[37] per Kellam J; *DPP v Moore* [2003] VSCA 90 at [20] per Batt JA; *Neuss v Magistrates' Court of Victoria & Currey* [2013] VSC 321; *DPP v Quick & Taylor* [2015] VSCA 273; *CDPP v TK* [Children's Court of Victoria-Stylianou M-27/09/2018] at [9].

Conversely, where an application by the prosecution for an adjournment of an information is not allowed, a plea of not guilty is entered and the prosecution calls no evidence, the Court must dismiss the information on its merits, not strike it out. See *Douglas v Birt* [Supreme Court of Victoria, {MC1/93}, 01/10/1992] per Hedigan J.

11.1.11 Children's Court has no direct power to impose community work/service

It may sound like an abundance of riches to have up to ten sentencing orders available in any case (ten rather than eleven because YRC & YJC are mutually exclusive alternatives). However, there is at least one large gap. There is no sentencing order pursuant to which the Children's Court can order a child to perform unpaid community work or service, that is there is no equivalent to a adult Community-based Order. One of the mandatory conditions of a YSO is that "the person must participate in a community service program or any other program" but that condition only applies if the person is "so directed by the Secretary" [s.389(1)(g); see also ss.389(6) & 389(7)]. Likewise, one of the mandatory conditions of a YAO [s.399(1)(h)] is that the person carry out the reasonable and lawful directions of the Secretary DJCS "...under ss.406 & 407(1)" and s.407(1) requires the person to "engage in community service or other activities as directed by the Secretary". Further, s.360(6) prohibits the Court from imposing any condition or requirement on a non-party without that person or body's consent. This all means that the Court has no power to impose a community work condition on either a YSO or a YAO. Nor has the Children's Court any other sentencing power to require a child to perform unpaid community work or service. Yet there are many offences - of which graffiti is a prime example - in which a good way to ensure that an offending child is held accountable (that is made aware that he or she must bear a responsibility for any action against the law [s.362(1)(f)]) is to require the child to clean up his or her own mess or some other person's mess. It is all very well to give the Court the power under s.360(3)(a) to order a child to make restitution or pay compensation but, as already indicated, a child rarely has the means and ability to pay.

11.1.12 Order for forensic procedure on finding of guilt

Section 464ZF(2) of the Crimes Act 1958 (Vic) [as amended] provides that if on or after 1 July 1998 a court finds a person guilty of-

- (a) a forensic sample offence [i.e. any offence specified in Schedule 8]; or
- (b) an offence of conspiracy to commit, incitement to commit or attempting to commit a forensic sample offence-

a member of the police force, at any time following that finding but not later than 6 months after the expiration of any appeal period or the final determination of any appeal (whichever is the later), may apply to the court for an order directing the person to undergo a forensic procedure for the taking of a sample from any part of the body and the court may make an order accordingly. Under s.464ZF(2AA) this 6 month period is extended to 12 months in certain circumstances.

The sample ordered may be either intimate or non-intimate: s.464ZF(4) The most common order for a child is for an intimate sample by way of buccal swab. Any such order must not be executed unless the appeal period has expired or an appeal (if any) has been finally determined and the conviction for the forensic sample offence upheld: s.464ZF(6). If an appeal on conviction for the forensic sample offence is quashed, an order for forensic procedure ceases to have effect: s.464ZF(7).

Section 464ZF(3) provides that if at any time before 1 July 1998 a person has been found guilty by the Court of a forensic sample offence and the person is serving a term of imprisonment or detention, a member of the police force may apply to the Children's Court for an order directing the person to undergo a forensic procedure.

There is a conflict of authority as to whether s.464ZF(3) – and so by implication s.464ZF(2) - excludes any requirement that notice be given to the subject and excludes any right in the subject to be heard. In *Lednar & Ors v The Magistrates' Court & Anor* [2000] VSC 549 Gillard J held that it did. In *Pavic v Chief Commissioner of Police* [2003] VSC 99 at [3]-[4] Nettle J took the opposite view, holding that s.464ZF(3) does not exclude a subject's right to be heard. However, parliament made its intention clear in the Crimes (Amendment) Act 2004 (Vic) [No.41/2004] when-

- in s.21 it validated earlier orders made without notice or without affording a right to be heard; and
- in s.16 it introduced a new s.464ZF(5) which permits an application under ss.464ZF(2) or 464ZF(3) in respect of an adult person to be made without notice to any person.

However, in s.16 it also introduced new ss.464ZF(5A) & 464ZF(5B) which set up a slightly less stringent regime for applications made in respect of children under 18:

- notice of the application must be served on the child and a parent or guardian of the child;
- the child is not a party to the application;
- the child may not call or cross-examine any witnesses;
- the child may not address the court other than in respect of any matter referred to in ss.464ZF(8)(a) or 464ZF(8)(b) or in response to inquiries made by the court under s.464ZF(8)(c).

Section 464ZF(8) provides that a court hearing an application for a forensic procedure-

- (a) must take into account the seriousness of the circumstances of the forensic sample offence;
- (b) must be satisfied that, in all the circumstances, the making of the order is justified; and
- (c) may such inquiries on oath or by affirmation or otherwise as it considers desirable.

Although it is a pre-condition to the making of an order under s.464ZF that the person has been found guilty of a forensic sample offence, a finding of guilt alone is not sufficient to justify the making of the order. This is clear from *R v Abebe* [1998] VSC 214 where, in refusing a forensic procedure order, Harper J said-

"Parliament has not said that a conviction for murder necessarily results in the success of an application...In this case the application is not supported by any material of any kind. If the conviction for murder is not itself sufficient the position therefore is that I have nothing upon which to be satisfied in all the circumstances the making of the order is justified."

See also *R v Lagona* [1998] VSC 220.

By contrast, in *Lednar & Ors v The Magistrates' Court & Anor* [2000] VSC 549 Gillard J at [268] said-

"It is important in my opinion to note that where there is a serious forensic sample offence committed in the past in the majority of cases the granting of an order will follow without much further consideration. If the forensic sample offence is serious and there is evidence which demonstrates that the prisoner by his past conduct is a repeat offender and likely to offend in the future then it is hard to see what arguments could be put forward to rebut the finding that in all the circumstances the making of the order is justified."

And in *R v Heriban and Brunner* [2005] VSC 76 at [7] Whelan J, although approving the dicta of Harper J in *R v Abebe*, did so in a very qualified way-

“It seems to me that *Abebe* and *Lagona* do not stand for the proposition that evidence of matters in addition to the circumstances of the offence itself must be led before an order can be made. Whilst it is correct, as those cases make clear, that a mere conviction in itself is not sufficient, an order may be justified in a particular case by the seriousness of the offence itself and the circumstances in which it occurred. The issue in every case is whether the order is justified, and in considering that issue the court must take the seriousness of the circumstances of the offence into account.”

If a court makes an order for a compulsory procedure in relation to a child, s.464ZF(9) requires it-

- (a) to give reasons for its decision and cause a copy to be served on the child and a parent or guardian of the child; and
- (b) to inform the child that a member of the police force may use reasonable force to enable the procedure to be conducted.

An order under s.464ZF must be made in open court: see *Lednar's Case*. The only avenue of 'appeal' is by an application for judicial review pursuant to O.56 of the Supreme Court Rules. In *R v Akin Sari* [2008] VSCA 137 at [107]-[108] Lasry AJA said that an order under s.464ZF was not a penalty or a sentence and accordingly such orders are not part of a sentencing order and are therefore not amenable to challenge on an appeal against sentence.

Section 464ZFB(1) of the Crimes Act 1958 (Vic) [as amended] provides, *inter alia*, that if on or after 1 July 1998-

- (a) a forensic procedure is conducted on a child in accordance with s.464U(7) or 464V(5); and
- (b) a court finds the person guilty of-
 - (i) the offence in respect of which the forensic procedure was conducted; or
 - (ii) any other offence arising out of the same circumstances; or
 - (iii) any other offence in respect of which evidence obtained as a result of the forensic procedure had probative value-

a member of the police force, at any time following that finding but not later than 6 months after the expiration of any appeal period or the final determination of any appeal (whichever is the later), may apply to the court for an order permitting the retention of any sample taken and any related material and information and the court may make an order accordingly.

In *R v Heriban and Brunner* [2005] VSC 76 Whelan J proceeded at [6] on the basis that the same considerations applied to applications under s.464ZFB(1) as to applications under s.464ZF(2).

Section 464ZFC(1) imposes an obligation on the Chief Commissioner of Police without delay to destroy, or cause to be destroyed, any forensic sample taken and any related material and information if no application was made for its retention under s.464ZFB within the specified period or if a court refuses to make an order under s.464ZFB.

11.1.13 Sentencing of children for Commonwealth offences

Section 20C of the Crimes Act 1914 (Cth) provides that a child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

In *CDPP v TK* [2018] VChC 4, the offender – who was aged between 16 & 17 at the time of the offending and 19 at the time of sentencing – had pleaded guilty to two charges laid under the Criminal Code Act 1995 (Cth) which prescribe maxima of 10 years' & 2 years' imprisonment respectively:

- (i) a representative charge under 477.2(1) of unauthorized modification of data whilst knowing that the modifications were unauthorised and being reckless as to whether the modifications will impair reliability, security or operations;
- (ii) a charge under s.478.1(1) of unauthorised access and or modification of restricted data intending to cause that modification and knowing that the modification was unauthorised.

The offences involved 'hacking' into the electronic network of a large American corporation.

Two of the issues which arose on the plea were:

- (1) whether the Children's Court – in sentencing a young federal offender – has power to impose dispositions under the Crimes Act 1914 (Cth); and

(2) whether the Children’s Court power under s.360 of the CYFA is constrained in the event of any conflict with s.16A of the Crimes Act 1914 (Cth).

The issues arose in the context of a dispute between the parties as to whether general deterrence was an applicable sentencing principle when sentencing a child in the Children’s Court of Victoria in respect of Commonwealth offences.

Stylianou M placed TK on probation without conviction for a period of just over 8 months. In her detailed written judgment her Honour held at [29]:

“I accept that s.20C, by use of the word ‘may’ is permissive and that this Court may, therefore, ostensibly decide to sentence a child charged with a federal offence under the regime of the Crimes Act 1914 (Cth). However, I am not persuaded by the prosecution submission that s.20C merely enables this Court to access the sentencing options in s.360 of the CYFA but otherwise constrains this Court to the extent that any aspect of the CYFA conflicts with s.16A of the Crimes Act 1914 (Cth).”

After referring to Part 1B of the Crimes Act 1914 (Cth) and ss.68(1) & 68(11) of the Judiciary Act 1903 (Cth), her Honour continued at [33]-[41]:

[33] “Section 79 of the Judiciary Act 1903 (Cth) provides that the laws of each state or territory including the laws relating to procedure shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in all cases to which they are applicable...Section 79...is entitled “State or Territory laws govern where applicable”. Section 20C of the Crimes Act 1914 (Cth), a federal law, makes provision for State and territory Courts to deal with a child federal offender as if the offence was committed against the laws of that jurisdiction. Put simply, it makes state laws applicable. The CYFA provides the legislative framework by which children are dealt with for offences against State law in Victoria.

[34] Section 20C by its clear terms enables this Court to deal with TK as if the offences were offences against a law of this State. Nowhere in its terms does s.20C limit the application of State law in the way contended for by the prosecution.

[35] The prosecution submission (as to the effect of s.20C) would obviously be more persuasive if that submission was instead being made in respect of s.20AB of the Crimes Act 1914. This section is titled ‘additional sentencing alternatives’. Here, the legislature made it clear that where a State Court imposes any one of the alternative sentences for a federal offence as specified in that section, *‘the provisions of the laws of the State...with respect to such a sentence...that is passed...or made under those laws shall, so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth, apply, by virtue of this subsection to and in relation to the sentence or order passed or made under subsection 1.’* Such restriction or qualification is notably absent from s.20C.

[36] Section 20C must be taken to mean what it says, not what it does not say. That being so, this Court is empowered to deal with this case ‘as if the offence were an offence against a law of the State’.

[37] When this Court determines to invoke the power vested in it by s.20C and therefore to deal with a young offender under State law, the CYFA comes into play. Under the CYFA, *in determining the appropriate sentence available under s.360*, the Court *must* apply ‘as far as practicable’ the considerations in s.362(1).

[38] The language of s.362(1) and the nature of the matters to which regard *must* be had, are such as to preclude any consideration of general deterrence. As the Court of Appeal said in *CNK v R* (2011) 32 VR 641 at [14]:

‘...if a sentence were increased – for the purpose of general deterrence – beyond what would otherwise have been imposed on the child, the sentencing Court would have breached its obligation to secure “as far as practicable” the objectives set out in s.362(1). More particularly, to treat a child as a vehicle for general deterrence would amount to “making an example” of the child, for the purpose of deterring others. This would, in our view, be in direct conflict with the Court’s obligation under s.362(1)(d) to ‘minimize the stigma to the child’ resulting from the Court’s determination.’

[39] The Court of Appeal determined that the language of s.362 CYFA conveys a clear legislative intent to exclude general deterrence. That conclusion did *‘not depend upon s.362(1) being treated as an exhaustive statement of sentencing considerations to be applied where a child is being sentenced. Rather, the analysis turns on the singularity of general*

deterrence as a sentencing consideration and...its incompatibility with the clear objectives and plain language of s.362(1): ibid at [38].”

[40] If this Court is ‘enabled’ to deal with TK as it would have, had he stood to be sentenced for a State offence, in so doing, for this Court then also to apply the sentencing considerations set out in s.16A of the Crimes Act 1914 (Cth) as argued by the prosecution, would be in direct conflict with the Court’s obligation under the terms of the CYFA. Amongst other factors, s.16A requires consideration of general deterrence, a concept entirely inconsistent with the provisions of the CYFA.

[41] *DPP (Cth), DPP v Dylan Hutchison (a pseudonym)* [2018] VSCA 153 dealt with an accused charged with both federal and state offences. Consistent with this Court’s interpretation of the applicable sentencing principles in the present case, Priest, Beach & Ashley JJA said at [56], by way of *obiter*, ‘[I]f the respondent’s offending had been detected at or about the time of its commission, he would have fallen to be sentenced under the provisions of the CYFA, where general deterrence would have played no part in the sentencing process’. In argument, the prosecutor in the present case submitted that insofar as the Court of Appeal in *Hutchison* included the Commonwealth offence in this statement of *obiter*, it was an incorrect statement. I am not persuaded by this submission of the prosecution.”

In *LS (a pseudonym) v CDPP* [2020] VSC 484 the appellant was a 17 year old female who had been found guilty, *inter alia*, of 5 charges of producing child pornography and 5 charges of transmitting child pornography, the charges being based on offences against ss.474.20(1)(a)(ii) & 474.19(1)(a)(ii) of the *Criminal Code 1995 (Cth)*. The CDPP’s central submission was that general deterrence is one of the mandatory sentencing considerations mentioned in s.16A of the *Crimes Act 1914 (Cth)* and that there was nothing in the terms of s 20C which compelled a court sentencing a child under the *CYF Act* to disregard general deterrence, as it must when sentencing a child for a state offence. At [64]-[67] Beale J rejected the CDPP’s submission:

[64] “But on a natural reading of s 20C, if general deterrence is taken into account when sentencing a child for a federal offence under the *CYF Act*, it is difficult to see how it can be accurately claimed that the child was ‘punished or otherwise dealt with as if the offence were an offence against the law of [Victoria]’.

[65] Further, s 20C makes specific provision for child federal offenders. In my view, s 16A — a general provision regarding federal offenders — must yield to the specific provision that is s 20C.

[66] I am fortified in this interpretation of s 20C by what the Court of Appeal said in *DPP v Hutchinson* [2018] VSCA 153. In that case, the court was dealing with an appeal by both the Victorian DPP and the CDPP against the adequacy of the sentences imposed by a County Court judge for four state offences and one federal offence. The offender was a child at the time of most of the offending (aged 16 years)³⁸ but not at the time he was charged (aged 19 years).³⁹ The sentencing judge placed him, without conviction, on two Community Correction Orders in relation to the State offences and a s 19B bond in relation to the federal offence. The Court of Appeal, in dismissing the Crown appeal, said this at [56]:

‘...If the respondent’s offending had been detected at or about the time of its commission, he would have fallen to be sentenced under the provisions of the *Children, Youth and Families Act 2005*, where general deterrence would have played no part in the sentencing process.’

[67] Based on a natural reading of s 20C and the Court of Appeal’s dicta in *Hutchinson*, I reject the submission of the CDPP that I must take general deterrence into account in sentencing you on the federal offences.”

11.1.14 Sentencing powers of Supreme Court or County Court

In s.3 of the Sentencing Act 1991 (Vic) [as amended] "young offender" is defined as "an offender who at the time of being sentenced is under the age of 21 years". Prior to an amendment introduced by Act No.48 of 1997, "young offender" had been defined as one "who at the time of being sentenced is aged 17 or more but is under the age of 21 years". This amendment and a number of related amendments appear to have been spurred by criticisms of the legislation made by the Court of Appeal in *R v Hill* [1996] 2 VR 496 and in order to resolve a conflict between the judgment of Hampel J in *R v G* [Supreme Court of Victoria, unreported, 16/09/1994] and of Cummins J in *R v F* [Supreme Court of Victoria, unreported, 05/12/1995].

Thus it is now clear:

- that the sentencing powers of the Supreme Court & County Court in respect of a child found by such court to be guilty of an offence include power to make any of the sentencing orders detailed in s.7(1) of the Sentencing Act 1991 (Vic) [as amended]: see e.g. *DPP v SJK & GAS* [2002] VSCA 131; and
- that in the exercise of those powers, the sentencing guidelines in s.5 of that Act are relevant.

However, in addition to those powers, s.586 of the CYFA authorises the Supreme Court or County Court, in sentencing a child for an indictable offence, to exercise the power to make any sentencing order which the Children's Court may make under the CYFA save that an order that the child be detained in a YRC or YJC must be made in accordance with Subdivision (4) of Division 2 of Part 3 (ss.32-35) of the Sentencing Act 1991 (Vic). And it appears from the judgment of Nettle J in *R v PP* [2002] VSC 578 at [28] that the sentencing principles set out in s.362(1) of the CYFA are also relevant to the sentencing of young persons by superior courts.

11.1.15 Relevance to sentencing of agreement between Crown and defence

An agreement between prosecuting authorities and an offender which affects the course of proceedings before a sentencing judge has been recognised as a significant factor in sentencing: see *R v Ioannou* [2007] VSCA 277 at [22]-[23]; *Malvaso v R* (1989) CLR 277; *DPP v Waack* (2001) 3 VR 194, 200-6.

However, it remains a matter for the sentencing judge whether he or she forms the same view as that encapsulated in a plea bargain between Crown and defence. In *R v G Williams* [2007] VSC 490 King J did not agree with the Crown and defence submission that a wholly suspended term of imprisonment would be an appropriate sentence. At [6]-[7] her Honour said-

“[I]t is ultimately for the court to determine what sentence is appropriate. The court is not bound, in any way, by the negotiations between counsel as to the appropriateness or otherwise of a sentence. That is clearly the role and function of the court. It is, however, extremely important that the court take heed of what has been agreed and if possible, within the proper principles of sentencing, to give effect to, or at the minimum to give considerable weight to such agreements...[Whilst] it is important, it is also to be noted as Coldrey J stated in *R v Kenneth Charles Jarrett* [Supreme Court of Victoria, 30/06/1994], when the Crown had submitted that a wholly suspended sentence was appropriate for Mr Jarrett, his Honour said- ‘It is, however, only one aspect of the broader sentencing considerations to which the court must have regard.’”

An appeal was dismissed by the Court of Appeal: see *R v George Williams* [2008] VSCA 95 at [27] where Osborn AJA, with whom Buchanan & Vincent JJA agreed, said:

“The real question is whether the reasons of the sentencing judge demonstrate that she failed to have proper regard to the Crown’s concession. When her Honour’s reasons are read as a whole they demonstrate...that she accepted that it was ‘extremely important that the Court take heed of what has been agreed’ and that she indicated she would pay it ‘significant regard’.”

In *Nguyen v The Queen; Ho v The Queen* [2019] VSCA 134 the sentencing judge did not agree with the prosecution concession that the appellants who had pleaded guilty to cultivation of a commercial quantity of cannabis were mere ‘crop sitters’. At [61] Priest & Beach JJA found no error:

“Although the Crown conceded on the plea that both applicants were crop sitters, the judge was not bound to accept that agreed factual statement, so long as the judge — as he did in the present case — afforded the parties procedural fairness: *R v Duong* [1998] 4 VR 68, 77–8; *Chow v DPP* (1992) 28 NSWLR 593; *R v Mielicki* (1994) 73 A Crim R 72; *Scott v The Queen* [2010] VSCA 290 [48]; *DPP v Perry* (2016) 50 VR 686, 711–712 [92]–[93].

See also *Kapkidis v The Queen* [2013] VSCA 35 at [20]; *DL v The Queen* [2018] HCA 32 at [39].

11.1.16 Procedural fairness

In *R v Alexandridis* [2008] VSCA 126 the Court of Appeal held that the failure of a sentencing judge to give an unrepresented offender the opportunity to adduce evidence or make submissions that he had been provoked when he slashed a victim’s face was a denial of procedural fairness. At [17] Redlich JA, with whom Buchanan & Nettle JJA agreed, said:

“It is uncontroversial that an ingredient of the court’s duty to accord procedural fairness involves the giving of a fair opportunity to a party to adduce evidence or make

submissions rebutting potential adverse findings. Procedural fairness must be upheld for its own sake, as well as for its consequences. The experience of the common law is that out of fair and lawful procedures will emerge fair and lawful outcomes.”

In *DL v The Queen* [2018] HCA 32 the appellant had been convicted of murder. At the sentencing hearing the primary judge found it probable that the appellant had been acting under the influence of some psychosis at the time of the offence and was accordingly not satisfied that the appellant had possessed the intention to kill. On appeal the prosecutor had submitted that there was no issue with the primary judge’s factual findings. However the Court of Criminal Appeal – in exercising a power to re-sentence – had rejected the primary judge’s finding that the appellant had suffered a temporary psychosis which precluded forming an intention to kill but failed to put the appellant on notice of its inclination not to act on the concession made by the prosecution. In holding that there had been a denial of procedural fairness and accordingly a miscarriage of justice, Bell, Keane, Nettle, Gordon & Edelman JJ said at [39] (emphasis added):

“Leeming JA was right to say that **the Court of Criminal Appeal was not bound by the prosecutor’s concession. Notwithstanding the adversarial nature of criminal proceedings, the public interest in the sentencing of offenders is such that the sentencing judge (or the appellate court in the case of re-sentencing) is not constrained by any agreement between the parties as to the appropriate range of sentence or by concessions made by the prosecutor:** *GAS v The Queen* (2004) 217 CLR 198 at 211 [31]; [2004] HCA 22; *Elias v The Queen* (2013) 248 CLR 483 at 494-495 [27]; [2013] HCA 31; *Barbaro v The Queen* (2014) 253 CLR 58 at 76 [47]-[49] per French CJ, Hayne, Kiefel and Bell JJ; [2014] HCA 2; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 606 per Kirby P. Where, however, the judge (or the appellate court in the case of re-sentencing) is minded not to act on a concession made by the prosecution, the failure to put the offender on notice of that inclination and give him or her an opportunity to deal with the matter by evidence or submissions will ordinarily be a miscarriage of justice. In the absence of such an indication, it will be reasonable for the offender to conduct his or her case upon the understanding that the concession will be accepted and acted upon by the court: *Collins v The Queen* (2018) 92 ALJR 517 at 525 [32]; 355 ALR 203 at 211; [2018] HCA 18; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 613 per Sheller JA; *R v Tadrosse* (2005) 65 NSWLR 740 at 745 [19] per Howie J; *Stokes v The Queen* (2008) 185 A Crim R 74 at 77 [13]-[15] per Barr J; *Ng v The Queen* (2011) 214 A Crim R 191 at 205-206 [43]-[50]; *Govindaraju v The Queen* [2011] NSWCCA 255 at [52]-[57], [62] per Hall J; *R v Cunningham* [2005] QCA 321 at 5 per Keane JA. It was an error to hold that the appellant had had ample opportunity to be heard on all aspects of his appeal.”

In *Mendelle v The Queen* [2018] VSCA 204 the Court of Appeal accepted the respondent’s concession that the sentencing judge’s departure from his earlier tentatively expressed sentencing indication without giving counsel for the applicant an opportunity to be heard constituted a failure to accord procedural fairness. However, leave to appeal was refused on the basis that the sentence imposed on the applicant was lenient and did not require any adjustment.

See also *R v Sa* [2004] VSCA 182 at [29]; *R v Bennett* [2006] VSCA 274 at [4]-[6]; *R v Healey* [2008] VSCA 132 at [42]-[43]; *R v Rule* [2008] VSCA 154 at [46].

11.1.17 Relevance of United Nations Convention on the Rights of the Child

In *DPP v TY (No 3)* [2007] VSC 489 at [47]-[51] Bell J discussed the relevance to the sentencing of child offenders of the United Nations Convention on the Rights of the Child which entered into force on 02/11/1990 and to which Australia is a party. The Convention has not been incorporated into Australian law, which means that it cannot operate as a direct source of law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287. However, as Maxwell P pointed out in *Royal Women’s Hospital v Medical Practitioners Board* (2006) 15 VR 22, 38, Australian courts have been prepared to consider international human rights conventions in exercising sentencing discretions. At least three cases have involved taking the Convention into account: *R v Toghias* (2001) 127 A Crim R 23, 43; *Walsh v Department of Social Security* (1996) 67 SASR 143, 147; *Bates v Police* (1997) 70 SASR 66, 70 (but see contra *Smith v R* (1998) 98 A Crim R 442, 448). As Bell J stated in *Tomasevic v Travaglini* [2007] VSC 337 at [60]-[65], international human rights, such as those recognised in Article 40(1), can be a relevant consideration in the exercise of judicial powers and discretions. Article 40(1) of the Convention recognises

“the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

In *DPP v TY (No 3)* at [51] while holding that the Convention reinforces the existing principle of “giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children”, Bell J also noted that-

- “the provisions of any relevant legislation...remain applicable and must be applied”; and
- “taking the Convention into account does not lead to the result that children can escape criminal responsibility and just punishment; where the crime is very serious, considerations other than youth and rehabilitation can become more pressing”.

Bell J also remarked at [48] that Article 40 can “cut both ways” where the victim is a child. In that case the defendant was 14, the victim whom he murdered in a spur of the moment attack was 18:

“The Convention reminds us, to use the words of Cummins J in his recent decision in *DPP v Farquharson* [2007] VSC 469 at [3]: “Children are precious and are vulnerable. They are entitled to love, to care, to health, to education, to security and to safety. Most of all they are entitled to life.”

11.1.18 Sentencing for conspiracy compared with sentencing for completed offence

In *DPP v Fabriczy* [2010] VSCA 334 the Court of Appeal held:

[2] “There is no principle of law that the sentence for conspiracy to commit an offence should be less than the sentence which the completed offence would have attracted. The conspiracy offence is directed at a different mischief – the making of an agreement to act unlawfully – and the sentencing court must assess the degree of criminality, and the moral culpability of the individual conspirators, accordingly. The Court must take into account not only what was done by the particular defendant but also the scope and duration of the conspiracy as a whole and everything done in furtherance of it.”

[14] The assertion that there could be such a general rule misapprehends the seriousness with which the law views the crime of conspiracy. Conspiracy is an inchoate offence. The offence lies not in the overt acts themselves, injurious though they may be to an ordered society, but in the anterior agreement to commit them: *DPP v Bhagwan* [1972] AC 60, 79 per Lord Diplock. It is the agreement of a number of persons to carry into effect the unlawful purpose in combination which is of the essence of the crime: *R v Ongley* (1940) 57 WN (NSW) 116, 117 (Jordan CJ); *Gerakiteys v The Queen* (1984) 153 CLR 317, 334 (Deane J); *Raptis, Lilimbakis & Sinclair v R* (1988) 36 A Crim R 362, 364 (Young CJ, O’Byrne and Tadgell JJ). The offence of conspiracy is complete once there is agreement between two or more persons: *R v Hoar* (1981) 148 CLR 32, 38 (Gibbs CJ, Mason, Aickin and Brennan JJ); *Gerakiteys v The Queen* (1984) 153 CLR 317, 327, 334; *Kamara v DPP* [1974] AC 104, 119. It is a continuing offence {*Truong v R* (2004) 223 CLR 122} so long as there are two or more parties to it intending to carry out the design {*DPP v Doot* [1973] AC 807, 823; *R v G, F, S and W* (1974) 1 NSWLR 31, 43–44}.

[15] The charge of conspiracy is brought because ‘criminal action organised, and executed, in concert is more dangerous to society than an individual breach of the law’: *DPP v Doot* [1973] AC 807, 817–8 (Lord Wilberforce); *R v Wasson* [2004] NSWCCA 200, [21]. The crime of conspiracy was described in Hawkins’ *Pleas of the Crown* as follows: ‘All confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law.’

[16] The essential feature of the offence of conspiracy is the agreement between two or more persons to commit the crime, sometimes referred to as the element of ‘concert’: *Raptis, Lilimbakis & Sinclair v R* (1988) 36 A Crim R 362, 364 (Young CJ, O’Byrne and Tadgell JJ). It is this element which differentiates the offence of conspiracy to commit a substantive offence from the offence of attempting to commit the substantive offence, and from the substantive offence itself. The element of concert makes the offence of conspiracy more serious than if an individual were acting alone to plan and commit the offence, as the likelihood of the crime occurring is increased by the involvement of multiple participants making a commitment to each other to do so. There is said to be a ‘dangerousness’ inherent in the plotting, ‘either because several may achieve what an

individual would find difficult or impossible, or because other criminal plans may emerge from the group.’: M Goode, *Criminal Conspiracy in Canada*, applied by the Federal Court in *R v Hoar and Noble* (1981) 34 ALR 357, 364. (The present case exemplifies the last point, as the second conspiracy emerged following the completion of the first.) As Lee J stated in *R v Shepherd*, ‘men acting in combination to achieve unlawful ends present a far greater evil and danger to the community than do the acts of individuals acting alone to achieve their nefarious ends.’: *R v Shepherd* (1988) 37 A Crim R 303, 313.

[17] The extent of the offender’s participation in the combination, established by reference to his or her individual acts and declarations, will inform but not determine the conclusion as to the offender’s degree of criminality: *Marie, Chitrezza and Casagrande* (1983) 13 A Crim R 440; *Raptis, Lilimbakis & Sinclair v R* (1988) 36 A Crim R 362, 365; *Shepherd (No 2)* (1988) 37 A Crim R 466, 478; Gillies, *The Law of Criminal Conspiracy*, 2nd ed (1990) 254–5; *R v Koh* [2001] NSWCCA 324. The individual offender is to be punished for involvement in the conspiracy and not just for the acts that he or she performed. The sentencing judge therefore needs to assess, for the purpose of sentencing the individual conspirator, the ‘content and duration and reality’ of the conspiracy, and what is actually done in transaction of it, as well as the role of the offender before the court: *R v Kane* [1975] VR 658, 661, applied in *Savvas v The Queen* (1995) 183 CLR 1, 6.

[18] It is an error to equate conspiracy to commit an offence with an attempt to commit that offence. A comparison of s 321 (conspiracy) and s 321N (attempt) shows that the elements of the two offences are quite different. More relevantly for present purposes, whereas the maximum penalty for conspiracy is the same as the maximum for the substantive offence, s 321P of the *Crimes Act 1958* (Vic) expressly fixes a lower maximum for an attempt than for the substantive offence.”

11.1.19 Offending in a custodial setting is a relevant sentencing consideration

In *DPP v De Castres; DPP v Kent* [2011] VSCA 377 Ross AJA (with whom Ashley & Harper JJA agreed) referred to *R v Allen & Jackson* (1994) 77 A Crim R 99, *R v Devries* [2005] VSCA 95 at [20]-[23] per Vincent JA and *R v Berry & Wenitong* [2007] VSCA 202 at [126] per Redlich JA (with whom Buchanan and Kellam JJA agreed) and said at [36]:

“In my view, these authorities support the proposition that deterrence assumes particular importance as a sentencing principle where the offending takes place in a custodial or prison setting. Hence the custodial or prison setting of an offence may be regarded as an aggravating feature.”

In *Hope v The Queen; Pua v The Queen* [2018] VSCA 230 Priest, Beach & Kaye JJA said at [73]-[74]:

“[I]t was correct for the sentencing judge to observe that it was an aggravating circumstance of the applicants’ crimes that their offences were committed while they were in custody and against prison officers who were merely performing their usual duties in an entirely appropriate manner. The common law has long recognised that it is an aggravating circumstance to assault a law enforcement or corrections officer while performing his or her duty. As to corrections officers performing their duties, see *R v Schneidas (No.1)* (1980) 4 A Crim R 95,100; *R v Keating* (1993) 65 A Crim R 315,323. Redlich JA (Buchanan & Nettle JJA agreeing) explained the reasons for this, in respect of police officers, in *DPP v Arvanitidis* (2008) 202 A Crim R 300. His Honour said:

‘It is a serious offence to assault police officers in the execution of their duty ordinarily requiring a significant element of deterrence in the sentences to be imposed: *R v Edigarov* (2001) 125 A Crim R 551 [42]-[43]; *R v Stone* (1995) 84 A Crim R 218. The courage of police officers in protecting lives and property is something upon which the community depends. It is incumbent on the Court to impose appropriate sentences to demonstrate support for the authority of police officers who undertake a difficult, and dangerous task in the execution of their duties in maintaining law and order: *R v Hamilton* (1993) 66 A Crim R 575; *re Attorney General’s Application under s.37 of the Crimes (Sentencing Procedure) Act 1999 No.2 of 2002* (2002) 137 A Crim R 196 [22]. Ambulance officers, and others performing such essential public duties, are to receive a similar measure of support and protection. Where the offenders knows or ought to have known that the victim was discharging a public duty of this sort, a more severe sentence will usually be imposed to deter such persons from violent assaults on them when performing their duties: *R v Nagy* [2004] 1 Qd R 63, [46]-[47] & [72]-[74].’

The same reasoning applies with equal force in respect of prison officers performing the essential public duties that they perform. An inmate of a prison who intentionally inflicts serious injury on a prison officer can ordinarily expect to receive a substantial term of imprisonment in addition to any term then being served.”

11.1.20 Vigilantism

In *Hamid v The Queen* [2019] VSCA 5 the Court of Appeal upheld a sentence of IMP10y/7y imposed on the 28 year old applicant on a charge of recklessly causing serious injury. The Court noted at [47] that “general deterrence is always an important sentencing consideration in offences of violence. It had heightened significance in the present case because there was an element of vigilantism in the applicant’s offending”. This was demonstrated by his text messages indicating that he attacked the victim because he perceived that the victim had dishonoured his sister and he wanted to punish the victim by permanently scarring him.” At [41]-[42] Whelan & Kyrou JJA said:

“The Courts have consistently condemned acts of vigilantism. They have repeatedly emphasised that members of the community must resolve their grievances by lawful means rather than taking the law into their own hands by physically harming perceived wrongdoers or members of their family, or damaging their property. The sentences that the courts impose on those who act contrary to the rule of law by taking personal vengeance need to be such as to deter not only the offenders from committing similar offences in the future but also to deter others from taking the law into their own hands.

We respectfully adopt the following statement of Brooking JA in *Director of Public Prosecutions v Whiteside* (2000) 1 VR 331, 339 [24] (citations omitted):

‘Vigilante enterprises must be suppressed, as appellate courts have made clear. Where four men, acting on ‘rumour and innuendo’, assaulted a fifth for ‘messing with kids’, the Court of Appeal endorsed the judge’s description of the ‘vigilante action’ and said that it called for serious reaction from any court anxious to preserve the rule of law: *R v Sheekey*. Similar offences committed by only one or two offenders have, as one would expect, drawn the same response: *Re Attorney-General’s Reference (Nos 17 and 18 of 1994)* (‘That is what this case was about, people taking the law into their own hands. It has to be stopped’); *R v Kennedy* (‘vigilante enterprises of this kind are simply not tolerated by the community’); *R v Demittis* (‘The idea that individual citizens may take the law into their hands in this way is quite mistaken. It frequently results in serious injuries, and very often they are inflicted on individuals who are quite innocent of any offence whatsoever. It is not the view adopted in this court in previous cases that the law may be taken into the hands of citizens or, indeed, that anything but the proper processes of the law should be gone through before a person is dealt with for criminal offences. Vigilante enterprises of this kind are simply not tolerated by the community.’); *R v Brelsford* (‘Vigilante action, from which Australia has happily been free so far, is notorious for the serious consequences that it often entails. Quite frequently, they are unintended and, on occasions, of course, the wrong person is selected as the target of this kind of rough justice.’).”

See *Wood v The Queen*; *Bell v The Queen* [2019] VSCA 39 at [37] & [90]; *R v Harvey* [2020] VSC 496.

11.2 Selected cases on sentencing

11.2.1 Young adults & children sentenced under the Sentencing Act

There are a plethora of cases in which principles relevant to the sentencing of young adults and a few cases in which principles relevant to the sentencing of children under the Sentencing Act 1991 have been discussed by superior courts. A convenient starting point is the judgment of Batt JA in *R v Mills* [1998] 4 VR 235. The offender, who was 20½ at the time of the offence and 21 at the date of sentencing and had no prior convictions, was convicted of recklessly causing serious injury resulting from a ‘glassing’. The trial judge had sentenced him to 18 months imprisonment with a 9 month non-parole period. The Court of Appeal allowed the appeal and sentenced him to be imprisoned for a term of 12 months with 8 months to be suspended for 3 years. In the leading judgment Batt JA made the following observations (at p.241) about the sentencing of youthful offenders-

- "(i) Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.

- (ii) In the case of a youthful offender, rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focussing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender).
- (iii) A youthful offender is not to be sent to adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark of what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. (This proposition is a particular application of the general principle expressed in s.5(4) of the Sentencing Act)."

In so holding, his Honour referred with approval to *R v Martin* [1973] VR 854; *R v Seymour* (1983) 5 Cr App R (S) 85 at 87; *R v Smith* (1988) 33 A Crim R 95 at 97; *R v G D P* (1991) 53 A Crim R 112 at 116; *R v Edwards* (1993) 67 A Crim R 486 at 489 (a very strong case, albeit that it was a Crown appeal); and *R v Misokka* [Court of Appeal, unreported, 09/11/1995] at pp.6-7 per Callaway JA and at pp.10-11 per Vincent AJA.

In *R v Le* [2009] VSCA 247 Coghlan AJA (with whom Ashley & Weinberg JJA agreed) applied *R v Mills*, saying at [21]:

"I am satisfied that the applicant should be treated as a youthful offender, and it follows that his rehabilitation should loom large in considering the appropriate sentence."

In *Salapura v The Queen* [2018] VSCA 255 at [77] Whelan & Kyrou JJA said: "Ordinarily, the more youthful the offender, the greater the weight to be given to his or her rehabilitation."

In *DPP v Monteiro* [2009] VSCA 105 the 26 year old respondent had been sentenced to 2y6m imprisonment on a count of intentionally causing serious injury and 21 months of the sentence was suspended for a period of 3 years. The circumstances of the offence were described pithily by Buchanan JA as "an unprovoked physical attack upon a man who had the misfortune to pass on the street and look at angry men affected by drugs and alcohol". The Court of Appeal held that the sentence was manifestly inadequate but dismissed the appeal in the exercise of discretion. At [29] Buchanan JA, with whom Maxwell P & Nettle JA agreed, referred to dicta of Fox J in *R v Dixon* (1975) 22 ACTR 13, 19-20 in describing how prison was antithetical to rehabilitation:

"Generally prison does not provide an atmosphere conducive to rehabilitation. Prisoners' lives are closely regulated. They have no real ability to adapt to society for they are isolated from the general community. Their neighbours are fellow criminals, some of whom are malicious and violent. Employment is limited. In the present case, the sentencing judge saw the rehabilitation of the respondent as significant. He was sending a young man to prison for the first time and may well have had in mind the likely adverse consequences of a lengthy gaol sentence. The prospects of the respondent's rehabilitation may be reduced if he re-enters society when his aspiration of a reformed way of life has been eroded or ended by a lengthy exposure to prison life."

In *DPP v Jason Thomas Roe* [2005] VSCA 178 the Court of Appeal dismissed a Director's appeal against a sentence of 12 months imprisonment, to be served by way of intensive correction order, on a respondent aged 25 with an IQ in the region of 75-79 who had pleaded guilty to one count of armed robbery and one count of intentionally causing serious injury. He had 41 prior convictions and 10 previous findings of guilt, mostly related to offences of dishonesty but including one conviction for robbery in 2000 for which he was sentenced to 12 months' imprisonment, 8 months of which was suspended. The offences were committed in the context of a heroin addiction against a fellow heroin user to whom the respondent had given \$100 to provide heroin. In dismissing the appeal, Charles JA, with whom Vincent & Ashley JJA agreed, said at [15] & [17]:

[15] "As Eames JA said in the very recent appeal by the DPP in the matter of *Caine Michael Snell* [2005] VSCA 131 at [35], 'the sentencing task is never more difficult than when a sentencing judge discerns a faint hope of rehabilitation with a youthful offender with multiple prior convictions, who stands yet again to be sentenced on serious offences', an offender 'who – unless rehabilitated – was likely to bedevil the community throughout what would no doubt be a shortened, and certainly wasted, lifetime of criminal behaviour interspersed with increased periods of imprisonment.'..."

[17] Her Honour was entitled to place significant weight on the respondent's plea of guilty, relative youth, remorse, that he had spent almost seven months in custody, his successful participation in Teen Challenge, that he had not thereafter relapsed into heroin use or re-offending, his interaction with Mr Winther and obtaining of employment, all of which led her Honour to the view that he has 'good rehabilitative prospects and the community is best served by your continuation on that path'.

However in *DPP v Lawrence* (2004) 10 VR 125 at 132; [2004] VSCA 154 - a case in which a 20 year old male with prior convictions for violence had been found guilty of intentionally causing serious injury in circumstances where, while intoxicated, he had engaged in a wantonly violent attack employing kicking and bottles - Batt JA said at [22]:

"[W]ith an offence as serious as intentionally causing serious injury and particularly with an instance of it as grave as this one, the offender's youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations. They must, as the President said in *Wright* [1998] VSCA 84 at [6], take a 'back seat' to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved, particularly where (again as here) the perpetrator has been given previous chances to control his aggressive habits. This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised. There is a particular reason why, with this offence, youthfulness of an offender cannot be of much significance. This is that, as this very case exemplifies, the persons who commit the offence and wreak appalling injuries, very often by kicking and stomping upon their prone or supine victims, are predominantly youths and young men acting under the influence of alcohol or drugs or both. Here, the respondent was in any event only on the borderline of youthfulness and moreover was not by any means a first offender."

This dicta was approved and applied by the Court of Appeal in *R v John Likiardopoulos* [2010] VSCA 344 at [173]. In *DPP v Avci* [2008] VSCA 256 at [52] Maxwell P (with whom Buchanan & Redlich JJA agreed) approved the general proposition from Batt JA in *R v Mills* [1998] 4 VR 235, 241 that "in the case of a youthful offender, rehabilitation is usually far more important than general deterrence" but also applied *DPP v Lawrence* (2004) 10 VR 125 at [22] in holding that the gravity of the offending (7 rapes of 4 females) meant that youth and rehabilitation had to be "subjugated to other considerations".

In *R v Hatfield* [2004] VSCA 195 at [11] Chernov JA, with whom Vincent JA & Gillard AJA agreed, said:

"It may be accepted that, ordinarily, an offender's youth is a very powerful mitigating circumstance that calls for rehabilitation to be in the forefront of the factors that govern the sentencing disposition. But it should be said that the offender's youth and the prospect of rehabilitation may be overridden by other sentencing considerations that point to the need to impose a custodial sentence. The weight to be given to youth as a mitigating factor must depend on the circumstances of the case. Thus, in *R. v. Mills* [1998] 4 VR 235 Batt JA pointed out that the youth of an offender is '**a primary consideration**' (my emphasis) for sentencing purposes and in *R. v. Bell* [1999] VSCA 223 the same learned judge again emphasised (at [14]) that the general propositions stated in *Mills* about the significance of the youth of the offender for sentencing purposes "are just that - general propositions". See also *Director of Public Prosecutions v. SJK* [2002] VSCA 131 at [60] per Phillips CJ, Chernov & Vincent JJA. And in *R v Teichelman* Batt JA, with whom Phillips CJ and Buchanan JA agreed, noted (at [20]) that, notwithstanding that the youth of an offender is a powerful mitigating factor, it may, in the face of other powerful considerations, be subjugated to other sentencing principles or purposes. For example, where general deterrence must be emphasised in the punishment of an offence, as, for example, in culpable driving, there may be correspondingly less scope for leniency on account of the offender's youth."

In *R v Angelopoulos* [2005] VSCA 258 the Court of Appeal allowed an appeal against a sentence of 30 months detention in YJC for offences of affray, intentionally causing serious injury, intentionally causing injury and possession of an unregistered firearm by a youthful offender who was aged 17 at the time of the offences and was 18 years 9 months at the time of sentence. The amendments to the CYPA caused by the Children and Young Persons (Age Jurisdiction) Act 2004 increasing the jurisdiction of the Children's Court to include 17 year old offenders had been given assent but were not in operation at the time of sentencing. The appellant was re-sentenced to a total effective sentence of 18 months detention in YJC. The judgment of Eames JA, with whom Callaway & Buchanan JJA agreed, discusses a number of relevant issues:

- The sentencing judge had erred in not giving weight to the fact that the offender would have been a child had the age amendments been in operation at the time of sentence: per Callaway JA at [3]-[5] & Eames JA at [49]-[57].
- Were it not for the judge's error in relation to the age amendments, the aforementioned principles enunciated by Batt JA in *R v Mills* [1998] 4 VR 235 and in *DPP v Lawrence* (2004) 10 VR 125 at 132 "would have been entirely applicable": per Eames JA at [44]-[47].
- It was inappropriate to decide whether general deterrence may be relevant to the sentencing of young offenders under the CYPA even though it is not specifically mentioned in s.139(1) [now s.362 of the CYFA]: per Callaway JA at [2]. See also per Eames JA at [56] after referring to the South Australian cases of *R v S* (1982) 31 SASR 263 & *R v Wilson* (1984) 35 SASR 200 and to the judgments of the Court of Appeal in *R v PP* [2003] VSCA 100 & *R v Evans* [2003] VSCA 223. Note: This has now been resolved in the negative: see *CNK v The Queen* [2011] VSCA 228.

In *DPP v Rose, DPP v Miller* [2005] VSCA 275, in dismissing a Director's appeal, Nettle JA, with whom Maxwell P & Charles JA agreed, said at [29]:

"[T]his case threw up for the sentencing judge the very difficult task of balancing the imperatives of general deterrence and denunciation against the youth and prospects of rehabilitation of the respondents, bearing in mind the pivotal role which drug addiction played in each case, and thus the overall need to produce a sentencing synthesis tailored to the particular and special circumstances of each case. It is apparent if I may say so with respect that, consistently with the observations of Buchanan JA in *R. v. McKee and Brooks* [2003] VSCA 16 at [12]-[16] the sentencing judge paid particular regard to the age and antecedents of the respondents, the factors which led to their commission of the offences, and to the significant progress which each of them has made in beating their addiction and re-equipping themselves to play a constructive role upon their release back into society. His Honour thus produced sentences which in the exercise of his intuitive synthesis he considered to be best adapted to the circumstances of the offenders."

In *R v Scott* [2012] VSC 514 at [26] – in sentencing a 20 year old offender to IMP8y6m/6y on a count of manslaughter by criminal negligence arising out of the driving of a motor car – Beach J also focussed on the balancing of deterrence and denunciation against the youth and rehabilitation of the accused:

"In the case of a youthful offender like you, rehabilitation is usually said to be more important than general deterrence because punishment may in fact lead to further offending. It is correctly said that the incarceration of a young person in the adult prison system, carrying as it does a real potential to cause damage of a kind for which both the offender and the community may pay dearly in the long term, should not be ordered unless the Court is satisfied that the powerful factors which have been accepted by the legislature and the courts as requiring and justifying the existence of a separate youth correctional system have been very clearly displaced in importance in favour of the adoption of a more punitive approach: *R v Misokka* [1995] VSC 215, per Vincent AJA. That said, in the circumstances of this case, the primacy of rehabilitation as a sentencing consideration must be moderated by the need for the Court to express the community's denunciation of your criminal conduct and to deter you and others from engaging in similar conduct in the future: cf *DPP v Neethling* (2009) 22 VR 466, 477 [53]-[54]."

In *DPP v TY (No 3)* [2007] VSC 489 Bell J sentenced the 18 year old defendant to 12 years imprisonment with a non-parole period of 8 years in respect of a non-premeditated murder which he had committed at age 14 years 8 months. At [53]-[54] his Honour said that the degree of the defendant's moral culpability was affected by his very young age and his intellectual, social and emotional immaturity. At [42]-[46] his Honour said:

[42] “The principles of sentencing provide that youth is a mitigating consideration of the first importance: *R v Kumar* (2002) 5 VR 193, 228; *R v Athuai* [2007] VSCA 2, [12]. There are two reasons for the approach of the courts in this regard...

[43] The first is that the immaturity of the offender may affect the court’s assessment of their moral culpability for the crime. A person as young as a child, while being criminally responsible, may lack the degree of insight, judgment and self-control that is possessed by an adult. As Phillips CJ and Chernov and Vincent JJA said in *DPP v SJK and GAS* [2002] VSCA 131 by ‘reason of the stage of development that an offender may have reached, he or she may not fully appreciate the seriousness and real consequences of the offending actions’, especially when the crime is committed on the ‘spur of the moment’, as many crimes committed by children are. The law recognises this in other ways. For example, the objective test in the law of negligence and of manslaughter by unlawful and dangerous act {*DPP v TY (No 2)* (2006) 14 VR 430, 434} takes account of youth. It does so, in the words of Kitto J in *McHale v Watson* (1966) 115 CLR 199 at 213 because children are different to adults when it comes to ‘things which pertain to foresight and prudence – experience, understanding of causes and effects, balance of judgment, thoughtfulness’.

[44] The second is that the community has a very strong interest in the rehabilitation of all offenders {*DPP v Tokava* [2006] VSCA 156 at [21]-[24]; *R v Detenamo* [2007] VSCA 160 at [27]}, but most especially young offenders {*R v Mills* [1998] 4 VR 235, 241-242; *R v Woodburn* [2002] VSC 72 at [18]-[22]; *R v Lam* [2005] VSC 495 at [8]; *DPP v McCloy* [2006] VSCA 99 at [59]; *DPP v Bridle* [2007] VSCA 173 at [10]; *DPP v Turnbull* [2007] VSCA 251 at [29]} which, in the case of the latter, is ‘one of the great objectives of the criminal law’: *R v Tran* (2002) 4 VR 457, 462. That objective may be achieved, depending on the circumstances, by a non-custodial sentence, which is by far the preferred course {*R v Misokka* (Unreported, Supreme Court of Victoria, Court of Appeal, Charles & Callaway JJA and Vincent AJA, 09/11/1995) at 10-11; *R v Mills* [1998] 4 VR 235, 241-242; *DPP v Tokava* [2006] VSCA 156 at [21]-[24]; *DPP v Bridle* [2007] VSCA 173 at [10]} or a sentence of youth detention rather than adult prison {*R v Woodburn* [2002] VSC 72 at [19]; *R v Johns* [2003] VSC 415 at [33]; *R v PP* (2003) 142 A Crim R 369, 374; *DPP v Turnbull* [2007] VSCA 251 at [29]}, or, if a sentence of imprisonment is positively called for, one of shorter length than might otherwise be the case and, finally, by a shorter than usual non-parole period {*R v Nguyen* [2003] VSC 62 at [30]; *R v Perera* [2003] VSC 146 at [44]}.

[45] The application of these sentencing principles is very challenging when the crime committed by the young person is very serious. True, youth and rehabilitation remain mitigating considerations of the first importance {*R v Edwards* (1993) 67 A Crim R 486, 489; *R v Tipas* [2004] VSC 25 at [13]; *DPP v Reynolds and Ors* [2004] VSC 533 at [29]; *R v Athuai* [2007] VSCA 2 at [12]; *R v BTB* [2006] VSC 374 at [22]-[27]; *DPP v Bridle* [2007] VSCA 173 at [10]}. But, they may apply with less force in such cases, having regard to the enhanced significance of other considerations, such as general and specific deterrence {*R v Giles* [1999] VSCA 208 at [18]; *R v Tran* (2002) 4 VR 457, 462; *R v PP* (2003) 142 A Crim R 369, 375-376; *DPP v Lawrence* (2004) 10 VR 125, 132; *DPP v Angelopoulos* [2005] VSCA 258 at [44]-[47]; *DPP v McCloy* [2006] VSCA 99 at [62]; *R v Nguyen* [2007] VSCA 165 at [42]-[44]} and the denunciation of the heinous nature of the crime. Thus, while rehabilitation will be of primary importance in the usual case, it is not the only objective of the criminal law and, when the crime is very serious, it may be displaced in favour of those other considerations {*R v Tran* (2002) 4 VR 457, 462; *R v Tipas* [2004] VSC 25 at [13], [18] & [23]; *DPP v Karipis* [2005] VSCA 119 at [13]}.

[46] Where the balance is to be struck in cases of serious crimes depends on the overall circumstances {*R v Ung* [2002] VSCA 101 at [29]; *R v Schneider* [2007] VSCA 103 at [15]-[17]}. For example, objectively the crime may be very grave, such as murder. In such cases, despite the youth of the offender, the sentence must reflect the gravity of the crime and not be disproportionately low {*R v Teichelman* [2000] VSCA 224 at [20]; *R v Giles* [1999] VSCA 208 at [20]; *R v Bell* (1999) 30 MVR 115 at [14]; *DPP v SJK and GAS* [2002] VSCA 131 at [61]-[62]; *R v GM* [2006] VSC 473 at [32]}. That, TY, applies to your case. Or it may appear that the young offender was behaving like an adult or had engaged in premeditated criminal activity, in which case they may have an adult-like degree of moral culpability {*R v JPD* [2001] VSC 204 at [15]-[16]; *R v PDJ* (2002) 7 VR 612, 629. That is not the case with you, TY. Or the young person may show no remorse, which may affect the court’s assessment of their prospects of rehabilitation {*R v Mills*

[1984] 4 VR 235, 241; *DPP v SJK and GAS* [2002] VSCA 131, [66]; *DPP v Turnbull* [2007] VSC 251 at [29]]. I have already acknowledged your sincere remorse, TY. Overall, depending on the circumstances, the rehabilitation of a young offender, even in cases of serious crime, is a relevant sentencing consideration, but the scope for actual leniency of sentence on account of age is less {*DPP v SJK and GAS* [2002] VSCA 131, [65]; *R v Kumar* (2002) 5 VR 193, 228}. This is the main reason why, TY, despite you being aged only 14 years at the time, I must sentence you to a significant term of imprisonment for committing the crime.”

In *DPP v Turnbull* [2007] VSCA 251, in dismissing a DPP appeal against a sentence of 18 months detention in a YJC on a plea of guilty to one count of armed robbery and one count of intentionally causing serious injury, Nettle JA, with whom Maxwell P & Dodds-Streeton JA agreed, said at [29]:

“[A]uthority is clear that the incarceration of young persons in adult prison should be avoided if possible, for the obvious reason that an adult gaol has the potential to cause damage of a kind for which the offender and the community will pay dearly in the long run {*R v Misokka* (Unreported Victorian Supreme Court of Appeal, 9 November 1995) at [10]; *DPP v Tokava* [2006] 156 at [21]-[23]}. Hence, in most such cases rehabilitation remains the primary consideration, so long as there is a realistic chance of rehabilitation {*R v Mills* [1998] 4 VR 235, 241}.

In *DPP v Mourkakos* [2007] VSCA 312 the 18 year old respondent had been sentenced to imprisonment for 6 months & 2 weeks on a 7 count presentment including charges of intentionally causing injury, aggravated burglary and affray. A declaration was made that the 201 days for which he had been in custody was already served. On a second 4 count presentment including charges of intentionally causing injury and affray, the respondent was sentenced to a community-based order for 2 years. The Court of Appeal allowed a Director’s appeal and re-sentenced the respondent on the first presentment to imprisonment for 3 years but suspended for 2 years all but the 201 days which he had already served. However, the judgments of Maxwell P & Dodds-Streeton JA (with whom Nettle JA agreed) highlight the importance of rehabilitation as a factor in sentencing a youthful offender. At [2]-[3], Maxwell P endorsed the remarks of the sentencing judge to this effect:

“[T]here can be no doubt that the community has a strong interest in seeking to ensure that young people learn from their mistakes, even bad ones, and are given the opportunity to put them behind them and become law abiding and contributing members of the community. It is right for the individual young person and it is right for the community. Rehabilitation therefore is an important matter. Prison should be the disposition of last resort.”

At [41] Dodds-Streeton JA referred, without disapproval, to the submission of counsel for the respondent that “youth, of its nature, bespeaks hope of reclamation”. And at [46]-[51] her Honour referred with approval to the judgments of the Court of Appeal in *R v Mills* [1998] 4 VR 235; *R v Hatfield* [2004] VSCA 195 & *DPP v Tokava* [2006] VSCA 156.

See also:

- the judgment of the Court of Criminal Appeal in *R v McCormack* [1981] VR 104 where the Court said (at 110): “It is a grave step to decide to impose upon young men previously of good character, the potentially devastating and corrupting experience of a prison term.”;
- the judgment of Osborn J in *R v EJC* [2008] VSC 474 where - in imposing a sentence of 3 years detention in a youth justice centre on a 17 year old found guilty of manslaughter arising from a fist fight – his Honour said at [51]: “I am satisfied that your prospects of rehabilitation are good and that conversely a custodial sentence in adult prison would be adverse to those prospects.”;
- the judgment of Maxwell P. in *DPP v Tokava* [2006] VSCA 156 at [24] where his Honour said: that “it would be unreal and artificial for sentencing courts to ignore the evidence about anti-social effects of time spent in gaol”;
- the judgments of the Court of Appeal in *R v Jones* [2000] VSCA 204, especially at [11]-[12] per Callaway JA;
- the sentencing remarks of Bongiorno J in *R v Louise Teresa Miller* [2002] VSC 456 at [9], of Habersberger J in *R v JH* [2006] VSC 201 at [13], of Lasry J in *R v Lovett* [2008] VSC 60 at [20]-[24] and of Coghlan J in *R v Strain* [2008] VSC 411 at [36] and *R v AO* [2009] VSC 13 at [47].
- the judgment of Nettle J in *R v PP* [2002] VSC 578 (young person aged 16 found guilty of manslaughter) where at [34] his Honour approved and applied the dicta of Batt JA in *R v Mills* and noted: “Something of that same sort of reasoning appears to lie behind the decision of the Court of

Appeal in *R v Hill* [1996] 2 VR 496 at 501; see also His Honour's judgment in *R v Clappers & Teap* [2003] VSC 462 at [44];

- the judgment of the Court of Appeal in *R v PP* [2003] VSCA 100, allowing an appeal against the afore-mentioned judgment of Nettle J, where Callaway JA said at [8]:

"[C]ounsel initially submitted that a child should not be imprisoned except where that was necessary to protect the community or the child was 'evil'. He later conceded that an exception might have to be made for culpable driving causing death, because of its prevalence among young offenders and the importance of general deterrence, although he pointed out that there was no example of a 15 year-old offender being imprisoned for that offence. I do not accept the limitation for which counsel contended. There is no bright line distinction between evil children and others. What is required in every case is a sound discretionary judgment that gives appropriate weight, and usually great weight, to youthful immaturity, the better prospects that a young person has for rehabilitation and the desirability of keeping such offenders out of the adult prison system. Those considerations reinforce and complement the common law principle of parsimony and statutory provisions such as s.5(3) and (4) of the *Sentencing Act*."

- the judgment of the Court of Appeal in *R v Huynh & Others* [2004] VSCA 128 at [47] where Eames JA - referring to *R v Mills* [1998] 4 VR 235 at 241-242 and *R v Giles* [1999] VSCA 208 - said: "Binh Pham had no relevant prior convictions and as a youthful first offender, and having pleaded guilty, the encouragement of rehabilitation was a factor of particular importance." See also [50] where the Court of Appeal referred with approval to *R v Thomas* [1999] VSCA 204 at [16] & *R v Harkness and Ors* [2001] VSCA 87 at [18]-[20];
- the judgment of Coldrey AJA in *R v Wilshaw and Lowe* [2001] VSCA 35 where, upholding the appeal, the Court of Appeal held that the youth of the appellants had not been given sufficient weight by the trial judge;
- the judgment of the Court of Appeal in *Jiaming Gui v The Queen* [2020] VSCA 273 at [18] where, in substituting a 12 month CCO for a 12 month YJC detention order on a charge of aggravated burglary, Priest & Weinberg JJA said:

"We note, however, that counsel for the applicant submitted that, given that the applicant was 18 years old at the time of the offence and 20 at the time of sentence, the principles outlined in *Mills* were relevant, so that rehabilitation was far more important in this case than general deterrence. The applicant was a 'young offender' within the meaning of s.3(1) of the Act. He was also a first offender, without prior convictions and of positive good character."

- the judgments of the Court of Appeal in *R v Wilshaw & Lowe* [2001] VSCA 35 at [43]-[48]; *R v Van Staveren* [2001] VSCA 41 at [11]; *R v Tooms* [2001] VSCA 144 at [35]-[36]; *R v Madiera* [2002] VSCA 5 at [37]-[38]; *R v Kumar* [2002] VSCA 139 at [130], [153] & [187]; *DPP v Whittaker* [2002] VSCA 162; *R v Buller* [2005] VSCA 184 at [10]-[11]; *R v Athuai* [2007] VSCA 2 at [12]; *R v Tien* [2007] VSCA 56; *R v Frost* [2007] VSCA 98 at [8]-[10]; *DPP v Bridle* [2007] VSCA 173 at [10]; *DPP v Samu* [2007] VSCA 191 at [8]-[9]; *R v Rosenow* [2007] VSCA 265 at [31]; *R v Schneider* [2007] VSCA 103 at [14]-[17]; *R v Rackley* [2007] VSCA 169 at [28]-[30]; *R v Awad* [2007] VSCA 299 at [12]-[15]; *R v Ozbek* [2008] VSCA 9 at [17]-[20]; *R v TG* [2008] VSCA 83 at [31]; *R v Keith Honkeong Chong* [2008] VSCA 119 at [1] & [4]-[5]; *R v Lay* [2008] VSCA 120 at [38]-[39]; *DPP v Dally* [2008] VSCA 173 at [13]-[14]; *DPP v Brooks* [2008] VSCA 253 at [23]; *DPP v Massey* [2008] VSCA 254 at [16]-[17]; *R v Morgan* [2008] VSCA 258 at [23]-[25]; *R v Bidmade* [2009] VSCA 90 at [15]-[16]; *R v O'Blein* [2009] VSCA 159 at [31]-[34]; *R v Malikovski* [2010] VSCA 130 at [31]; *R v Ashton* [2010] VSCA 329; *R v Taskiran*; *R v Nabalarua* [2011] VSCA 358 at [23]-[28]; *Ludwig v The Queen* [2015] VSCA 35 at [27]-[38]; *Le v The Queen* [2019] VSCA 299 at [28]-[29]; *Haberman v DPP* [2020] VSCA 286 at [68]-[70].

A statement of principle similar to that of Batt JA in *R v Mills* is contained in the sentencing remarks of Bongiorno J in *R v Do and Tran* [2002] VSC 49 where his Honour said (at [25]) in relation to the offender Do who was aged 21 and had been found guilty of the offence of intentionally causing serious injury, the victim having been rendered paraplegic by the shocking offence:

"In sentencing you I am required to take into account your relative youth. Indeed, that fact must be a primary consideration in determining a sentence to be imposed. Rehabilitation of someone as young as you is usually far more important than any question of general deterrence. It benefits the community as well as the offender."

In *R v Nguyen & Deing* [2014] VSC 203 the two accused had been involved in a violent incident in which they had caused some less serious injuries to the victim who had also been stabbed 7 times by a coaccused. The DPP accepted that it was not open to say that either accused was responsible for or complicit in the stabbing of the victim. Both accused were aged 18 at the time of the offending and respectively 19 & 20 at the time of sentence. In sentencing them to community corrections orders on charges respectively of intentionally causing serious injury and intentionally causing injury, Crocuer J said at [35]:

"Whilst the seriousness of their offending and their prior and subsequent criminal histories reduced the weight to be accorded to their youth, I still regarded their youth and maximizing their chances of rehabilitation as important considerations in each case."

In *R v McConkey [No 2]* [2004] VSCA 26 Eames JA - with whom Buchanan JA & Smith AJA agreed - said at [37] in justifying disparity between sentences imposed on a 19-year old & a 30-year old offender: "It is well settled that youth, and the prospects of rehabilitation it offers, is a factor of particular importance in sentencing."

However in *R v Giles* [1999] VSCA 208 at [20] Batt JA observed that the propositions he enunciated in *R v Mills* cannot be applied without qualification to cases of a very different nature. In *R v Bell* (1999) 30 MVR 115 at [14] His Honour made the same point:

"[I]t seems necessary to state again that the general propositions accepted in *R v Mills* are just that - general propositions. They are, as their terms show, not of universal or automatic application. True it is that they may apply not infrequently, but each case depends upon its own circumstances, including, it is to be noted, the circumstances of the offence as well as those of the offender."

In *R v Connolly* [2004] VSCA 24 Coldrey AJA - with whom Winneke P & Bongiorno AJA agreed - made a similar point:

"The Court of Appeal case of *R v Mills* [1998] 4 VR 235 is frequently cited in relation to young offenders... No doubt a sentencing court will endeavour to implement these principles as far as is possible in sentencing a youthful offender but they are not to be regarded as immutable. In the context of the variety of fact situations and offenders with which courts have to deal, such factors as the seriousness of the offence or offences committed (and the just punishment therefore), the need for deterrence (specific and general), the offender's prospects of rehabilitation and the need to protect the community may need to be reflected in the sentence imposed. This has been recognised in judicial statements in such cases as *R. v. Edwards* (1993) 57 A Crim R 486, *R. v. Missoka* (Court of Appeal, 9 November 1995), *R. v. Tran* (2002) 4 VR 457 and *R. v. PP* [2003] VSCA 100."

That having been said, the Court of Appeal did however reduce the sentence of the youthful offender (17 & 18 at the time of offending) with a "relatively innocuous" criminal record from 4½ years with a non-parole period of 3 years to 3 years with a non-parole period of 2 years on the ground of manifest excess. See also *R v Rongonui-Chase* [2004] VSCA 25 where an identically constituted Court of Appeal, referring to dicta of Callaway JA in *R v Tran* (2002) 4 VR 457, said at [42] & [43]: "The importance of rehabilitation in a youthful offender cannot be gainsaid but the principles enunciated in *R v Mills* are not immutable...It is perhaps trite to observe that the law is not, and cannot be, that regardless of the seriousness of the specific offences or the number and nature of the previous criminal convictions, a youthful offender cannot be sent to an adult prison."

In *R v PDJ* [2002] VSCA 211 the applicant (who was aged 16 at the time of the offence and 17 on the date of sentencing) had been found guilty of the brutal murder of an elderly female and was sentenced to imprisonment for 16 years with a non-parole period of 12 years. Dismissing his appeal against sentence, O'Bryan AJA (Chernov & Eames JJA concurring) referred to *R v Giles* and said at [81]-[83]:

"The judge commented, with justification I consider, that the applicant's conduct was a very serious example of murder for which the maximum penalty is life imprisonment and indicating a high level of culpability. The judge said that the applicant appeared to have experienced little remorse. He was intent upon falsely inculpating other persons and exculpating himself.

The judge said he appreciated the applicant at age 17 years had many years ahead of him and that his eventual reintegration into society must be accorded great weight in determining an appropriate sentence. I am satisfied that the judge, being very

experienced in criminal cases, particularly murder cases, gave proper weight to the matter of rehabilitation. It is impossible for a judge, who considers that a long sentence of imprisonment is called for, to foresee the future life of the offender. The age of the applicant was considered carefully in terms of a long period of incarceration. His Honour said, in effect, that had the offender been older the sentence would have been higher. There can be no doubt in my mind that conduct of the kind indulged in by the applicant cannot be significantly reduced because he is a youthful offender in the sense in which that expression is used in *R v Mills* [1998] 4 VR 235. A youth who roams the streets at night, drinking alcohol, planning and participating in serious criminal activities, cannot rely upon his immaturity or lack of years when he is caught.

Sadly, with very serious offences such as murder, armed robbery and rape, the age of the offender is reducing to an alarming level. The youthful offender can no longer expect to trade on his or her youth in such cases for the elements of deterrence, condemnation and just punishment are significant matters: *R v Giles* [1999] VSCA 208."

In *DPP v SJK & GAS* [2002] VSCA 131, the Court of Appeal again emphasised that the propositions in *R v Mills* are no more than general propositions. In that case two boys, aged 16 & 15 at the time of the offences, had pleaded guilty to manslaughter of an elderly woman in her home in circumstances starkly described by the Court of Appeal at [69]: "[W]e are not aware of a manslaughter which has been accompanied by such a degree of callousness." They had each been sentenced to 6 years imprisonment with a non-parole period of 4 years. The Court of Appeal allowed a Director's appeal and increased the sentences to 9 years imprisonment with a non-parole period of 6 years. Special leave to appeal was granted by the High Court but the appeal was dismissed: *GAS v The Queen; SJK v The Queen* [2004] HCA 22. After referring to the afore-quoted dicta of Batt JA in *R v Mills*, the Court of Appeal said at [60]-[61] & [65]-[66]:

[60] "But as his Honour himself pointed out in that case, youth is 'a primary consideration' (emphasis ours) for sentencing purposes and in *R v Bell* [1999] VSCA 223 the learned judge again emphasised (at [14]) that the general propositions accepted in *Mills* 'are just that - general propositions'.

[61] When youth is raised for sentencing considerations, the focus is usually placed upon the offender's prospects of rehabilitation, but this is by no means the only basis upon which it assumes relevance. For at least a century, the attribution of criminal responsibility and the response in terms of the dispositions handed down upon offenders has increasingly reflected developing ideas and understandings concerning personal responsibility, moral culpability and accountability. In the case of young people, to some extent, the law incorporates an acknowledgment of aspects of immaturity. By reason of the stage of development that an offender may have reached, he or she may not fully appreciate the seriousness and real consequences of the offending actions. However, it does not follow that this is always the situation or that, as teenagers, offenders cannot be held appropriately accountable for their conduct in engaging in serious criminal activity."

[65] "These remarks are not intended to diminish in any way the considerable significance to be accorded to youth and rehabilitation as factors to be taken into account in the determination of the appropriate sentence to be imposed on a youthful offender. They are intended, however, to emphasize that these factors constitute only some of a number of matters that must be taken into account and that, even in the case of a young offender, there are occasions on which they must give way to the achievement of other objectives of the sentencing law.

[66] In this case, given the seriousness of the offence and of the offending and the lack of any real remorse shown by the respondents in relation to their crimes and given that there is little evidence to show that they have reasonable prospects of rehabilitation in the near future, the principles of general and specific deterrence and the need for the court to express denunciation of the crime assume considerable significance for sentencing purposes so that there is correspondingly less scope for leniency on account of the respondents' youth. See *R. v. Sherpa* [2001] VSCA 145 at [11] per Callaway JA with whom Ormiston JA and O'Bryan AJA agreed."

In *R v Simpas & HR* [2008] VSC 222 at [44]-[46] King J distinguished *DPP v SJK & GAS* as a case with "many levels of depravity associated with the offence" and said: "The courts have consistently stated that for young offenders the primary focus should be rehabilitation."

In *R v Teichelman* [2000] VSCA 224, Batt JA, while reiterating the importance of an offender's youth and lack of prior convictions and prospects of rehabilitation, said at [20] that they may have to be subjugated to other sentencing principles in particular cases:

"Both *McCormack* [1981] VR 104 at 110 and *Misokka* [Court of Appeal, unreported, 09/11/1995 at pp.6-7 and especially at p.10] recognised that the principles [to] which reference was earlier made...may, in the face of powerful considerations, have to be subjugated to other sentencing principles or purposes. *R. v. Hill* (1982) 6 A Crim R 202, a rape case, provides an example of that. Moreover, whilst it may be that *R. v. Thompson* [Court of Appeal, unreported, 21/04/1998] (where there were two counts), *R. v. David John Wright* [1998] VSCA 84 and *R. v. Stevenson* [2000] VSCA 161 furnish worse examples of the offence of intentionally causing serious injury than does this case, those cases do show that the offence is a very serious one in the sentencing for which general deterrence, sometimes coupled with just punishment or denunciation, will normally outweigh youth and prospects of rehabilitation and - where it exists - lack of prior convictions and require a prison sentence to be served."

In *R v Ferezanis* [2002] VSC 582 at [43] Nettle J noted that in keeping with the approach adopted in *Oldaker* [Court of Appeal, unreported, 25/09/1995], Batt JA in *R v Teichelman* had accepted that the welfare considerations to which he had adverted in *R v Mills* "will yield to the need for denunciation and deterrence in appropriate cases". However, an appeal was allowed in *Ferezanis' Case* [2003] VSCA 8, principally on the ground that Nettle J had not given adequate weight to the defendant's undertaking to give evidence against other gang members charged with murder and affray. At [27] Ormiston JA also noted: "One should be cautious, nevertheless, especially when dealing with a first offender, in concluding that a sentence of imprisonment is ordinarily the appropriate penalty for [affray]."

In *R v Nancarrow* [2010] VSCA 300 the sentencing judge had convicted and sentenced to 3y8m/2y2m imprisonment a young female who had pleaded guilty to one count of attempted armed robbery and one count of armed robbery. The armed robbery offence was committed whilst on bail for the attempted armed robbery. The appellant was aged 19 at the time of the offences and 20 at the time of sentence. She had numerous prior convictions. By majority her appeal was dismissed. At [18]-[20] Hansen JA (with whom Ross AJA agreed) discussed the operation of *Mills' Case* and dicta of Maxwell P in *R v Wyley* [2009] VSCA 17:

[18] "As has often been pointed out, *Mills* is not authority for the proposition that in the case of youthful offenders, rehabilitation is invariably the overriding factor in sentencing. As Maxwell P said in *Wyley* at [19]-[20]:

'... what *Mills* did, in my respectful opinion, was to draw attention to the great significance for sentencing of looking to the offender's future, as well as to the past conduct for which the offender is being sentenced.

Mills constantly reminds sentencing courts, and this Court on appeal, that there is great public benefit in the rehabilitation of an offender and in maximising the prospect that the offender will carry on a law-abiding life in the future. But that consideration is not unique to young offenders. Nor is there any one correct answer as to how the balance is to be struck between that consideration and others which may point towards a period, or a longer period, of imprisonment, rather than a non-custodial sentence.'

[19] In short, the sentencing judge is required to balance conflicting considerations and determine the weight to be given to those considerations. That involves a value judgment, as there is no single correct sentence. Rather, there is a range in which the sentencing discretion can be lawfully exercised...

[20] Further, as the appellant's counsel conceded, *Mills* sets out propositions of a general nature, the application of which is inherently fact dependent."

In *R v Hennen* [2004] VSCA 42 the Court of Appeal, despite noting that the total effective sentence was particularly long having regard to the offender's age and the fact he had never before been sentenced to adult prison, nevertheless said at [24]:

"The primacy given to questions of rehabilitation in the case of youthful offenders by cases such as *Mills* must give way, in appropriate cases, to other sentencing considerations. In this case the appellant's shocking criminal history which included prior convictions for robbery would have entitled the sentencing judge to displace the

appellant's prospects of rehabilitation from the prime position they might have held had the offences under consideration been committed by someone in the position of the appellant without such a history. The expression by the judge of his being more concerned with community protection than the appellant's prospect of rehabilitation does not, per se, bespeak error."

See also *DPP v Byrnes* [2005] VSCA 63 at [8]; *R v Athuai* [2005] VSC 252 at [21]; *R v JED* [2007] VSC 348 at [38]-[42]; *DPP (Vic) v Yeomans* [2011] VSCA 277 at [45]-[48]; *R v Tito* [2011] VSCA 303.

In *R v Sherpa* (2001) 34 MVR 345 the applicant who was 20 at the time of the offence, pleaded guilty to one count of culpable driving constituted by negligence. Though there were mitigating factors in addition to his youth which led the Court of Appeal to reduce by 2 years a sentence of 7 years imprisonment with a non-parole period of 5 years, the Court of Appeal said at [11]:

"General deterrence must usually be emphasised in the punishment of this offence and there is correspondingly less scope than in the case of some other crimes for leniency on account of an offender's youth. That does not mean that there is no scope for youth and concomitant prospects of rehabilitation to influence the disposition. Even if an immediate custodial sentence is warranted, as it almost always is, those factors may still have a bearing on the kind of sentence to be imposed (in particular the choice between imprisonment and youth training where the latter is a realistic option), the length of the sentence and the time that must necessarily be served. But it is not to be forgotten that a life has been lost."

In *R v Toombs* (2001) 34 MVR 509 the appellant had pleaded guilty to several offences including one count of culpable driving constituted by recklessness. Despite the appellant's youth the Court of Appeal affirmed a sentence of 6 years' imprisonment on this count, O'Bryan AJA - in the leading judgment - applying at [35]-[36] the above passage from *R v Sherpa*.

In *R v Tran* (2002) 4 VR 457 at [11] Callaway JA - with whom Buchanan & Vincent JJA agreed - said of the above two cases involving youth and culpable driving that they "state the principle and illustrate what might be called 'the supremacy of the facts'." At [14]-[15] His Honour said:

"The rehabilitation of youthful offenders, where practicable, is one of the great objectives of the criminal law, but it is not its only objective. It is not difficult to cite cases where other objectives have had to prevail. It is true that, in the case of a youthful offender, rehabilitation is *usually* far more important than general deterrence [the second proposition in *R v Mills* at 241 which is well supported by the authorities cited] but the word I have italicised is there to remind us that there are cases where just punishment, general deterrence or other sentencing objectives are at least equally important.

This is an example of such a case. An offender with previous findings of guilt of trafficking in and possession of heroin, driving [in a stolen car] in a criminally negligent fashion and under the influence of heroin to such an extent as to be incapable of having proper control over her vehicle, killed two young men and seriously injured four others. There were no exceptional mitigating factors and a lenient sentence was, for all practical purposes, out of the question...[T]he quite moderate sentences that were passed on the individual counts and the equally moderate directions for cumulation that were given took full account of the appellant's youth and prospects of rehabilitation. The non-parole period gave emphasis to the latter..."

This dicta of Callaway JA was referred to with approval by the Full Court in *DPP v Kosmidis* [2008] VSCA 66 at [27] per Forrest AJA, with whom Buchanan & Ashley JJA agreed.

In *R v Dudas* [2003] VSCA 131 at [8] the Court of Appeal drew a distinction between a youthful offender and a youthful first offender:

"True it may be that the appellant can be characterised as a youthful offender, but he was not a 'youthful first offender' of the type who has come under this Court's consideration in cases such as *Mills* and the cases which have followed *Mills*. True it is, also, that the appellant has not before been sentenced to a term in prison, but his Honour was entitled, in [our] opinion, to come to the view that the time for merciful dispositions was up in respect of this appellant, who had demonstrated a clear inclination not to 'mend his ways' and, indeed, had effectively been 'thumping his nose' for some time at the opportunities which had been previously afforded to him to terminate his criminal activities and to put his obvious God-given talents to law-abiding pursuits."

In *R v Johns* [2003] VSC 415 a 19 year old accused was found guilty of manslaughter of an 18 year old by a tae-kwondo style kick to the head outside a hotel. He was 20 on the date of sentencing. Although Nettle J spoke strongly about the potentially negative effects of adult prison upon a young offender, His Honour did not consider that the maximum period of YJC detention available under the *Sentencing Act* 1991 was adequate in the circumstances:

[33] "I need no persuading that the effects of adult prison upon a young offender are to be avoided if at all possible. As a matter of common sense it is obvious, and as a matter of authority, in *R v Mills* [1998] 4 VR 235 at 241-2 the Court of Appeal remarked that youth of an offender for sentencing purposes is a primary consideration and that in the case of a youthful offender rehabilitation is usually far more important than general deterrence. As the Court observed, punishment may in fact lead to further offending, and therefore, individualised treatment focusing on rehabilitation is often to be preferred, and where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. As a rule, therefore, a youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality or, to put it as counsel did in submissions on your behalf, the benchmark of what is sufficiently serious to justify adult prison in the case of a youthful offender may be quite high. See also *R v Hill* [1996] 2 VR 496 at 501.

[34] But all that having been said, I do not consider that a youth training centre order is appropriate in this case. The maximum period for which I could sentence you to be detained in a youth training centre would be three years [*Sentencing Act* 1991, s.32(3)] and, although current sentencing practices dictated by the Court of Appeal are to treat young offenders with remarkable leniency, even for offences as grave as that which you have committed [see *R v PP* [2003] VSCA 100], I do not consider that a head sentence of three years detention should be regarded as near to adequate. The period could perhaps be increased in effect to as much as four and a half years, by making an order under s. 35(1) of the *Sentencing Act* that your pre-sentence detention not be reckoned as a period of detention already served under the sentence [*R v Hill* [1996] at 505]. But in my judgment even that length of time would fall considerably short of what is required. Of course, it will be open to the Adult Parole Board to order that you be transferred from prison to a youth training centre pursuant to s. 244 of the *Children and Young Persons Act* 1989, and in those circumstances I propose to forward the relevant papers to the Board for their consideration. But any decision of that kind is a matter entirely for the Board, when and if they choose to make it...

[37] In the result, I sentence you to six years imprisonment. I fix a period of three years and six months as the period you must serve before becoming eligible for parole."

In *R v PSJ* [2004] VSC 502 a 16 year old offender with adjustment and obsessive compulsive disorders had pleaded guilty to one count of intentionally causing serious injury by stabbing a housemate 17 times with a knife. There was no issue between the parties that the young offender should be sentenced to a term of 3 years detention in a youth justice centre, the maximum period of detention allowed by s.32(3) of the *Sentencing Act* 1991. The issue was whether or not it was open to the court to provide that the period of 312 days for which the offender had been on remand could or should be reckoned as already served pursuant to s.35(1). After discussing the cases of *R v Gilbert* [unreported, Supreme Court Victoria, 16/09/1994] and *R v Hill* [1996] 2 VR 496 at 505, Redlich J held at [35] that although he had power to make an order for an effective term of detention of almost 4 years, that would not be an appropriate order having regard to the circumstances of the offence and the mental condition, age and prospects of rehabilitation of the offender. At [34] His Honour said to PSJ:

"In considering what course I should adopt, I have borne in mind that in the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public can have no greater interest than that you should become a good citizen. The difficult task for the court is to determine what treatment gives you the best chance of realising that objective. Rehabilitation is the dominant consideration: *C (a child) v R* (1995) 83 A Crim R 561; *MacKenzie & Nicholson v R* (1984) 13 A Crim R 330."

In *DPP v Muliaina* [2005] VSCA 13 the 21 year old respondent had pleaded guilty to 11 counts involving aggravated burglary, false imprisonment, rape and brutal assaults on his former de facto wife and had been sentenced to a total of 4 years imprisonment with a non-parole period of 2 years. The Court of Appeal allowed a Director's appeal, holding that the sentencing judge had given undue weight

to the respondent's youth and insufficient weight to the principles of general and specific deterrence. At [24] Chernov JA (with whom Winneke P & Charles JA agreed) said:

"It may be accepted that, ordinarily, an offender's youth is a very powerful mitigating circumstance that calls for rehabilitation to be in the forefront of the factors that govern the sentencing disposition. But it should be said that the offender's youth and the prospects of rehabilitation may be overridden, at least to a significant extent, by other sentencing considerations that point to the need to impose a substantial custodial sentence. The weight to be given to youth as a mitigating factor must depend on all the circumstances of the case. Thus, in *R v Mills* at 241-242, Batt JA accepted that the youth of the offender is a primary consideration (my emphasis) for sentencing purposes, and in *R. v. Bell* [1999] VSCA 223 the same learned judge again emphasised {at [14]; see also *DPP v SJK* [2002] VSCA 131 at [60] per Phillips CJ, Chernov and Vincent JJA, and *Lawrence*}, that the general propositions stated in *Mills* about the significance of youth of the offender for sentencing purposes 'are just that - general propositions'. In *R v Teichelman* [2000] VSC 224 at [20] Batt JA, with whom Phillips CJ and Buchanan JA agreed, noted that, notwithstanding that the youth of an offender is a powerful mitigating factor, it may, in the face of other powerful considerations, be subjugated to other sentencing principles or purposes. For example, where general deterrence must be emphasised in the punishment of an offence, as here, there may be correspondingly less scope for leniency on account of the offender's youth: *R. v. Hatfield* [2004] VSCA 195 at [11] per Chernov JA. I consider that this is particularly so in a case such as the present where, notwithstanding the anger of the respondent, he must have been fully aware of the nature of his offending conduct."

In *R v Glenn* [2005] VSCA 31 Nettle JA (with whom Vincent JA agreed) said at [13]-[14]:

"Property invasion and assault occasioning injury are serious offences, even when they are committed by a youth of only 17 years of age, and it cannot be gainsaid that there is need for general deterrence of them. I am unable to accept that a suspended sentence of imprisonment of 15 months was manifestly excessive, even if it were stern. So to say is not to deny that rehabilitation is ordinarily the paramount consideration in the sentencing of young offenders, or that the incarceration of them in adult prison is to be avoided wherever possible. So much is well established by authority and it makes obvious sense: *R v Mills* [1998] 4 VR 235 at 241 per Batt JA cf. *R v Diss* [2002] VSCA 14 at [13] and [14] per Brooking JA. But where despite those considerations a judge is of the view that a sentence of imprisonment is necessary, then it must be imposed. For as Batt JA recently observed in *DPP v Lawrence* [2004] VSCA 154 at [16]:

'...the general propositions in *R v Mills* were just that, general propositions, not of usual or automatic application. Each case depended on its own circumstances, including the circumstances of the offence as well as of the offender: *R v Bell* [1999] VSCA 223 at [14] and *R v Hennen* [2004] VSCA 42 at [24] ...'

Cummins AJA dissented. He considered that the proper sentence below would have involved no conviction being recorded. He said at [31]-[34]:

"This appellant, in my view, is a decent young man with a worthwhile future. The question is whether it should be burdened, if not afflicted, for the rest of his life by one brief error of serious, but limited, physical character. Looking to principle, punishment is the first principle, and I consider the appellant has been punished already by his experience through the courts. The third principle is specific deterrence. I consider he needs no deterrence; he will deter himself. The fourth principle is rehabilitation. He will rehabilitate himself. It seems to me the only justification for imposing a sentence of imprisonment upon this young man is general deterrence, and the question arises whether his future should be sacrificed on that principle. In my view, unequivocally, it should not be. The necessary principle involved in imposing a sentence of suspended imprisonment is, as s.21(3) states, that 'a court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to the provisions of this Act.'...I consider it was not open to the judge below to impose a sentence of imprisonment upon a decent young man for one limited lapse in his life."

It is not easy to reconcile some of these cases. In *DPP v McCloy* [2006] VSCA 99 the divergence in counsels' submissions illustrated the difficulty. The judgment of Ashley JA, with whom Warren CJ & Buchanan JA agreed, illustrates how the principles in *R v Mills* are to be reconciled with the other sentencing principles:

[58] "[T]here was a divergence in the submissions; counsel for the respondent would only accept that the importance of the *Mills* considerations were diluted when an offender's prior criminal history showed that the offender was a doubtful prospect for rehabilitation. But counsel for the Director submitted that an offence might be intrinsically so serious as to dilute the importance of those considerations regardless whether the offender was shown to be a doubtful prospect for rehabilitation.

[59] In my opinion, the true position is not that contended for by either party. Rather, in the usual case, for reasons explained in *Mills*, the considerations there mentioned will be at the forefront when a young offender is to be sentenced. But any one of a series of circumstances may dictate a different approach in a particular case. I should give some examples.

[60] In respect of a particular offence, general deterrence may ordinarily be a predominant sentencing consideration. Thus, the offence of culpable driving, as to which see *R v Sherpa* (2001) 34 MVR 345 at [11] per Callaway JA, cited in *R v Toombs* (2001) 34 MVR 509 and in *Tran* (2002) 4 VR 457 at 461-462. But there can be no inflexible rule. There may still be cases of culpable driving involving a young offender where prospect of rehabilitation is at the forefront of sentencing considerations.

[61] Again by way of example, in a particular case the circumstances of the offence, coupled with the offender's past criminal history, may operate to deny the application of a sentencing regime which has rehabilitation as a consideration of first importance. *Huynh* [2004] VSCA 156 at [15], [17], [18] was such a case.

[62] Further again, in a particular case the circumstances of the offence, regardless that the offender does not have a past criminal history, may be so serious as to make considerations such as punishment, denunciation and deterrence – general and special – of prime importance. *DPP v SJK & GAS* [2002] VSCA 131 was such a matter. Neither offender had prior convictions, but each had participated in a very grave instance of the crime of manslaughter...*R v PDJ* [2002] VSCA 211 was also a matter falling into that category. The offence was murder...The observations [of the Court of Appeal] recognize the importance, in particular circumstances, of sentencing considerations other than those highlighted in *Mills*."

In sentencing youthful offenders for murder, Redlich J had performed a similar reconciliation in *R v Cuong Quoc Lam & Ors* [2005] VSC 495 at [8]:

"It is universally accepted within common law countries that in the case of a youthful offender reformation remains an important consideration. Courts have recognised that a youthful offender is likely to be exposed to corrupting influences during a period of imprisonment which may entrench criminal ways which would defeat the very purpose for which punishment is imposed. A primary objective of the criminal justice system is to achieve crime prevention to protect the public. The rehabilitation of an offender should not be seen as a consideration inimical to that objective. Crime prevention to protect the public and the rehabilitation of the offender are interlinked objectives. In sentencing there is thus a broad public interest in taking into account the youth of the offender. Where the offence which has been committed is of a very serious nature that factor may have to yield to other sentencing considerations such as general deterrence. In such cases punishment, general deterrence and other sentencing objectives will assume a more important role and the rehabilitation of a youthful offender less significance. *DPP v Lawrence* (2004) 10 VR 125 at 132; *R v Angelopoulos* [2005] VSCA 258; *R v Ung* [2002] VSCA 101 per Eames JA at [18]-[30] & Callaway JA at [38]-[41]; *R v Misokka* (unreported, Victorian Court of Appeal, 09/11/1995 per Vincent AJA at [48]; *R v Pham & Ly* (1991) 55 A Crim R 128 per Lee CJ at 135."

See also *R v Tuan Quoc Tran* [2006] VSC 352 at [15] per Harper J; *Mogoai & Another v The Queen* [2014] VSCA 219 at [13].

In *R v Azzopardi*, *R v Baltatzis*, *R v Gabriel* [2011] VSCA 372, the applicants, who were all aged 19 at the time of their offending, had engaged in persistent and grave criminal conduct, including multiple counts of armed robbery and of intentionally causing serious injury. All pleaded guilty. Azzopardi & Baltatzis pleaded guilty to 46 counts committed in 21 separate incidents on 11 different evenings over

an 8 week period and involving 34 separate victims. Gabriel pleaded guilty to 10 counts committed in 5 separate incidents on the one evening. They were sentenced respectively to IMP 18y6m/13y6m, 16y6m/10y6m & 9y9m/6y. Their appeals principally raised the question whether the mitigating influence of their youth had been expunged because of the extent and seriousness of their criminality and whether, upon a proper understanding of the principle of totality, the imposition of lesser sentences was required. Their appeals were allowed and they were re-sentenced respectively to IMP 16y/10y6m, 12y/7y & 7y/4y.

At [34]-[36] Redlich JA (with whom Coghlan & Macaulay AJJA agreed) reiterated and expanded upon the considerations underlying the primacy of an offender's youth as a sentencing consideration:

“Firstly, young offenders being immature are therefore ‘more prone to ill-considered or rash decisions’: *R v McGaffin* [2010] SASCFC 22, [69]. They ‘may lack the degree of insight, judgment and self-control that is possessed by an adult’: *DPP v TY (No 3)* (2007) 18 VR 241, 242. They may not fully appreciate the nature, seriousness and consequences of their criminal conduct. As Vincent JA explained in *Director of Public Prosecutions v SJK & GAS* [2002] VSCA 131 at [61]:

‘In the case of young people, to some extent, the law incorporates an acknowledgment of aspects of immaturity. By reason of the stage of development that an offender may have reached, he or she may not fully appreciate the seriousness and real consequences of the offending actions. However, it does not follow that this is always the situation or that, as teenagers, offenders cannot be held appropriately accountable for their conduct in engaging in serious criminal activity.’

Secondly, courts ‘recognize the potential for young offenders to be redeemed and rehabilitated’: *R v McGaffin* [2010] SASCFC 22, [69]. This potential exists because young offenders are typically still in a stage of mental and emotional development and may be more open to influences designed to positively change their behaviour than adults who have established patterns of anti-social behaviour. No doubt because of this potential, it has been stated that the rehabilitation of young offenders, ‘is one of the great objectives of the criminal law’: *R v Tran* (2002) 4 VR 457, 462. The added emphasis for the purposes of sentencing on realisation of a young offender's potential to be rehabilitated is further justified because of the community's interest in such rehabilitation {*DPP v TY (No 3)* (2007) 18 VR 241, 242; *R v Marshall* [2003] NSWSC 448, [15]}, not only at a theoretical level, but because the effective rehabilitation of a young offender protects the community from further offending. As stated in *R v Lam & Ors* [2005] VSC 495, [8]:

‘A primary objective of the criminal justice system is to achieve crime prevention to protect the public. The rehabilitation of an offender should not be seen as a consideration inimical to that objective. Crime prevention to protect the public and the rehabilitation of the offender are interlinked objectives. In sentencing there is thus a broad public interest in taking into account the youth of the offender.’

Thirdly, courts sentencing young offenders are cognizant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation: *R v McGaffin* [2010] SASCFC 22, [69]. While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment is imposed: *R v Lam & Ors* [2005] VSC 495, [8]. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender has adverse flow-on consequences for the community: *R v Hatfield* [2004] VSCA 195, [10] (Chernov JA). As Fox J stated in *R v Dixon* (1975) 22 ACTR 13, 19–20:

‘The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals...

When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long

one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.”

His Honour went on at [37]-[40] to discuss “the tension between the mitigating influence of an offender’s youth and the increased need for deterrence in the case of very serious violent offending” – in short the tension between the judgments of Batt JA in *R v Mills* [1998] 4 VR 235, 241 and *DPP v Lawrence* (2004) 10 VR 125, 132 – before concluding at [44]:

“The general propositions which flow from these authorities is that where the degree of criminality of the offences requires the sentencing objectives of deterrence, denunciation, just punishment and protection of the community to become more prominent in the sentencing calculus, the weight to be attached to youth is correspondingly reduced. As the level of seriousness of the criminality increases there will be a corresponding reduction in the mitigating effects of the offender’s youth: see also *IE v The Queen* (2008) 183 A Crim R 150 [16] (Latham J; Spigelman CJ and Hulme J agreeing). But only in the circumstances of the gravest criminal offending and where there is no realistic prospect of rehabilitation may the mitigatory consideration of youth be viewed as all but extinguished: cf. *DPP v Terrick* (2009) 24 VR 457,470-71.”

See also *R v Filippi, Kosterman and Vergados* [2011] VSCA 438 at [78] per Warren CJ with whom Nettle & Ashley JJA agreed.

In *R v Boland* [2007] VSCA 242 the Court of Appeal allowed an appeal against a sentence of 43 months imprisonment with a non-parole period of 24 months imposed on the appellant in respect of 8 counts of indecent assault committed by him on a person under the age of 16, the offences having been committed 24-29 years ago at times when the appellant was aged 14-19. At [16] Nettle JA, with whom Ashley & Dodds-Streeton JJA agreed, said:

“Decisions of this Court in *R v Nutter* (unreported, 08/11/1995, Charles & Callaway JJA & Vincent AJA) and *R v Better* [2003] VSCA 71 (Charles, Buchanan & Vincent JJA) recognise that where offences which have been committed while an offender is a child or immature and are not prosecuted until many years after the event, there is good reason to mitigate penalty, or at least to do so where the offender has achieved a significant degree of rehabilitation and there has been no further offending. Although such an offender falls to be sentenced as an adult, common sense and fairness dictate that the assessment of the nature and gravity of the crime, and of the offender’s moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity. Counsel for the appellant is also correct that general deterrence ordinarily has a lesser role to play in the sentencing of children and immature young people than in the case of mature adults, and that it is significant that the appellant has not re-offended in more than 24 years.”

The above dicta was applied by the Court of Appeal in *R v Miller* [2011] VSCA 143 at [67] and in *DPP (Cth) & DPP v Dylan Hutchison (a pseudonym)* [2018] VSCA 153 at [67].

11.2.2 Children and young persons sentenced under the CYPA & CYFA

There are few reported or unreported decisions of superior courts dealing with the sentencing of children and young persons under the Children and Young Persons Act 1989 (Vic) [‘the CYPA’] or the Children, Youth and Families Act 2005 (Vic) [‘the CYFA’]. This is because such appeals as there are generally proceed by way of a hearing *de novo* in the County Court. In *H v R & Ors* [2008] VSC 369 at [72] Forrest J commented that that was only the second hearing in the Trial Division of the Supreme Court involving an appeal from the President of the Children’s Court.

In addition to the specific considerations listed in s.362(1) of the CYFA, one would expect the general principles enunciated in *R v Mills* to apply, *a fortiori*, to the sentencing of young offenders under the CYFA, the legislature having made no explicit mention in that Act of punishment, denunciation or deterrence (either specific or general), but rather having set out a series of sentencing principles predominantly based on a ‘welfare’ model.

In *H v R & Ors* [2008] VSC 369 at [11]-[13] Forrest J said:

“Considerations relevant to a sentence imposed under the CYFA are set out in s.362(1)...

The term ‘rehabilitation’, whilst not appearing within the section, nevertheless underpins those matters set out in s.362(1)(a) to (d). The principle of specific deterrence is incorporated within s.362(1)(g) of the Act; general deterrence is not a relevant sentencing principle: see *R v Angelopoulos* [2005] VSCA 258 at [52]–[56].

Section 360 of the Act then provides a raft of sentencing options open to a Court”.

In upholding the President’s sentence of 27 months’ detention in a youth justice centre for a number of serious and violent offences - including an armed robbery in which H had used a Stanley knife to slash the victim’s face inflicting a cut which penetrated the victim’s skull and ran from after his left eye down and across to behind his ear - Forrest J made the following points at [80]-[82]:

- the fact that H has a loving and strong relationship with his mother and that it would be desirable for him to live at home with his mother is counterbalanced by the fact that having been given a number of opportunities to live with his mother and to receive counselling at a fairly intense level, he still committed a very serious crime only eight days after he had been placed on his fifth youth supervision order;
- the possibly detrimental effects of H being detained in a youth justice centre for a relatively lengthy period needed to be balanced against his persisting and escalating criminality;
- a critical aspect in the sentencing of H, particularly given that at times he has shown an apparent lack of any real insight into his wrongdoing, is a need to ensure that he must bear responsibility for what he has done over the past two years;
- there was also a real need for public protection from the type of violent acts that H has perpetrated, which included two assaults requiring hospital treatment of his victims, the second of which was a vicious attack requiring surgical intervention.

In *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 the applicant came to be sentenced in the Supreme Court because he had been presented – along with a number of adult co-offenders – on a charge of attempted murder, in respect of which that Court has exclusive jurisdiction: see s.516 of the CYFA. Following his acquittal on that count, the charges of which the applicant was found guilty – namely aggravated burglary, kidnapping, recklessly causing serious injury and reckless conduct endangering serious injury – were all within the jurisdiction of the Children’s Court. The Court of Appeal said of this: “Circumstances like this will, doubtless, occur very infrequently.” On its face, the offending was extremely serious. In the company of his mother and uncle and an 18 year old associate (with his 19 year girlfriend) and a 15 year old associate, the applicant – who had just turned 15 and had no prior convictions – went to the home of the victim who was a long-time friend of his mother. All six offenders forced their way into the victim’s home. She was assaulted by the mother and uncle and with the assistance of the applicant and four of the co-accused she was forcefully abducted, overpowered and placed in the boot of the 19 year old’s car which was then driven to the Maribyrnong River. There she was forcibly removed from the boot and forced through the bush to the river. En route she was further assaulted and kicked. The applicant’s uncle then threw her into the river and pushed her head forcefully under the water on a number of occasions. The blows which caused the serious injury to the victim were struck by the uncle and the 18 year old associate. The sentencing judge found that the applicant had played “a significantly lesser role in the offending”.

In the unusual circumstances of the case the Court disagreed with the Crown submission that the Children’s Court might have decided that the charges were unsuitable to be determined summarily saying at [85]: “Having regard to the low level of the applicant’s culpability, there was nothing in the circumstances of the offending which would have attracted the ‘exceptional circumstances’ provision.” The Court continued at [86]-[87]:

“That being so, the applicant was entitled to be sentenced in accordance with the provisions of the CYFA, and subject to the limitations which it imposed. We are conscious that, by force of s.586 of the CYFA, when the Supreme Court sentences a child to detention in a youth justice centre the applicable maximum is 3 years, as set by s.32(3)(b) of the Sentencing Act 1991 (Vic), not 2 years as set by s.413(2) of the CYFA. In the circumstances, however, the applicant was entitled to the benefit of the 2 year maximum. Any other result would have the effect of treating the applicant unequally with any other child in like circumstances, solely because he had been proceeded against, unsuccessfully, for attempted murder.

For these reasons, the submission of the prosecutor on the plea – that the full range of adult penalties was available – was erroneous, in our view. The prosecutor cited the

decision of Coghlan J in *R v AO* [2009] VSC 13, but that was a case of manslaughter which, as explained earlier, raises entirely different considerations.”

The applicant had been sentenced to 3 years’ detention in a youth justice centre. Allowing his appeal, the Court of Appeal re-sentenced him to 194 days’ detention in a youth justice centre on each of the charges of aggravated burglary, kidnapping and recklessly causing serious injury and convicted him and placed him on an 18 month youth supervision order on the charge of reckless conduct endangering serious injury. Given time already served, this meant the applicant’s immediate release. At [70]-[75] the Court of Appeal said that had it been re-exercising the sentencing discretion as at the date of sentence (by which time the applicant had spent 96 days in custody), it would have released him on a YSO immediately based on the following considerations:

1. The applicant was a very young offender – barely 15 years old at the time – and very immature.
2. His behaviour was entirely reactive. He had not taken the initiative in any respect. He had followed the lead of his uncle and his mother, joining in an enterprise entirely initiated by them.
3. Once he was in the car, his ability to withdraw was limited.
4. The culpability of a young offender who gets drawn into something on which his mother and another close adult relative are embarking is very different from that of a young offender who, alone or in company, initiates a course of unlawful, violent activity: cf. *DPP (Vic) v SJK* [2002] VSCA 131.
5. His role was minimal, his presence making no practical difference of any kind.
6. His prospects of rehabilitation were quite exceptional.

In *DPP v DDH* [unreported, County Court of Victoria, 10/11/2011] Judge Wood allowed a DPP appeal against a sentence of 12 months youth attendance order imposed on a 16 year old Aboriginal offender on charges of theft, intentionally cause injury, rape, armed robbery and recklessly cause injury committed over a period of 6 months. His Honour described the offending, particularly the rape and the armed robbery, committed at night and at knifepoint, as “shocking”. In imposing a sentence of 18 months detention in a youth justice centre his Honour said at [29]:

“I have concluded that your offending, which is serious in the case of the thefts and assaults but extremely serious in the circumstances of rape and armed robbery leaves the court with no alternative than to impose a sentence of immediate detention in a Youth Justice Centre. In so determining I have considered the sentencing hierarchy set out in section 360 of the *CYFA*. I do not find that the sentencing objectives set out in section 362 of that Act can be met by a Youth Attendance Order. – particularly paragraphs (e), (f) and (g) of subsection 1..”

See also *RAC v The Queen* [2011] VSCA 294.

11.2.3 Sentencing hierarchy

In *Y v F* [2002] VSC 166, the appellant Y, who was aged 13, was charged with theft from a shop of a padlock and bike-lock valued at \$16. He had no prior convictions, he had pleaded guilty and was placed on a good behaviour bond in the sum of \$50 by the presiding Magistrate. Y’s legal representative had urged the Court “to consider proving and dismissing a charge perhaps with a short undertaking to be of good behaviour”. The Magistrate said: “ I’m prepared to put [Y] on a bond.” Y’s legal representative replied that it was Y’s first time in court to which the Magistrate responded, “Well I understand that he has probably had a warning before he has come here”. Y’s legal representative replied, “But that goes for everyone here so when would there ever be an undertaking in that situation.” She then referred the Magistrate to s. 138 of the *CYPA*, stating that he had to consider why “a lower order would not be appropriate”. The Magistrate then said, “Well it’s a theft which is a serious offence, an indictable offence. My view is that it would take something quite extraordinary to dismiss, find a charge proved and dismissed where it’s a theft.” Upholding the appeal, McDonald J said (at [28]):

“[B]y so construing the provisions of s. 137(1)(a), (b) or (c) of the [*CYPA*] the presiding Magistrate qualified the capacity of the Court, in the exercise of its sentencing discretion, where a child had been found guilty of a theft and in substance so construed the Act that such sentencing dispositions would not be available to the Court in such a case unless there was ‘something quite extraordinary’. Such construction of the provisions of s. 137(1)(a), (b) or (c) is not open on the clear language of s. 137 of the [*CYPA*]. In so construing those provisions the presiding Magistrate made an error of law. Further, I conclude that by reason of the presiding Magistrate wrongly so construing those statutory provisions, he did not have regard to the mandatory statutory direction as provided by s. 138 of the [*CYPA*].”

11.2.4 Factual basis of sentencing – Relevance of uncharged acts

R v Storey [1998] 1 VR 359 was a decision of a Court of Appeal consisting of 5 judges. The majority (Winneke P, Brooking JA, Hayne JA & Southwell AJA) held (at p.368) that in sentencing it is not "appropriate or useful to ask which party bears an onus [of proof]. The question is, what is the standard of proof that is to be met and on what matters." Overruling the decision of the Court of Criminal Appeal in *R v Chamberlain* [1983] 2 VR 511 and disapproving in part the decision of the Court of Appeal in *R v Ali* [1996] 2 VR 49, the majority held (at pp.368-9) that there is no relevant distinction between circumstances of aggravation and circumstances of mitigation or between circumstances of the offence and circumstances of the offender. The relevant distinction is between facts adverse to the interests of the offender (adverse in the sense of being "likely to result in a more severe sentence than would otherwise be the case") and facts favourable to the offender. The majority concluded (at p.369) that

"the judge may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities."

In *R v PP* [2002] VSC 578 at [26] Nettle J applied the aforementioned dicta from *R v Storey* and dicta from *R v Cheung* [2001] HCA 67 at [14] when he said to PP: "According to high authority, while there is no general requirement to sentence you on the view of the facts most favourable to you, it is required that facts which tell against you be proved beyond reasonable doubt." See also *R v Cain* [1974] VR 759 at 762; *R v Hill* [1979] VR 311 at 312; *R v Rumpf* [1988] VR 466, *R v Olbrich* (1999) 199 CLR 270; *Banda v DPP (Cth)* [2003] VSC 224 at [15]; *R v Saw* [2004] VSC 117 at [14]; *R v Mitchell* [2005] VSC 219 at [6]; *R v Lanteri* [2006] VSC 225 at [11]-[12]; *R v Healey* [2008] VSCA 132 at [39]-[51]; *R v Elias (Ruling)* [2011] VSC 405; *R v Formosa* [2012] VSCA 298 at [8]; *Director of Public Prosecutions v Devey (No 1)* [2020] VSC 826.

In *R v Storey* [1998] 1 VR 359 the majority also said at 371:

"Ordinarily, much of what is relied on in sentencing is not the subject of evidence given on the plea. Judges have always relied heavily on what is asserted from the bar table and we see no reason why that practice should not continue ... As we have said, judges can, and commonly do, act in such hearings on matters that are not proved by evidence that would be admissible at trial."

In *R v Stratton* [2008] VSCA 130 at [3]-[4] Ashley JA [who formed the majority with Lasry AJA] said:

"[T]he learned sentencing judge was asked to sentence the appellant on the basis that he had simply presented the gun in [the deceased's general] direction and [it had] discharged.' It was implicit in this version of events that the appellant had not intentionally discharged the firearm. This was consistent with the weapon – which was never recovered - being described as having had a 'hair trigger'.

It is not to the point whether the version of events upon which the learned judge was asked to sentence the appellant strains credulity. For it was the basis upon which the Crown, having accepted the appellant's plea, presented the matter to the learned sentencing judge."

In *Strbak v The Queen* [2020] HCA 10 at [1] the High Court (Kiefel CJ, Bell, Keane, Nettle & Edelman JJ) said of the questions raised by the appeal:

"Under the common law of Australia, on the trial of a criminal allegation (save in rare and exceptional circumstances), no adverse inference should be drawn by the jury (or the judge in a trial without a jury) from the fact that the accused did not give evidence: *RPS v The Queen* (2000) 199 CLR 620 at 632-633 [27]-[28] per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ; *Dyers v The Queen* (2002) 210 CLR 285 at 292 [9] per Gaudron and Hayne JJ, 305-306 [52] per Kirby J, 327-328 [120]-[121] per Callinan J. **The question raised by the appeal is whether the same stricture applies to the resolution of a dispute as to the facts constituting the offence in sentencing. If it does, a further question is whether that position is modified by s 132C of the Evidence Act 1977 (Qld), which relevantly provides that, if an allegation of fact is not admitted or is challenged, the sentencing judge may act on the allegation if the judge is satisfied on the balance of probabilities that the allegation is true."**

The High Court answered the questions respectively “Yes” and “No.” In answering the first question affirmatively the High Court said at [13] & [44]:

[13] “When sentencing an offender where there is a dispute as to the facts constituting the offence, the judge should not draw an adverse inference by reason of the offender’s failure to give evidence save in the rare and exceptional circumstances explained in the joint reasons in *Azzopardi v The Queen*: (2001) 205 CLR 50 at 70 [52], 73 [61]-[62], 74 [64], 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ; see also at 123 [210] per Callinan J.”

[44] “Notwithstanding his Honour’s meticulous review of a large body of evidence, the determination of at least some contested facts adversely to the appellant took into account her failure to give sworn evidence at the sentence hearing. It is not suggested that the case is within the rare and exceptional category in which the trier of fact might properly take such a failure into account: *Azzopardi v The Queen* (2001) 205 CLR 50 at 75 [68] per Gaudron, Gummow, Kirby and Hayne JJ. It cannot be said that the findings respecting the appellant’s callous failure to seek prompt treatment for Tyrell’s arm injury and instances in which she subjected him to physical violence were not material to the ultimate conclusion that she inflicted the fatal injuries. In the circumstances, the appeal must be allowed.”

In answering the second question negatively the High Court said at [32]:

[32] “[W]here the prosecution seeks to have the court sentence on a factual basis that goes beyond the facts admitted by the plea, and which is disputed, it is incumbent on the prosecution to adduce evidence to establish that basis: *R v Olbrich* (1999) 199 CLR 270 at 281 [25]. Absent contrary statutory provision, the prosecution is required to prove matters on which it relies that are adverse to the interests of the offender to the criminal standard: *R v Olbrich* (1999) 199 CLR 270 at 281 [27] per Gleeson CJ, Gaudron, Hayne and Callinan JJ, citing *R v Storey* [1998] 1 VR 359 at 369 per Winneke P, Brooking and Hayne JJA and Southwell A-JA.. The adoption of the lesser, civil standard for proof of facts in sentencing under s 132C of the Act says nothing as to onus of proving a fact that is not admitted or is disputed.”

In *KMC v Director of Public Prosecutions (SA)* [2020] HCA 6, the High Court concluded at [34]: “The applicant was not sentenced on the basis of the facts most favourable to him. His sentencing was therefore contrary to what the law (as stated by *Chiro v The Queen* (2017) 260 CLR 425) required.”

In *R v Sa* [2004] VSCA 182 the appellant, a 28 year old Australian citizen of Samoan descent, had pleaded guilty to one count of aggravated burglary and one count of intentionally causing serious injury to his 47 year old cousin. In the course of his reasons the sentencing judge said:

"You have armed yourself with a machete and attacked a defenceless man from behind in his own home in front of children. There is a disturbing prevalence of offences of violence with these types of weapons in our community."

Counsel for the appellant submitted that the last sentence betrayed error in 2 ways. Firstly, that there was no evidence for the assertion that there was a prevalence of such behaviour with such weapons involving Samoan men. Secondly, that the judge did not put counsel on notice that he was having regard to the prevalence of such offending and thus the appellant was denied procedural fairness. The Court of Appeal rejected both submissions. At [29] & [31] Eames JA, with whom Callaway & Buchanan JJA agreed, said:

"[29] It is inappropriate for a sentencing judge to aggravate a sentence by reference to facts of which he or she has knowledge without giving counsel the opportunity to address and answer those facts, but that is not so when the facts are a matter of notoriety: see *R v Li* [1998] 1 VR 637. In such a case counsel should know, without being told, that such an adverse factor is likely to be taken into account: see *R v Downie & Dandy* [1998] 2 VR 517 at 523 per Callaway JA, with whom Phillips CJ & Batt JA agreed...

[31] The observation that there was a disturbing prevalence of use of such items as weapons highlighted a matter which is notorious within the criminal justice system and was therefore open to be made by the judge without being the subject of evidence. In my view, it was not an observation about which counsel needed to be forewarned, in particular because the use made of the factor by the judge was quite limited in scope. The judge did not suggest that use of machetes as a weapon was prevalent among Samoans. His Honour was, however, entitled by way of addressing the need for general deterrence, to warn anyone minded to use such weapons, whatever their cultural background and experience with machetes, that the courts would discourage such use."

In *Elsayed v The Queen* [2019] VSCA 113 the appellant submitted that the sentencing judge had erred by taking uncharged offending into account as an aggravating circumstance. Rejecting that submission, Kaye & Weinberg JJA said at [56]-[58]:

“In *De Simoni* (1981) 147 CLR 383 the offender pleaded guilty to a charge of robbery. The Criminal Code (WA) provided two penalties for the crime of robbery, with a more substantial penalty being prescribed for robbery accompanied by circumstances of aggravation. Wounding was defined as one of such circumstance. In sentencing the offender, the trial judge took into account, not only that violence was used in the course of the robbery, but that the victim was wounded as a consequence of that act of violence. The High Court (by a majority) held that although the trial judge was entitled to take into account the use of violence by the offender in commission of the offence, he was not entitled to take into account, as an aggravating factor, the wounding that was a consequence of it.

The relevant principle was stated by Gibbs CJ (with whom Mason and Murphy JJ agreed) at pp.389-392 as follows:

‘... the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no-one should be punished for an offence of which he has not been convicted...

The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence...It is not only in cases in which the offence has been accompanied by circumstances of aggravation that a trial judge may be required, in sentencing, to take an artificially restricted view of the facts. This will be so also in cases where the jury’s verdict is inconsistent with the view of the facts that the judge himself has formed, for the judge cannot act on a view of the facts which conflicts with the jury’s verdict. However, where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.

See also *R v Teremoana* (1990) 54 SASR 30; *R v Birnie* (2002) 5 VR 426; *Semaan v The Queen* [2017] VSCA 261 [91]; *Rodriguez v DPP* (2013) 40 VR 436, 444 [27]-[29]; *R v Hebls* (2000) 117 A Crim R 49, 55 [33] (Eames AJA); *DPP v McMaster* (2008) 19 VR 191, 200 [41] (Ashley JA); *Pollard v The Queen* [2010] VSCA 156 [23]; *Alejandro Mendieta-Blanco v The Queen*; *Chey Tenenboim v The Queen* [2020] VSCA 265 at [22]-[24].

In *Elsayed’s Case* at [61] Kaye & Weinberg JJA also referred with approval to *R v Newman & Turnbull* (1997) 1 VR 146. The applicants had pleaded guilty to one charge of aggravated burglary and one charge of intentional and unlawful damage to property. In the course of the burglary Newman struck the householder with an axe handle and Turnbull joined in the attack. As a consequence, the victim suffered a broken nose and bruising. In his sentencing remarks the judge took into account that the two applicants had ‘launched quite a fearsome attack’ on the members of the household which was the subject of the aggravated burglary. The Court of Appeal held that by doing so the judge had gone beyond permissible limits in taking into account the serious assault in which each applicant had participated. At p.150 Winneke P said:

‘The common law principle that a person cannot be sentenced for an offence with which he has neither been charged nor convicted is a venerable one, but it is one which has created a tension with another equally venerable principle of sentencing; namely, that a sentencing judge is entitled, and indeed bound, to take into account all the circumstances which are relevant to the commission of the offence with which the prisoner has been charged. The latter principle however must, in the appropriate circumstances, give way to the former because it could never be consistent with fairness and justice to sentence a person for an offence with which he has not been charged or convicted.’”

11.2.5 Purpose of a Youth Justice Centre sentence [formerly YTC]

In *R v Kenny* [Court of Criminal Appeal, unreported, 02/10/1978] Young CJ, with whom Starke & Marks JJ agreed, said: "The court...cannot in my view proceed upon the basis that a YTC is other than what it is said to be, namely a method of detaining young offenders with a view to training them for rehabilitation."

In *R v Vassalo & Tasioulas* [Court of Appeal, unreported, 07/05/1998] the appellants, aged just under 19 & just under 18 at the time of the offences and 19 & 18 on the day of sentencing, had pleaded guilty at the earliest opportunity in the County Court to one count of burglary (warehouse-breaking) and one count of theft of goods worth about \$36,000 wholesale. Each was sentenced to 12 months detention in a YJC. In dismissing their appeals, Brooking JA said (at p.5):

Youth and good character and a plea of guilty and good prospects of rehabilitation do not confer immunity from a sentence of [YJC] detention, which, unlike a prison sentence is, after all, specifically designed to further rehabilitation. It will, from time to time, be quite appropriate to sentence a young first offender to a period of [YJC] detention."

However, in the judgment of the Court of Appeal in *R v PP* [2003] VSCA 100, Callaway JA, referring to a sentence of YJC detention imposed pursuant to the Sentencing Act 1991, said at [9]:

"Counsel was at first disposed to submit that the purpose of such a disposition was solely rehabilitation and that there was no element of deliberate punishment. Punishment, in the form of deprivation of liberty, was simply an incident of rehabilitation. I do not accept that submission. All or any of the purposes for which a sentence may be imposed, which are found in s.5(1) of the *Sentencing Act*, may be pursued by a sentence of detention in a youth training centre. It is true that there is much more emphasis on rehabilitation. In the end I think counsel agreed that the difference lies more in the weight to be given to the different purposes of sentencing. Deprivation of liberty is not a mere incident of rehabilitation. It is a punishment, intended as such as well as establishing conditions within which the offender's rehabilitation may be facilitated. There is no need to take the matter further for the purpose in hand."

11.2.6 Parity of sentencing

In their majority judgment in *Green v The Queen; Quinn v The Queen* [2011] HCA 49; (2011) 244 CLR 462, French CJ, Crennan & Kiefel JJ said at [28]:

"'Equal justice' embodies the norm expressed in the term 'equality before the law'. It is an aspect of the rule of law: Dicey, *Introduction to the Study of the Law of the Constitution*, 7th ed (1908) at 198; Holdsworth, *A History of English Law*, (1938), vol X at 649. . It was characterised by Kelsen as 'the principle of legality, of lawfulness, which is immanent in every legal order': Kelsen, *What is Justice?*, (1971) at 15, cited in Sadurski, *Equality Before the Law: A Conceptual Analysis*, (1986) 60 *Australian Law Journal* 131 at 132. It has been called 'the starting point of all other liberties': Lauterpacht, *An International Bill of the Rights of Man*, (1945) at 115. It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law...

Consistency in the punishment of offences against the criminal law is 'a reflection of the notion of equal justice' and 'is a fundamental element in any rational and fair system of criminal justice': *Lowe v The Queen* (1984) 154 CLR 606 at 610 per Mason J; [1984] HCA 46. It finds expression in the 'parity principle' which requires that like offenders should be treated in a like manner: *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29.. As with the norm of 'equal justice', which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances: *Postiglione v The Queen* (1997) 189 CLR 295 at 301 per Dawson and Gaudron JJ; [1997] HCA 26."

In *R v Goodwin* [2003] VSCA 120 at [21] Eames JA said that:

"Equal justice is said to require an identity of outcome in cases that are relevantly identical and to require different outcomes in cases that are different in some relevant respect: see *Wong v The Queen* [2001] HCA 64 at [65]. Where such disparity was

disclosed the Court may intervene even though the sentence does not otherwise disclose error in the sentencing process: see *R v Wilson* (2002) 116 A Crim R 90.”

In *R v Dare* [2009] VSCA 91 at [25] Nettle JA said:

“It is also necessary to bear steadily in mind that the concept of parity in sentencing ‘is not to be likened to a principle of physics or mathematics which is necessarily to be applied, or necessarily to be withheld from application, in a particular case’: *R v Tien & Ors* [1998] VSCA 6, [39] (Tadgell JA). As Vincent JA stated in *R v Jovica Djukic* [2001] VSCA 226, [25]–[26]:

‘The concept of parity of treatment is fundamental to our notions of justice and is integral to both the procedures and substance of our legal system. It is regarded as inherently unjust to discriminate, in the sentences imposed upon them, between equally culpable and otherwise equally positioned co-offenders. It is also accepted that there is no justice in the imposition of the same penalty upon persons who are not equal in these senses. Equal justice requires identity of outcome in cases that are relevantly identical. *It requires different outcomes in cases that are different in some relevant respect.* citing *Wong v The Queen* (2001) 207 CLR 584, 608, [65] (Gaudron, Gummow and Hayne JJ), my emphasis.”

See also *R v Taudevin* [1999] 2 VR 402, 404 (Callaway JA); *R v Christopher* [2007] VSCA 290 at [22]–[23] (Neave JA with whom Chernov & Vincent JJA agreed); *Hili v The Queen*; *Jones v The Queen* [2010] HCA 45 especially at [46]–[50] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ; *R v L.T.Lam* [2011] VSCA 140; *R v Ciavarella & Ors* [2011] VSCA 155; *R v Hilder & Sandhu* [2011] VSCA 192 at [10]–[23]; *DPP v Farrugia* [2011] VSCA 201 at [29]–[31]; *R v Emery* [2011] VSCA 212; *Khoa v The Queen* [2015] VSCA 80; *Roujnikov v The Queen* [2015] VSCA 97 [24]–[25]; *Collins v The Queen* [2015] VSCA 106 [23]; *Anthony v The Queen* [2016] VSCA 22; *Jeremy Cox (A Pseudonym) v The Queen* [2016] VSCA 134 at [34]–[37]; *Maele & Ors v The Queen* [2018] VSCA 206 at [32]; *Gorman v The Queen* [2019] VSCA 128 at [41]; *Butler v The Queen* [2019] VSCA 132 at [18]–[39]; *Adam Williamson v The Queen* [2019] VSCA 138; *Kim v The Queen* [2019] VSCA 149 at [19]–[26].

In *R v Simmons* [2008] VSCA 185 Weinberg JA (with whom Nettle JA & Mandie AJA agreed) said at [33]–[36]:

[33] “I accept, of course, that parity in the punishment of offenders is a basic objective in sentencing. As the High Court has made plain, inconsistency in punishment is regarded as a badge of unfairness and unequal treatment under the law. Such inconsistency is calculated to lead to an erosion of public confidence in the integrity of the administration of justice: see *Lowe v R* (1984) 154 CLR 606, 610–11. Any difference between the sentences imposed upon co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of grievance on the part of the offender who receives the heavier sentence: see *Lowe v R* at 623.

[34] In *Postiglione v R* (1997) 189 CLR 295, the High Court emphasised that the parity principle recognised that equal justice required that as between co-offenders, there should not be a marked disparity giving rise to a justifiable sense of grievance. If there were, the sentence should be reduced notwithstanding that it was otherwise appropriate and within the permissible range of sentencing options. Of course, the imposition of comparable sentences upon co-offenders whose respective conduct and antecedents warranted disparate sentences is also unjust: *Postiglione v R* at 303.

[35] An illustration of these principles may be found in the proposition that a sentencing judge is not obliged to achieve parity in the case of an offender sentenced pursuant to an agreed statement of facts in circumstances where his or her co-offenders do not receive the benefit of such a statement: *R v Mielicki* (1994) 73 A Crim R 72,85.

[36] I accept that the principles of parity must always be taken into account, even where a sentencing judge considers that a sentence previously imposed on a co-offender may be inadequate. See *R v Pecora* [1980] VR 499; *R v Tisalandis* [1982] 2 NSWLR 430; *R v Capper* (1993) 69 A Crim R 64; and *R v Morrice* (Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Southwell, Ormiston and McDonald JJ, 9 May 1995). The extent to which those principles will operate to constrain the sentencing discretion will, however, vary from case to case.”

In *R v McConkey* [No 2] [2004] VSCA 26, two co-offenders had attacked a taxi driver. The 21 year old was given a suspended sentence of 2 years and a community-based order. The 30 year old appellant was sentenced to 2½ years imprisonment with a non-parole period of 15 months. The Court of Appeal found no appealable disparity. Eames JA - with whom Buchanan JA & Smith AJA agreed - said:

[30] "As stated by Winneke P in *R v Sterling* [2000] VSCA 8 at [40] 'before an appellate court can interfere on the ground of disparity, the disparity should be manifest and such as to engender a justifiable sense of grievance in the offender and that appearance of injustice to the objective bystander'. That principle which derives from *Lowe v R* (1984) 154 CLR 505 was discussed by Callaway JA in *R v Taudevin* [1996] 2 VR 402 where His Honour at 404 [made the same remarks as he was later to make in the above-mentioned extract from *R v Bernath* [1997] 1 VR 271 at 276-7.

[31] In *Postiglione v The Queen* (1997) 189 CLR 295 at 339, Kirby J said of parity between offenders 'due allowance will be made for their respective criminality. Due allowance will also be made for their differing antecedents, personal circumstances and mitigating factors'.

[32] A suspended sentence must be regarded as a sentence of imprisonment, and as a very significant punishment, not merely as being a 'soft option' (Fox & Freiberg, *Sentencing*, 2nd ed., para.9.403). Such a sentence can serve the function of general deterrence: see *DPP v. Carter* [1998] 1 V.R. 601, at 607-608. Such a sentence might be imposed because the judge considered that it offered the greatest prospect of reformation and, in turn, protection of society: *R. v. Davey* (1980) 50 FLR 57."

See also *DPP v Buhagiar and Heathcote* (1998) 4 VR 540 at 547-548 where Batt & Buchanan JJA made similar comments about the nature of a suspended sentence and *R v Groom* [1999] 2 VR 159 at [40] where Batt JA discussed some of the factors working significantly in favour of suspending, principally prospects of rehabilitation and unlikelihood of re-offending.

In *R v Morgan* [2008] VSCA 24 the Court of Appeal (Hansen AJA with whom Maxwell P & Williams AJA agreed) allowed an appeal by a 20 year old offender who had received a 5 year head sentence and a 3 year non-parole period on a count of armed robbery "which were so out of line with the sentence imposed on [an 18 year old co-offender] as to bespeak error, and to produce in a fair-minded observer a justifiable sense of grievance at the inequality of sentence as between co-offenders".

In *Kim v The Queen* [2019] VSCA 149 the Court of Appeal (Kaye & T Forrest JJA), in rejecting the appellant's parity argument, said at [21]:

"The principles governing a contention of disparity of sentence between co-offenders were conveniently summarised in *Collins v The Queen* [2015] VSCA 106 at [23]:

'The principles governing parity are well-established: see *Khoa v The Queen* [2015] VSCA 80; *McCloskey-Sharp v The Queen* [2015] VSCA 87; *Roujnikov v The Queen* [2015] VSCA 97 [24]–[25]. Equal justice requires that like offences be treated alike, but also that relevant differences between offenders be capable of being treated as justifying different outcomes. If there is a "marked" or 'manifest' disparity between sentences which gives rise to a justifiable sense of grievance on an appellant's part, then the principle of parity may be said to have been infringed: *Lowe v The Queen* (1984) 154 CLR 606; *R v Postiglione* (1997) 189 CLR 295; *Green v The Queen* (2011) 244 CLR 462.15 However, no justifiable sense of grievance can be said to arise where it was reasonably open to the sentencing judge to differentiate between co-offenders in the way in which he or she did: *Roujnikov* [2015] VSCA 97, quoting *McCloskey-Sharp* [2015] VSCA 87 [17] (Osborn JA). When an appellate court considers whether it was open to the sentencing judge to differentiate, or not differentiate, in the way he or she did, the approach is relevantly analogous to that which arises where it is said that a sentence is manifestly excessive: *Hilder v The Queen* [2011] VSCA 192 [38]–[39] (Maxwell P)."

In *R v Hildebrandt* [2008] VSCA 142 at [42]–[65] Dodds-Streeton JA (with whom Ashley JA & Lasry AJA agreed) discussed and analysed a large number of cases in which the principle of parity of sentencing has been considered and applied. In the process, her Honour stated at [42]:

“Judicial expositions of the meaning of the parity principle are not entirely uniform. The term ‘the parity principle’ is used in at least two senses in the relevant authorities. First, to express the recognition that like cases should be treated alike (itself an emanation of equal justice). Secondly, the phrase is used to describe the requirement to consider the ‘appropriate comparability’ of co-offenders, and in that sense, comprehends the mirror propositions that like should be treated alike, and that disparate culpability or circumstances may mandate a different disposition.”

In *Alejandro Mendieta-Blanco v The Queen; Chey Tenenboim v The Queen* [2020] VSCA 265 the Court of Appeal (Priest, Kaye & T Forrest JJA) said at [32]-[33]:

[32] “Recently, in *Nipoe v The Queen* [2020] VSCA 137 at [38]-[40], this Court (Maxwell P, Niall & Emerton JJA) – quoting *Drake v Minister for Immigration and Ethnic Affairs [No 2]* (1979) 2 ALD 634, 639 (Brennan J), *Green v The Queen* (2011) 244 CLR 462, 473 [28] (French CJ, Crennan and Kiefel JJ), *Wong v The Queen* (2001) 207 CLR 584, 608 (Gaudron, Gummow and Hayne JJ) (emphasis in original), and *R v Djukic* [2001] VSCA 226, [25] (Vincent JA) (citations omitted) – restated the principle of parity:

‘Consistency in the application of the law is a fundamental aspect of the rule of law. In a very different context, but in terms that are relevant to discretions generally, Brennan J said that: ‘[i]nconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with ordinary notions of justice’. The High Court has observed that:

Consistency in the punishment of offences against the criminal law is ‘a reflection of the notion of equal justice’ and ‘is a fundamental element in any rational and fair system of justice’.

Appealable error may be inferred from disparity that is not explained in the reasons for sentence, and the disparity itself may provide a basis for appellate intervention. However, any assessment of an argument based on disparity requires this Court to have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders and to recognise that:

Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires different outcomes in cases that are different in some relevant aspect.

The real issue is whether it was reasonably open to the sentencing judge to differentiate, or fail to differentiate, between the co-offenders, having regard to the ‘qualitative and discretionary judgments required’ to arrive at the sentence imposed. It is necessarily a comparative exercise but the process of sentencing is not a mechanical exercise in which the relevant factors must be given a fixed weight, and rarely will two offenders stand in exactly the same position when they fall to be sentenced. As Vincent JA, with whom Brooking and Phillips JJA agreed, said in *R v Djukic*:

Seldom, I suggest, would co-offenders be identically positioned in every respect. There will almost always be aggravating and mitigating factors singular to one or another of them, to which attention can be drawn and often it will simply not be possible to make fine distinctions between them.

[33] Further, in *Chamma v The Queen* [2020] VSCA 232, on the issue of parity, this Court (Priest, Beach and T Forrest JJA) said at [60]:

Parity is an aspect of equal justice that requires like to be alike. What will constitute ‘like’ as between co-offenders will ultimately require an evaluation based on impression. What will constitute a departure from like and the extent of that departure will require a similarly impressionistic evaluation. Reasonable minds will inevitably differ on these sorts of evaluations. On appeal, disparity in treatment of co-offenders, or its unwarranted absence, is treated within the same analytical framework as manifest excess. An appellate court will rarely resentence based on disparity (or impugned parity) because sentencing, by nature, is imprecise and involves an exercise of judicial discretion. The disparity (or lack of it) must be so ‘marked’ or ‘manifest’ so as not to be reasonably open to the sentencing judge.”

There is a dispute in the authorities about whether, on an appeal against sentence by an adult offender, the principle of parity requires reduction of one adult offender's sentence to the point where it becomes manifestly inadequate when an adult co-offender has received a manifestly inadequate or very lenient sentence. In *Sammy Taleb v The Queen* [2014] VSCA 96 at [36]-[54] the Court of Appeal discussed this conflict between the principle of parity and the principle requiring an offender to receive an adequate sentence. On the one hand the Court noted the cases of *R v William* [2001] VSCA 130 & *Scerri v The Queen* [2010] VSCA 287 at [45]-[47] where the principle of parity prevailed. On the other hand it noted the alternative view expressed in the cases of *Wilson v The Queen* (2000) 116 A Crim R 90; *R v Nguyen* [2005] VSCA 40 at [20]-[21]; *O'Loughlin v R* [2010] VSCA 175 at [31]-[33] & [37]; *Fletcher v The Queen* [2011] VSCA 4 at [31]-[32]; *Farrugia v The Queen* (2011) 32 VR 140 & *DPP v Holder* [2014] VSCA 61 at [5]. Neave & Weinberg JA preferred the latter view, holding at [52] that "we must take account of the sentence imposed on [the co-offender] for the purposes of deciding whether the sentence imposed on the applicant gives rise to a justifiable sense of grievance, but we are not required to reduce the applicant's sentence to the point where it becomes manifestly inadequate." Their Honours also noted at [49] that this interpretation was consistent with the observations of French CJ, Crennan & Kiefel JJ in *Green v The Queen* (2011) 244 CLR 462.

There is a particular difficulty in achieving parity – in either sense - between an adult offender and a child co-offender given the substantial difference in the sentencing principles respectively set out in s.5(1) of the Sentencing Act 1991 and s.362(1) of the CYFA. A very striking example is provided by *R v Dwayne Andrew Evans* [2003] VSCA 223 where Vincent JA said at [44] that the different considerations applicable to the sentencing of children "can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals."

OFFENDER	AGE	PRIORS	PLEAS OF GUILTY TO	SENTENCE
Marks	22	31 (non violence)	Armed robbery x 4 Intent. cause serious injury x 1, Theft x 1	IMP 8y/6y
McDonald	19	16 (non violence)	Armed robbery x 4 Intent. cause serious injury x 1 Reckless endangerment x 1	IMP 11y/8y
Evans 17/11/1984	17	73 (non violence)	Armed robbery x 4 Intent. cause serious injury x 1 Possess drug of dependence x 1	IMP 9y/7y On appeal 7y/3y6m
XJ 03/04/1985	16	2 (theft & use cannabis) GBB 6m	Armed robbery x 4 Intent. cause serious injury x 1	YJC 6m
RH 01/06/1985	16	No priors	Armed robbery x 2	6m probation no conviction

Evans who was 17 at the time of the offences was an adult as the law then stood. He was jointly presented with adult co-offenders Marks & McDonald. Notwithstanding the large difference in their prior criminal histories, the disparity between the sentences imposed on Evans and on the child co-offender XJ – who was only 4½ months younger – is striking.

Although the Court of Appeal was unanimous in allowing Evans' appeal and re-sentencing him to 7 years imprisonment with a minimum of 3½ years, an apparent difference arose between the opinions of Vincent JA & Ormiston JA on whether the principle of parity of sentencing had any application at all as between adult and child co-offenders.

Vincent JA saw some - if very qualified - room for operation of the principle of parity as between very young adult and child co-offenders:

"[41] The Court of Criminal Appeal in *Andrews* (unreported, 10/12/1979) said:

'Children's Courts are given special powers ... and may be regarded as having special responsibilities. Because of these, a comparison between sentences imposed in those Courts and sentences imposed or to be imposed in the County Court or in this Court will not always be a relevant consideration. However, in a case where joint offenders form a group all of about the same age, but where some are under seventeen and some over, it must be accepted that a feeling of injustice will arise if those under seventeen are dealt with upon one basis by the Children's Court and those over seventeen on an entirely different basis by the County Court or by this Court.'

See also *R v Mapolar* (unreported, Court of Criminal Appeal, 28/05/1993 and *R v Kraja* (unreported, Court of Criminal Appeal, 07/03/1984).

Whilst this may well be justifiably the situation in some situations, there are a number of statements which make clear that the parity principle can have only limited application, in

the case of an adult offender where a younger co-offender has been dealt with according to different principles and practices. In *R v Wilson* [unreported, Court of Criminal Appeal, 28/02/1983] [where the 22 year old Wilson had complained unsuccessfully of disparity between his 8 year sentence and a 2½ year sentence imposed on his 16 year old co-accused, E], Lush J. stated:

'The age difference between the two men is a little over five years. The sentence which was received by E came as a result of the provisions of the *Children's Court Act*. ... E's sentence emerges then as a result of special processes set up in the handling of charges against persons under seventeen. The result of the application of that process cannot exercise any large influence in the fixing of an appropriate sentence by this Court or the County Court for a man aged twenty-two.'

See also *R. v. Angus* [unreported, Court of Criminal Appeal, 01/02/1996] where these passages were cited and applied [by Southwell AJA].

[42] Winneke P. in *Neket* [unreported, Court of Criminal Appeal, 28/05/1997] also considered this issue: (at pp.6-7):

'It is true that the sentence imposed upon the female co-accused seems to pale into insignificance alongside the sentence given to the applicant, but it must be remembered that she was dealt with pursuant to a quite different sentencing regime and in circumstances which make it inappropriate to apply the principles of sentencing parity discussed by the High Court in *Lowe v. The Queen* and by this Court in *R. v. Taudevin*, particularly at p.404, per Callaway, J.A. I refer also to the decision of this Court in *R. v. Angus*, where the Court explained why the so-called parity principle must be qualified in circumstances where co-offenders are sentenced pursuant to different regimes in which quite different sentencing principles apply.'

[43] I observed that in neither of these passages is it suggested that no regard whatever is to be had to the sentence imposed on the younger offender in such situations...

[46] The making of comparisons in order to achieve parity of treatment which may require some disparity in outcome between co-offenders is frequently an extremely difficult task to perform where offenders have been sentenced in the same court and by the same judge. Individuals regularly seek to rely upon quite different factors to differentiate themselves favourably from their confederates in terms of their respective levels of culpability, roles in the offences and prospects of rehabilitation. The task can be considerably more difficult where the sentences have been imposed by different judges on the bases of different information, to the extent that sometimes the exercise may be virtually impossible to perform in the case of adult offenders as no relevant basis for comparison can be seen to be present.

[47] In the present case, not only was J dealt with under a different regime but it is not even possible to ascertain upon what factual foundation his sentence rested. In any event, there were a number of bases upon which his situation could be distinguished from that of the appellant. In his statement he claimed that, although he agreed to go with the others, he remained in the car when each of the offences was committed. He said that he did so because he was scared. There is a distinct possibility that he was sentenced on that foundation. As earlier mentioned, he was the second youngest of the group and he had a significantly less serious criminal history than any of his older companions. The inference can, I think, be reasonably drawn that these features did not escape the attention of the magistrate who sentenced him. H who had not previously appeared before a court was, as earlier indicated, not only the youngest of the group, but charged with only two of the offences committed on that night. He was clearly entitled to a significantly more lenient disposition.

[48] Bray, C.J. in delivering the judgment of the Court in *R. v. Harris (No. 2)* [1971] 2 SASR 255 made the further point that the argument for the application of the principle of parity in such circumstances:

'... amounts to this, that if a man commits a crime in conjunction with a juvenile he ought to be more leniently treated than if he had committed the crime alone or in the company of an adult, because the juvenile will necessarily receive special treatment. We think that proposition bears its own refutation on the face of it.'

[49] Nevertheless, allowing for these obvious differences and the limited bases for comparison as well as the known distinctions which can properly be made between H, J and the appellant, as in *Andrews*, the disparity between their respective sentences appears stark. Had the appellant been only a few months younger, he almost certainly would have been dealt with in the Children's Court and subject to the handing down of a maximum sentence of 3 years' detention in a Youth Training Centre, that is, a possible period of incarceration of one-third of that actually imposed and which he would have served in significantly less onerous circumstances. It seems to me that in a situation of this kind, rather than attempting to make a comparison between the dispositions of these two offenders, as we have been urged to do, the focus of the enquiry must be placed upon the appropriateness of the sentence imposed on the appellant. Clearly many of the considerations which have resulted in the development of a separate juvenile justice system, and the balances of principle upon which it operates, may possess as much relevance six months, or, for that matter one day, after an offender attains 17 years as they did on the day before he reached that age. This, I believe, is well recognised and underpins the general approach of the courts to the sentencing of young persons, often leading to the moderation of sentences and the fixing of significantly lower non-parole periods than would be the case where a more mature individual was before the Court."

Ormiston JA saw no room for the operation of the principle in either direction:

[3] "As to parity, I have the gravest doubts as to whether that is applicable in the circumstances..."

[4] As Vincent JA has succinctly summarised them (see para.[44] of his judgment), the considerations applicable under [the CYPA] 'can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older...individuals': see e.g. *R v Neket* (C.A. unreported, 28/05/1997) and *R v Harris (No.2)* (1971) 2 SASR 255 at 257 per Bray CJ.

[5] In my opinion, notwithstanding certain dicta and earlier decisions largely directed to the previous legislation, those considerations make any comparisons between sentences under the two regimes entirely unsatisfactory and inappropriate. Consistency in sentencing is no doubt, in general terms, a desirable aim, however difficult it is to achieve in practice having regard to the multifarious factors which must now be taken into account. One of the virtues, however, of the Children's Court system is that that court can make special allowance for factors which would otherwise be irrelevant under the *Sentencing Act*. Consistency must work both ways and it would be entirely inappropriate that members of the Children's Court should temper their sentences to reflect what had been done or might yet be done in sentencing offenders pursuant to the *Sentencing Act*. Apart from the effective limit of three years' detention in a youth training centre, there is also the practical consideration that for the most part the evidence given in that court and more importantly the sentencing remarks are not published generally and certainly are not made available in the ordinary course of events to either trial judges or members of the Court of Appeal. One may wonder, therefore, to what extent any person might *reasonably* be perceived to have a legitimate ground of grievance if they are unable to know what the factual basis was for sentencing in the Children's Court, what were the factors peculiar to the individual and what were the grounds upon which that court acted, assuming that they have been expressed in full: see generally the useful discussion in Fox & Freiberg: *Sentencing State and Federal Law in Victoria*, 2nd ed., paras. 11.506-11.509....

[8] Logically, and I concede that in sentencing one must be very cautious about the application of logic in every case, the appellant might complain of want of parity even if he were sentenced to three or four years total effective sentence, for such a sentence would be six to eight times that handed out to his younger colleague 'merely because [the appellant] was a few months beyond the jurisdiction of the Children's Court'. It would be better, in my opinion, to scotch the idea that such comparisons can fairly be made, for it merely gives an impression to those sentenced, especially for serious offences, that they can call in aid the so-called principle of parity in circumstances where objectively there is no basis for proper comparison."

Batt JA regarded the differences between his two brothers as more apparent than real:

[11] "Whilst I would not presume to speak for the other members of the Court, it appears to me that the gap between their views on the question of 'parity' is not as great as it

might seem. Although I acknowledge the force of Ormiston, J.A.'s observation that consistency must work both ways, it is, to my mind, difficult when sentencing an offender who had just attained 17 years of age at the time of offending to disregard the sentence imposed in the Children's Court for the same offending upon an offender with like antecedents who is, say, two months younger. Some – not great – regard is, it seems to me, to be had to the latter sentence and it may be that some moderation in sentence results. That is what I understand Vincent, J.A. to say in paragraph [49] of his reasons for judgment. For myself I would not elevate that process into an application of the principle of parity."

In *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 there was a very large disparity between the roles of the applicant – who was then aged 15 – and most of the other co-offenders, two of whom were his mother and his uncle. At [80] the Court of Appeal said of this:

"The sentencing judge in the present case faced an extraordinarily difficult task in sentencing two very young offenders at the same time as he was sentencing adult offenders for participation in the same offending. As s 4 of the *Sentencing Act 1991* (Vic) makes clear, the sentencing framework for adults has no application to the sentencing of children in the Children's Court. And the sentencing regimes are strikingly different, as this Court has remarked previously [*R v Neket* (unreported, Supreme Court of Victoria Court of Appeal, Winneke P, Brooking JA and Ashley AJA, 28/05/1997) at 6], such that there is considerable difficulty in ensuring parity between co-offenders when one is sentenced as an adult and the other as a child."

This led the Court of Appeal to recommend at [88] separate sentencing hearings for adult and child co-offenders in superior courts:

"Given the very great difficulty of sentencing co-offenders under such different sentencing regimes, we would think it desirable in future that a wholly separate hearing be held to deal with the sentencing of the child offender(s)."

See also *RAC v The Queen* [2011] VSCA 294 where the Court of Appeal re-sentenced another young co-offender in accordance with the judgment in *CNK v The Queen* but drew one minor distinction based on this co-offender's prior convictions; *Poutai v The Queen* [2011] VSCA 382 where at [21] Harper JA held:

"The two regimes are strikingly different...There is, accordingly considerable difficulty in ensuring parity between co-offenders when one is sentenced as an adult and the other as a child. Even if the ages of the two are similar, but one is sentenced as an adult while the other is not, difficult issues of parity may arise. But where, as here, the age difference is 13 years, the difficulties generally become almost insurmountable."

This dicta was expressly approved by Beach & Ferguson JJA in *Leo Clayton (a pseudonym) v The Queen* [2016] VSCA 88 [32].

Occasionally, albeit uncommonly, an emphasis on rehabilitation can lead to a young offender receiving a sentence of detention even though an adult co-offender is not sentenced to imprisonment. In *D v B* [2001] VSC 353, D, a 16 year old with an extensive criminal history largely for offences of dishonesty, had pleaded guilty to one count of armed robbery and was sentenced by a Children's Court magistrate to be detained in a YJC for a period of 8 months. The co-accused, O, who was 17 at the date of the offence and 18 at the date of sentencing, also had an extensive criminal history for offences of violence and dishonesty. The contributions of D & O to the armed robbery were not identical but were said by Balmford J to be "not significantly different". Her Honour continued at [9]:

"[O] was one of two people who threatened the service station attendant with knives and yelled at him to lie on the ground; [D] removed \$300 from the till and the safe and cigarettes from the shelf. A fourth member of the party kept watch. They all then ran from the service station and left in a car which they had stolen."

O was sentenced in the County Court as an adult on 2 counts of armed robbery, one being in the company of D and the other committed 9 days earlier in similar circumstances and on 2 counts of theft of a motor car. She received a six month Intensive Correction Order [ICO] on the first of the counts of armed robbery and one of the counts of theft, and a three month ICO on the other counts of armed robbery and theft. Two months of the second sentence were made cumulative upon the first, giving a total effective sentence of an eight month ICO. During the plea on behalf of O, the prosecutor had indicated that she would not be accepted for a YJC. His Honour was concerned that, that being so, the only custodial disposition available was confinement in an adult prison. He indicated his view that

O should be given whatever chance was reasonable. It was expressly on the basis of giving O an opportunity for a supervised rehabilitation process that the ICOs were made. D appealed, submitting that the disparity between a 6 month ICO and 8 months detention in a YJC was such as to give rise to a justifiable sense of grievance. The role of the appellant in the robbery was lesser, she was involved in an isolated armed robbery rather than a course of serious offending, and her prior convictions were less serious than those of O.

Balmford J was not persuaded there was a sufficient disparity. Her Honour summarised the applicable law at [18]-[20]:

"The leading case on parity in sentencing is *Lowe v The Queen* (1984) 154 CLR 606, where Gibbs CJ, Mason, Wilson and Dawson JJ adopted the principle that an appeal court will intervene only where the disparity in sentences between co-offenders is such as to engender a justifiable sense of grievance in the accused receiving the heavier sentence, or where the disparity gives the appearance that justice has not been done.

In *R v Bernath* [1997] 1 VR 271 at 276-77 Callaway JA expanded on that statement of principle as follows:

'An appellate court intervenes on that ground only where the difference between the relevant sentences is manifestly excessive and such as to engender a justifiable sense of grievance or to give the appearance in the mind of an objective observer that justice has not been done. The important words are 'manifestly', 'justifiable' and 'objective'. There is much to be said for the view that all three requirements are variations on the same theme, i.e. that only a manifest discrepancy in the sense of a difference that is clearly excessive will satisfy the other two requirements. However that may be, it is clearly true that a sense of grievance is not justifiable unless it would be shared by an objective observer.'

Both counsel were in agreement, in my view rightly, that the objective observer must be an informed observer."

Having found, at [13], that "the sentence handed down by the Magistrate in respect of [D] must also be seen as directed to rehabilitation, in circumstances where a [YJC] sentence was available, as was not the case with [O]", her Honour held at [32]: "I cannot be satisfied that an informed objective observer would necessarily feel that the discrepancy between the two sentences was so extreme, in all the circumstances, that any resulting sense of grievance or injustice would justify a finding that the exercise by the Magistrate of his sentencing discretion was 'clearly wrong'."

D v B was the converse of the more usual case in which disparity has been, generally unsuccessfully, claimed by an adult on the basis that a child co-offender has been dealt with more leniently: see the cases cited in Fox & Freiberg, *Sentencing: State and Federal Law in Victoria*: 2nd edition at [3.1010].

Another aspect of 'parity of sentencing' is whether or not male and female offenders should be treated equally. In *DPP v Ellis* [2005] VSCA 105 upheld a Director's appeal against a wholly suspended sentence of 22 months' imprisonment imposed on a female school teacher who had pleaded guilty to 6 counts of sexual penetration of a male child under 16 who was in her care, supervision or authority contrary to s.45 of the Crimes Act 1958 [as amended]. The respondent was re-sentenced to 32 months' imprisonment with 6 months to serve immediately and 26 months suspended for 3 years. At [7] Callaway JA said:

"In *R v Jobling-Mann* [2000] VSCA 3, which was concerned with an earlier version of s.45, Winneke P, with whom the other members of the Court agreed, said:

[2] 'Whilst each breach of the section must be treated on its own merits, its underlying purpose precludes me from accepting the submission made to this Court on behalf of the applicant that the section does, or is intended to, operate differentially depending upon whether the person accused is male or female.'

Later his Honour said of the offender in that case:

[5] 'In the eyes of the law her conduct is, in my view, no more acceptable than would be the conduct of a 34-year-old male who, in similar circumstances, took advantage of two 14-year-old infatuated girls.'"

The principle enunciated by the Court of Appeal in *DPP v Ellis* is that, whatever the nature of the offence, it is not acceptable to sentence male and female offenders differently **solely** because of their sex: At [10]-[11] Callaway JA, with whom Batt & Buchanan JJA agreed, said:

[10] “The need to treat male and female offenders equally is not limited to sexual offences. In *R. v. Harkness and Ors* [2001] VSCA 87 two young women, Densley and Rye, assisted their male co-offenders to traffic in heroin. They were given very lenient sentences. The principle of parity almost required appellate intervention in favour of the co-offenders. (For an example of a case where undue leniency to a female co-offender did re-open the sentencing discretion, see *R v Izzard* (2003) 7 VR 480 at 483). I said with the concurrence of Winneke ACJ at [58]:

‘The approach of the courts to sentencing female offenders has changed over the years in reflection of the community's views. The principle at stake is equality. The law cannot, and should not, be blind to human nature or to the vulnerability of persons in the position of Densley and Rye and there are other differences between male and female offenders that can legitimately affect the sentencing discretion, but it is no longer acceptable that an offender be given a different sentence *solely* because of his or her sex.’

(In the original I emphasized the word ‘solely’ and said, by way of example, that I expressed no opinion on the argument that, at least in relation to some crimes, general deterrence is less important for female offenders.)

[11] As that passage shows, differences between offenders that are not solely because of their sex may, and where they are relevant should, be taken into account. The law does not require an artificial transposition, treating men as if they were women or women as if they were men. It is not fallacious to detect error in the present sentence because it is completely different from the sentence that would have been imposed on a male offender. It would be an error simply to substitute, after allowance for double jeopardy, the sentence that would have been imposed on a male schoolteacher who had taken part in six acts of sexual penetration with a female student. We must not replace one set of unjust stereotypes by another that is no less unjust.”

In *R v Saenchai* [2005] VSCA 201 the appellant was one of four adult co-offenders sentenced for the trafficking of heroin. He alone had prior convictions. In dismissing his appeal on the grounds of disparity Ormiston JA noted at [24] that “where a sentence is imposed on an offender who has had no convictions, a very wide discretion is given to the sentencing judge and he may properly impose a far lesser sentence than otherwise would be the case. It makes the task of comparison that much harder”. See also *R v Woolley* [2008] VSCA 44 at [21]-[22] where the Court of Appeal imposed a higher sentence on an offender who differed from a co-offender in having six prior convictions in the Children’s Court and who had also been sentenced to an intensive correction order and imprisonment for subsequent offending.

In *R v Ziday* [2006] VSCA 163 the appellant had received the same sentence in respect of a count of recklessly causing serious injury as had her daughter on a count of intentionally causing serious injury arising in the same circumstances. The Court of Appeal held that this did not infringe the parity principle. Callaway JA, with whom Redlich JA & Coldrey AJA agreed, said at [8]:

“Quite often there are legal differences between co-offenders, such as different maximum penalties, that make no practical difference when all the circumstances of the offences and of the offenders are taken into account. In particular, if such a difference gives rise to a sense of grievance, it is not a justified sense of grievance. In most cases of the kind that I have in mind they do not give rise to a sense of grievance at all. The co-offenders well and truly understand that they were in it together and there is no unfairness in treating them in the same way.”

In *R v Kolokythas* [2007] VSCA 80 at [8]-[9] the Court of Appeal referred with approval to the dissenting judgment of Callaway JA in *R v Cooper* [1998] VSCA 39 at [32] where his Honour had specifically approved unequal treatment of an offender in a joint criminal enterprise who had intervened to protect a victim from further harm:

“Joint criminal escapades frequently get out of hand. It is very much in the public interest to reward a participant who not only ceases to take part at that stage but also intervenes, to the best of his or her ability, to protect the victim from further harm. If all the perpetrators received the same or similar sentence, there may not only be a justifiable sense of grievance, but there will also be no incentive to engage in such conduct. Indeed, there may be a positive disincentive because a participant who draws back or goes to the help of a victim often risks reprisals from the continuing offenders, ranging from accusations of cowardice, to ostracism, to physical injury.”

In *DPP (Cth) v Vestic* [2008] VSCA 12 at [29] the Court of Appeal (Coghlan AJA with whom Vincent & Neave JJA agreed) said: “A matter which is so personal to the co-accused which gives rise to a lenient or very lenient sentence based on a call for mercy cannot give rise to the application of principles of parity.” Compare *DPP v Downing* [2007] VSCA 154 at [13]-[14].

In *Hilder v The Queen* [2011] VSCA 192 Maxwell ACJ identified at [37] “the true nature of the question which must be addressed when the ground of parity is advanced” as being “whether it was reasonably open to the judge in the circumstances of the case to differentiate — or fail to differentiate — between the co-offenders in the way that he or she did”. His Honour went on to say that there was a “close analogy with the stringency of the test of manifest excess” and then said at [38] that, for a parity ground to succeed, “it must be shown that the conclusion as to sentence differentials was not reasonably open”: see also *Collins v The Queen* [2015] VSCA 106 [23].

In *Salapura v The Queen* [2018] VSCA 255 at [77] Whelan & Kyrou JJA said:

“In our opinion, the difference of 3 years in the offenders’ ages [25 of 22] at the time of the offending was not material in the circumstances of this case. Ordinarily, the more youthful the offender, the greater the weight to be given to his or her rehabilitation. However, in the present case, in the light of the seriousness of the aggravated burglary offence and the extensive relevant criminal histories of both offenders, the judge was justified in not treating rehabilitation as a paramount sentencing consideration in relation to either of them. See *Mongrag v The Queen* [2018] VSCA 105 [37]-[39].

In *Tsun Shing Ip v The Queen* [2020] VSCA 211 the Court of Appeal applied *Trogenza v The Queen* [2015] VSCA 163 in allowing an appeal and reducing a sentence for attempting to possess a commercial quantity of methamphetamine and two counts of dealing with money reasonably suspected of being proceeds of crime from IMP9y/5y4m to IMP8y5m/5y. This was because the coaccused’s sentence had been reduced on appeal. At [17]-[18] Maxwell P & Weinberg JA said:

“The applicant also contends that the convergence between the sentences which resulted from the resentencing process ought to be corrected. He argues that the proper approach in such a case is as set out by this Court in *Trogenza v The Queen* at [41]. That is, although this Court is not obliged to restore the original relativity between the sentences, the matter should be approached:

‘on the basis that the distinction drawn by [the judge] between the cooffenders should be maintained, in the absence of some identifiable error or further fact which necessitates a different course.’

Counsel for the respondent conceded that the lack of differentiation between the sentences consequent upon the resentencing of Kao could not be justified.”

Other cases involving adult offenders in which the issue of parity has been discussed include *Lovelock v The Queen* (1978) 33 FLR 132 at 136-7 per Brennan J; *R v Merceica* [2004] VSCA 170 at [6] & [14]; *R v QMN*; *R v WD* [2004] VSCA 32 at [15]-[19]; *R v Greenslade* [2004] VSCA 213 at [19]-[20]; *R v Rodden* [2005] VSCA 24; *R v Thanh Cong Nguyen* [2005] VSCA 40 at [9]-[14]; *R v Cassar* [2005] VSCA 164 at [14]-[23]; *R v Wade* [2005] VSCA 276 at [17]-[18]; *R v Le*; *R v Nguyen* [2005] VSCA 284 at [16]-[20]; *R v Eaton* [2006] VSCA 16; *R v Airey* [2006] VSCA 31 at [11]; *R v Hieu Huu Nguyen* [2006] VSCA 39 at [15]-[16]; *R v Bortoli* [2006] VSCA 62 at [26]-[32]; *R v Quang Hung Pham & Anor* [2006] VSCA 68 at [21]-[29]; *R v Lee* [2006] VSCA 80 at [27]-[29]; *R v Lam* [2006] VSCA 162 at [37]-[38]; *R v Asim Selcuk* [2006] VSC 465; *R v Guthrie & Nuttal* [2006] VSCA 192 at [87]; *R v Sibic & Sibic* (2006) 168 A Crim R 305 at [50]; [2006] VSCA 296 at [34] & [50]; *R v Moroz & Mendelis* [2007] VSCA 30 at [57]; *R v Nguyen & Ors* [2007] VSCA 165 at [38]; *R v Rackley* [2007] VSCA 169 at [26]-[31]; *R v Lacey* [2007] VSCA 196 at [19]-[25]; *R v Hall* [2007] VSCA 218 at [15]-[17]; *R v Barbaro & Ors* [2007] VSCA 271 at [39]; *R v Nunno* [2008] VSCA 31 at [35]; *R v Eastham* [2008] VSCA 67 at [16]-[17]; *R v Koumis & Ors* [2008] VSCA 84 at [28]; *R v Van Dat Le* [2008] VSCA 155 at [14]-[19]; *DPP v Tuan Quoc Tran* [2008] VSCA 158; *R v Crabbe* [2008] VSCA 160 at [3]-[4]; *R v Lewis* [2008] VSCA 202 at [15]-[17]; *R v Mundy* [2008] VSCA 184 at [14]-[22]; *R v Simmons* [2008] VSCA 185 at [29]-[38]; *R v Lewis* [2008] VSCA 202; *R v Nguyen, Dang, Ly & Nguyen* [2008] VSCA 235 at [60]; *R v Holmes* [2008] VSCA 271 at [73]-[74]; *R v Wolfe* [2008] VSCA 284 at [9]-[10]; *R v Barbaro* [2009] VSCA 89; *R v Waugh* [2009] VSCA 92 at [15]-[20] esp [19]; *R v Doherty* [2009] VSCA 93 at [17]-[21]; *R v Bloomfield*, *R v Wilson*, *R v Davidson* [2009] VSCA 302 at [28]-[31]; *R v Stanbury* [2010] VSCA 49 at [28]-[29]; *R v Velevski* [2010] VSCA 90; *R v Morgan* [2010] VSCA 248 at [7]-[11]; *R v Harrington* [2010] VSCA 249 at [3]-[9]; *R v Boase & Parker* [2010] VSCA 316; *R v Fletcher & Or* [2011] VSCA 4; *R v Kelly* [2011] VSCA 11 at [5]-[7]; *R v Faure* [2011] VSCA 115 at [23]-[24]; *R v Goussis* [2011]

VSCA 117 at [59]-[65]; *DPP v Clifford* [2011] VSCA 199 at [15]-[24]; *DPP v Heeman and Rivette* [2011] VSCA 221; *DPP v Jacobs and Ross* [2011] VSCA 238 at [23]-[24]; *DPP v Breuer* [2011] VSCA 244 at [29]; *R v Raylene Sarvak* [2011] VSCA 300 at [32]-[43]; *R v Crawley* [2011] VSCA 131 at [22]-[25]; *The Queen v Kim Man Freeman Tsang* [2011] VSCA 336 at [147]-[154]; *DPP(Cth) v Graziosi* [2011] VSCA 418 at [20]-[24]; *Smith v The Queen* [2012] VSCA 5 at [37]-[40]; *R v Nguyen* [2012] VSCA 119 at [15]-[30]; *R v Saab* [2012] VSCA 165 at [64]-[68]; *DPP v Bonacci and Vasile* [2012] VSCA 170 at [34]-[48]; *R v Morrison* [2012] VSCA 222 at [22]; *DPP v Carr* [2012] VSCA 299 at [75]-[81]; *R v Ulutui* [2012] VSCA 301 at [46]-[54]; *R v Charters* [2012] VSCA 318 at [42]-[48]; *Dawid v DPP* [2013] VSCA 64 at [41]-[48]; *Director of Public Prosecutions (Cth) v Peng* [2014] VSCA 128; *Joseph v The Queen* [2014] VSCA 343 at [62]-[82]; *Johnson v The Queen* [2014] VSCA 283 at [47]-[58]; *Sayed Hashmi v The Queen* [2014] VSCA 291 at [127]-[134]; *Le v The Queen* [2014] VSCA 283 at [31]-[32]; *Philp v The Queen* [2017] VSCA 320 at [5]; *Terry Darren Mitchell v The Queen* [2018] VSCA 158 at [46]-[53]; *Azaan Rosales (a pseudonym) v The Queen* [2018] VSCA 130; *Moresco v The Queen* [2018] VSCA 33 at [43]-[67]; *Ah-Kau v The Queen*; *Ofamooni v The Queen* [2018] VSCA 296; *Buovac v The Queen* [2018] VSCA 302 at [54]-[65]; *Ghannoum v The Queen* [2019] VSCA 25 at [47]-[65]; *Shakhanov v The Queen* [2019] VSCA 38; *Wood v The Queen*; *Bell v The Queen* [2019] VSCA 39 at [76]-[79]; *Anderson v The Queen*; *Smith v The Queen* [2019] VSCA 42 at [82]; *Neil v R* [2019] VSCA 64 at [31] & [39]-[44]; *Simpson v The Queen* [2019] VSCA 82 at [26]-[31]; *Miller v The Queen* [2019] VSCA 108; *Qui v The Queen*; *Ng v The Queen* [2019] VSCA 147; *Piacentino v The Queen* [2019] VSCA 153 at [43]-[47]; *DPP v O'Brien* [2019] VSCA 254; *Topal v The Queen* [2019] VSCA 289 at [21]-[28]; *Chatters v The Queen* [2019] VSCA 309 at [20]-[24]; *Zaia v The Queen* [2020] VSCA 9 at [83]-[97]; *Levy v The Queen* [2020] VSCA 44 at [70]-[84]; *Charlie Galea v The Queen* [2020] VSCA 69 at [19]-[23]; *Brad Freedman (a pseudonym) v The Queen* [2020] VSCA 287 at [22]-[26]; *Taleb v The Queen* [2020] VSCA 329 at [19] & [24]-[34].

11.2.7 Double Jeopardy

Where the ultimate facts establish the proof of 2 offences of a similar character based on the same act or omission, it is a doctrine of the common law that an offender cannot be convicted of both offences: *Falkner v Barba* [1971] VR 332.

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This doctrine was applied by Phillips J in *Reardon v Baker* [1987] VR 887 in holding that as possession for sale of heroin was the essential basis of the charge of trafficking with which the defendant was convicted, she should not also be convicted of the offence of possession of the same heroin at the same place on the same date. See also *DPP v Collins* [2004] VSCA 179.

In *R v Mason* [2006] VSCA 55 the applicant had been convicted on one count of trafficking and one count of cultivation of cannabis. At [8]-[9] Buchanan JA (with whom Maxwell P & Redlich AJA agreed) held that although the elements of both offences were not identical – and hence a conviction on count 1 could not give rise to a plea of autrefois convict on count 2 – the applicant should not be punished for both offences given that the same acts of cultivation were relied upon as the basis of both counts. See also *R v Van Xang Nguyen* [2006] VSCA 158; *R v Ngo* [2007] VSCA 240; *R v Filipovic*; *R v Gelevski* [2008] VSCA 14.

In *R v Nunno* [2008] VSCA 31 the appellant had admitted to police that he had engaged-

- (1) in actual cultivation of cannabis (for the purpose, in part, of trafficking); and
- (2) then, later, in actual trafficking of part of the cultivated crop; and
- (3) then, later again, in actual possession (partly for the purpose of further trafficking and partly for his own use).

Cavanough AJA (with whom Buchanan JA & Coldrey AJA agreed) rejected an argument that the imposition of sentences on the counts of cultivation and possession as well as trafficking constituted double punishment, holding that “the offending in each case was distinct” and adding: “To the extent that the three counts involved what I would call ‘linked’ rather than ‘overlapping’ behaviour, I consider that the same should be reflected in the sentences imposed, rather than the convictions recorded.”

For the purpose of the doctrine of double jeopardy, punishment includes the recording of a conviction even if unaccompanied by any further order: *R v Sessions* [1998] 2 VR 304, 313; *RR v The Queen* [2013] VSCA 147 at [141] per Ashley JA.

In *Pearce v The Queen* (1998) 194 CLR 610, the offender, who had broken into a house and had inflicted grievous bodily harm on the victim, had been sentenced to identical terms of imprisonment on both counts. In allowing an appeal from the Supreme Court of NSW, the High Court held that the offender had been doubly punished for one act. At p.623 McHugh, Hayne & Callinan JJ said:

"To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just desserts."

A similar consequence flows from s.51(1) of the Interpretation of Legislation Act 1984 (Vic): "Where an act or omission constitutes an offence under two or more laws, the offender shall, unless the contrary intention appears, be liable to be prosecuted under either or any or all of those laws but shall not be liable to be punished more than once for the same act or omission." See also *R. v. Sessions* (1997) 95 A Crim R 151.

An illustration of s.51(1) is to be found in *R v Bowen* [2002] VSCA 199 where:

- the first count presented that the accused unlawfully and maliciously caused by an explosive substance an explosion of a nature likely to cause injury to property contrary to s.317(2) of the Crimes Act 1958 (Vic); and
- the second count presented that on the same date and at the same place the accused intentionally and without lawful excuse destroyed a motor vehicle contrary to s.197(1).

The Court of Appeal commented with approval at [3]: "On count 1 [the accused was] convicted and imprisoned for three years. On count 2 no conviction was recorded. The judge was of the opinion that s.51(1) of the Interpretation of Legislation Act 1984 meant that the appellant was not liable to be punished more than once for an offence arising out of the same act as the offence of causing an explosion".

In *Lecornu v The Queen* (2012) 36 VR 382; [2012] VSCA 137 Maxwell P distilled three distinct propositions concerning double punishment from the majority judgment of McHugh, Hayne and

Callinan JJ in *Pearce v The Queen* (1998) 194 CLR 610 at 616, 620-621 & 623, propositions which for ease of reference he called Rules 1, 2 & 3:

- “Rule 1** A plea in bar (autrefois convict or autrefois acquit) is available only in relation to an offence the elements of which are the same as, or are included in, the elements of an offence for which an accused has been tried to conviction or acquittal.
- Rule 2** Where no plea in bar is available in relation to the second offence, prosecution of that offence may nevertheless be stayed as an abuse of process if it would be vexatious or oppressive or unfair.
- Rule 3** As a matter of sentencing, persons found guilty of two offences must not be punished twice for an act which is common to the two offences.

These rules could equally have been based on s.51(1) Interpretation of Legislation Act 1984 (Vic). As the Court of Appeal noted in *R v Nor* (2005) 152 A Crim R 118 at 123, Rules 1 and 2 go to conviction “in the sense that, if conviction has been secured in breach of either of the two aspects of double jeopardy it will ordinarily be set aside.” Rule 3, on the other hand, goes to sentence. See also *Lipp v The Queen* [2013] VSCA 384 esp at [23]-[24].

In *Neill v County Court of Victoria & Anor* [2003] VSC 328 at [65] Redlich J noted that the fact that offences are similar or arise substantially out of the same facts is not determinative of whether the principle of double jeopardy applies:

“Whether as a consequence of the common law or by virtue of s 51 *Interpretation of Legislation Act 1984* an offender cannot be punished twice for the same act or omission. Whilst the boundaries of the doctrine remain uncertain they extend to prohibit conviction where the elements of the offences are the same, or where the two offences contain elements established by the same act unless there are different consequences from the same act. Though the doctrine has a scope of operation beyond such circumstances, the fact that the offences are similar or arise substantially out of the same facts is not determinative of whether a conviction on both offences offends these principles.”

In *R v WWS* [2009] VSCA 125 at [27] Vincent, Nettle & Neave JJA approved the aforementioned dicta of Redlich J in *Neill’s Case* and made it clear at [30] that the prohibition on double punishment does not prevent the prosecution of an offender for more than one offence where an offender’s single action causes harm to more than one person. Referring with approval to-

- *Phillips v Carbone (No.2)* (1992) 67 A Crim R 392 where the Full Court of the Supreme Court of Western Australia held that double jeopardy did not apply in a situation where an offender caused bodily harm to two persons by a single act of dangerous driving; and
- dicta of the Court of Appeal in *R v Bekhazi* (2001) 3 VR 321 holding that an offender who drove a car while under the influence of drugs, killing one victim and recklessly endangering another, could be convicted of two offences arising out of that action-

their Honours concluded at [33]:

“The applicant’s act of masturbation affected each of the three young girls who were present when this action was performed. The situation is therefore similar to that arising in *Phillips*. If the applicant had been convicted of only one of these offences, the judge would not have been able to sentence the applicant for the effects of his action of the other two girls.”

Double jeopardy may also arise where cumulation has been ordered in respect of two offences which share some common elements in circumstances where those elements have already been taken into account in sentencing for one of the offences. In *R v Orgill* [2007] VSCA 236 the appellant had been sentenced to 4 years imprisonment on a count of stalking and to partly cumulative sentences of imprisonment on 2 counts of burglary. At [17]-[18] Redlich JA, with whom Chernov & Vincent JJA agreed, said:

“It is arguable that entry to the premises for the purposes of the offence of stalking is of a different character to entry for the purposes of the offence of burglary. The same may be said of the *actus reus* of the offence of theft and interference with the victim’s property in the offence of stalking. But if there be a distinction in the present circumstances between acts constituting the *actus reus* of those offences, it was a distinction which should not be drawn. As the joint judgment of McHugh, Hayne and Callinan JJ and the judgment of Gummow J in *Pearce v The Queen* (1998) 194 CLR 610, 614, 624, 628-9 illustrate, to the extent that offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are

common. That has been understood to mean that the offender is not to be punished twice for the same act: *R v Henderson*, *supra*, 836; *R v Chhom Nor* [2005] VSCA 46 at [15] (Chernov JA). The joint judgment in *Pearce* cautioned [at 623] against the use of 'excessive subtleties and refinements' in determining whether the same act is common to two offences and that the task should be approached with common sense.

In my view, the order for cumulation amounted to double punishment for each of those acts had already been taken into account in fixing the sentence on the count of stalking. The sentence imposed on that count and the remarks of the sentencing judge shows that the appellant's invasion of the victim's residence with the intent to steal personal property of the victim and the subsequent theft of the victim's property were reflected in the sentence of four years' imprisonment fixed on the count of stalking. To characterise the appellant's acts of entry to the premises differently for the counts of stalking and burglary was to engage in excessive refinement of the feature common to both counts."

It is not uncommon in the Children's Court for an offender to be found guilty of an offence which breaches a supervisory order such as probation. This is complicated by the fact that the breach is frequently not heard at the same time as the substantive offence. A question arises as to whether imposition of an additional sentence in respect of the breach constitutes double jeopardy. Of course, if the breach is constituted by general non-compliance as opposed to commission of a breaching offence, there will be no real issue. But what if the Court, sentencing on the substantive offence, has treated as an aggravating factor the fact that the offence was committed at a time when the offender was on probation? The relevant law is discussed in *R v Loader* (2011) 33 VR 86; [2011] VSCA 292 where the applicant had been sentenced, *inter alia*, on eight charges of indecent assault and charges of failing to comply with a condition of an Interim Extended Supervision Order and of failing to comply with a condition of an Extended Supervision Order. The breaches of the Supervision Orders were constituted by committing the eight offences of indecent assault. Some cumulation was ordered on each of the two breaches. A ground of appeal alleged that this constituted double jeopardy. In dismissing the appeal, the Court of Appeal distinguished the case of *R v Audino* [2007] VSCA 381 at [115]–[119], a case where an offender was charged both with exceeding the prescribed concentration of alcohol (reading 0.141) and with culpable driving. Nettle JA (with whom Warren CJ & Ashley JA agreed) said at [29]–[30] & [53]–[54]:

[29] "There is no injustice in charging or convicting an offender of more than one offence committed in the course of the one episode of criminal behaviour if each offence is comprised of or includes different elements. As the Court said *Pearce v The Queen* (1998) 194 CLR 610, 621 [31]:

'To hold otherwise would be to preclude the laying of charges that, together, reflect the whole criminality of the accused and, consonant with what was held in *R v De Simoni*, would require the accused to be sentenced only for the offence or offences charged, excluding consideration of any part of the accused's conduct that could have been charged separately.'

[30] Of course, as was also made clear in *Pearce*, to the extent that two or more offences are comprised of the same criminal behaviour, a sentencing judge must take care to modify the sentences imposed for each offence in order to avoid the offender being punished more than once for the same conduct. But that is a matter of sentencing. There is no double punishment in the fact of entering a conviction on each offence."

...

[53] [In *Audino*], it was held that it was double punishment to impose any penalty on more than one of the offences. But, in this case, there is only a partial overlap between the [indecent assault offences and the offences of breaching the Supervision Orders].

[54] Certainly, to the extent of the overlap, the sentences imposed on the offences of failing to comply with conditions of the [Supervision Orders] must be moderated in accordance with *Pearce v The Queen* (1998) 194 CLR 610, 623–4; *R v Wei Tang* (2009) 23 VR 332, 338 [28]. But the offences of failing to comply with the conditions of the orders involved the added criminality of failing to comply with orders of the court. That warrants additional punishment."

In *Lecornu v The Queen* (2012) 36 VR 382; [2012] VSCA 137 the Court of Appeal applied similar reasoning, rejecting the appellant's submission that the decision in *R v Loader* was "plainly wrong". In 2007 L had been made subject to an extended supervision order (ESO), a condition of which was that he not commit a relevant offence while the order is in force. Possession of child pornography is a relevant offence. In 2011 L pleaded guilty to two charges of possessing child pornography and two

charges of failing, by committing the CP offences, to comply with a condition of the ESO. He was sentenced to IMP 15m on the CP charges and IMP 6m, of which 5m was cumulative, on the breach charges. The Court of Appeal found no abuse of process and no double punishment in L being prosecuted for and convicted of both the CP offences and the breach offences. At [8]-[10] Maxwell P (with whom Hollingworth & Cavanough AJJA agreed) said:

[8] "The offences were different in important respects and it was appropriate to proceed to conviction on charges which, together, reflected the full criminality of L's conduct.

[9] Nor, in my view, did the sentences imposed on L infringe the rule against double punishment. L does not dispute that, in sentencing him on the CP offences, the sentencing judge was entitled to treat as an aggravating feature of *those* offences the fact that he had committed them while subject to the ESO. Having done so, her Honour was also entitled to impose sentence for the corresponding breach offences – but only for the separate criminality constituted by L's disobedience of a Court order.

[10] Had the sentences on the breach counts also punished L (to any extent) for the criminality involved in his acts of possessing child pornography, the rule against double punishment would have been infringed. But there is nothing in the sentences imposed to suggest that this occurred, and the sentencing reasons explicitly addressed the need to avoid double punishment."

However, in *Price v R (No 2)* VSCA 44 the Court of Appeal (Whelan AP, McLeish & T Forrest JJA) – although applying *Pearce v The Queen* (1998) 194 CLR 610, *Loader v The Queen* (2011) 33 VR 86, *Lecornu v The Queen* (2012) 36 VR 382, *Heath (a pseudonym) v The Queen* (2014) 45 VR 154 and while noting that the breach of a court order involved separate and distinct criminality – did find an element of double punishment expressed in the sentencing judge's reasons, allowed the appeal and resented the appellant. See especially [52]-[60], [62], [64] & [66].

In *Dang v The Queen* [2014] VSCA 49 at [39]-[85] the Court of Appeal discussed in detail the principle of double punishment as applied in *Pearce v The Queen* (1998) 194 CLR 610 and its application to circumstances where the offences have been charged as *Giretti* charges: *R v Giretti and Giretti* (1986) 24 A Crim R 112.

For further discussion of the principles prohibiting "double punishment" see the decision of the High Court in *R v Hoar* (1981) 148 CLR 32 at 38, the decision of the Full Court in *R v Wedding* [1959] VR 298 and the decisions of the Court of Appeal in *R v Gruber, Ridgeway & Rowley* [2004] VSCA 100 at [18]-[19] per Callaway JA (with whom Warren CJ & Vincent JA agreed); *R v Langdon* (2004) 11 VR 18; *R v El-Kotob* (2002) 4 VR 546; *R v Langdon & Langdon* (2004) 11 VR 18; [2004] VSCA 205 at [1] per Batt JA, [35]-[37] & [88]-[97] per Gillard AJA; *R v Ly & Others* [2004] VSCA 45 at [29]-[30]; *R v Zaydan & Others* [2004] VSCA 245 at [42]; *R v Chhom Nor* (2005) 11 VR 390, 396 [15], 400 [22]; [2005] VSCA 46 at [13]-[23]; *R v Chin Poh Tan* [2005] VSCA 54 at [10]; *R v Carne* [2006] VSCA 2 at [33]-[34]; *R v Lacey* [2006] VSCA 4 at [22]-[26]; *R v Spero* [2006] VSCA 58 at [53]; *R v Duncan* [2007] VSCA 137 at [28]-[30] per Nettle JA; *R v Alashkar – R v Tayar* [2007] VSCA 182 at [47]-[53]; *R v Henderson-Drife* [2007] VSCA 211 at [26]-[29]; *R v Norris* [2007] VSCA 241 at [44]-[49]; *R v King - R v Ngyouen* [2007] VSCA 263 at [29]; *R v Ahmed* [2007] VSCA 270 at [18]-[19]; *R v Audino* [2007] VSCA 318 at [12]-[18]; *R v Healey* [2008] VSCA 132 at [27]-[34]; *R v Mario Katsoulas* [2008] VSCA 278 at [7]; *R v Bidmade* [2009] VSCA 90 at [24]-[27]; *R v Doherty* [2009] VSCA 93 at [22]-[24]; *R v Stamenkovic* [2009] VSCA 185; *R v Le* [2009] VSCA 247 at [5]-[13]; *R v Bradley* [2010] VSCA 70 at [23]-[25]; *R v Nguyen* [2011] VSCA 139 at [15]; *DPP v Farrugia* [2011] VSCA 201 at [24]-[25]; *R v Grixti* [2011] VSCA 220 at [9]-[12]; *DPP v Salisbury* [2011] VSCA 366 at [26]-[27]; *R v Azzopardi, R v Baltatzis, R v Gabriel* [2011] VSCA 372 at [26]-[28]; *R v Kam Tin Ho & Ors* [2011] VSCA 344 at [123]-[125] applying *R v Wei Tang* (2009) 23 VR 332, 340-1, [32]-[34]; *R v Tran* [2011] VSCA 363 at [14]-[22]; *Shields v The Queen* [2011] VSCA 386 at [11]-[12]; *R v Charles* [2011] VSCA 399 at [187]-[195]; *R v White* [2011] VSCA 441 at [62]-[66]; *R v Orbit Drilling Pty Ltd; R v Smith* [2012] VSCA 82 at [68]-[70]; *DPP v Gangur* [2012] VSCA 139 at [10]-[25]; *DPP v El-Waly* [2012] VSCA 184 at [88]-[93]; *Nguyen v The Queen* [2013] VSCA 63 at [27]-[30]; *Lipp v The Queen* [2013] VSCA 384 at [23]-[39]; *Kruzenga v The Queen* [2014] VSCA 10 at [14]-[21]; *Buddle v The Queen* [2014] VSCA 232 at [18]-[22]; *Jakob Sutic v The Queen* [2018] VSCA 246 at [82]-[90]; *Salapura v The Queen* [2018] VSCA 255 at [40]-[68]; *Dale Cairns (a Pseudonym) v The Queen* [2018] VSCA 333 at [39]-[40]; *Fox v The Queen* [2020] VSCA 3 at [30]; *McMillan v The Queen* [2020] VSCA 189 at [22].

For discussion of the issues of "commonality between offences" and "minimal additional criminality" see *Dang v The Queen* [2014] VSCA 49 at [86]-[96]; *Mustica v The Queen*; *DPP v Mustica* (2011) 31 VR 367 and *Trajkovski v The Queen* (2011) 32 VR 587.

11.2.8 Effect of guilty plea, remorse, admission of offence, assistance to the authorities

There do not appear to be any superior court cases specifically dealing with the effect on the sentencing of a child offender of a guilty plea and/or assistance to the authorities. Nor is there any provision in the Children, Youth and Families Act 2005 (Vic) akin to s.5(2)(e) of the Sentencing Act 1991 (Vic) which provides that in sentencing an adult offender a court must have regard to "whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so". Nevertheless there seems no reason why the cases dealing with adult offenders should not also be relevant for juvenile offenders, at least so far as any non-rehabilitative component of the sentence is concerned.

A number of relevant principles are set out in the judgment of Callaway JA in *R v Duncan* [1998] 3 VR 208 at 214-215. These include:

- Both a plea of guilty and significant assistance to the authorities usually justify some mitigation of sentence in the exercise of the wide discretion conferred on a sentencing judicial officer. It is referred to as a 'discount' to make it clear that a sentence is never increased or made more severe because an accused person puts the Crown to its proof or declines to give such assistance.
- This distinction is practical, whether or not it is logical or easily understood. In that respect it is like the proposition that, whilst remorse is a circumstance of mitigation, its absence is not an aggravating factor.
- In appropriate circumstances the discount for assistance may be very considerable indeed. Even where it does not evidence repentance or foreshadow amendment of life, a large reduction may be made for purely utilitarian reasons dictated by the public interest.
- In the case of a plea of guilty it is necessary to distinguish between the plea as indicating contrition or some other quality or attribute that is relevant to sentencing and the plea in its own right, but again the public interest is important.
- A plea that evidences genuine remorse and prospects of rehabilitation, that is entered at the earliest practical opportunity and that saves the State a trial and the witnesses both trauma and inconvenience normally justifies a high discount.
- An early plea that does nothing except save time and expense is still entitled to consideration, and should usually attract a significant discount, for the reasons explained by Hunt CJ at CL in *R v Winchester* (1992) 58 A Crim R 345 at 350 and by King CJ in *R v Shannon* (1979) 21 SASR 442 at 451. See also *R v Morton* [1986] VR 863 at 866-8.
- In a time of rising sentences, in conformity with community concerns to which Parliament has given expression in legislation, the discount for pleading guilty should be more rather than less: *R v Bolton and Barker* [1998] 1 VR 692 at 698.

In *R v P & Ors* [2007] VChC 3 the President of the Children's Court, Judge Grant, imposed youth supervision orders or probation on eight young co-offenders. Each had pleaded guilty to:

- representative counts of procuring by intimidation a young woman FS described as "mildly delayed in her intellectual development" to take part in an act of sexual penetration with two of them;
- assault of FS; and
- making child pornography, namely a film depicting FS engaging in sexual activity.

At [22]-[23] Judge Grant highlighted to the offenders the significance of their guilty pleas:

"The offending here is so serious that, in the absence of a plea of guilty and your willingness to participate in an appropriate treatment regime, you would have been at significant risk, had you been found guilty after trial, of being detained in a Youth Justice facility. It follows from what I have just said that I give great credit to your pleas of guilty. They are so significant because they relieve the victim of the burden of giving evidence. She is not compelled to re-live these terrible events.

Importantly, your pleas of guilty also indicate your remorse. The pleas of guilty indicate your understanding of the importance of accepting responsibility for what you have done."

In *R v Davy* [2011] VSCA 98 at [34] Bongiorno JA (with whom Harper & Hansen JJA agreed) said:

"The practical benefit of a plea of guilty and the consequent sentence discount, particularly in a child sex abuse case, should not be undervalued. Not only is the trauma of a trial on a 19-count presentment avoided for the victims, but the recognition by the justice system of a real discount for such a guilty plea has an encouraging effect on those subsequently charged with such offences."

It is clear from the above that a plea of guilty does not necessarily connote genuine remorse but is nevertheless entitled to consideration. In *R v Fulop* [2009] VSCA 296 at [15] Buchanan JA (with whom Nettle JA agreed) said:

“As to remorse, her Honour was not bound to find that the pleas entailed remorse. As Gleeson CJ and Gummow, Hayne and Callinan JJ said in *Saganto v The Queen*: ‘A plea of guilty is usually evidence of some remorse on the part of the offender.’ In the present case, there were countervailing factors bearing upon remorse, and in my view the sentencing judge was entitled to take them into account.”

In *R v WWS* [2009] VSCA 125 at [56] Vincent, Nettle & Neave JJA said:

“[H]er Honour made no error in finding that the applicant was not genuinely remorseful. Further, even if her Honour should have found that the applicant displayed some limited remorse, that remorse was so qualified and rationalised by the applicant that we do not consider it should have been given any weight in addition to that given for the guilty plea. Her Honour said she had given considerable weight to that plea, even though the applicant did not plead guilty to the offences at the first available opportunity.”

In *R v Fisher* [2009] VSCA 100 an attempt had been made to deceive the sentencing court for the purpose of obtaining a lesser sentence than that which justice requires. While noting at [80] that “it cannot be said that there has been an unqualified desire to submit to just punishment for the offence”, nevertheless Redlich & Dodds-Streton JJA said at [81]:

“[T]he deception did not relate to any aspect of the offending but to one aspect of the personal circumstances of the applicant. We doubt that the deception supported the inference that the appellant had no remorse at all. Rather, the discount for a plea of guilty was to be reduced to reflect the extent to which the offender’s remorse was qualified by such conduct. And that part of the discount for the guilty plea that was to be afforded on utilitarian grounds, was not to be reduced: *R v Pajic* [2009] VSCA 53.”

In *Va v The Queen* [2011] VSCA 426 at [17] Maxwell P and Redlich & Weinberg JJA – citing *Cooper v The Queen* (1998) 103 A Crim R 51, 55 (Winneke P with Tadgell JA agreeing) – stated that a sentencing court should always distinguish between regret and remorse. In *R v Kells* [2012] VSC 53 – after referring to *Va v The Queen* – Macaulay J said at [29]: “I accept that even genuine remorse is never likely to be entirely ‘pure’ and devoid of some degree of self interest: *R v Whyte* (2004) 7 VR 397, 403 [21]. Nevertheless, I am satisfied that your expressions of remorse at the time were much more than mere self-pity at the situation in which you had placed yourself.”

In *R v Pajic* (2009) 23 VR 527 Redlich JA had stated at [19]-[20]:

“One of the matters which may affect the appropriate discount to be allowed for a plea of guilty is the strength of the Crown case: see *R v Donnelly* [1998] 1 VR 645, 648. Thus, a plea of guilty in the context of a weak Crown case will generally warrant an additional level of discount. It will be proper for a sentencing judge in some particular cases to find that the circumstance of a plea of guilty which might otherwise attract leniency is absent: *Siganto v The Queen* (1998) 194 CLR 656, [22]-[23] (Gleeson CJ, Gummow, Hayne and Callinan JJ). Where the Crown case is a strong one, the conclusion may sometimes be justified that the plea has resulted from the recognition of the inevitable and so qualifies the extent of genuine contrition: *R v Shannon* (1979) 21 SASR 442, 452; *R v Winchester* (1992) 58 A Crim R 345, 350 (Hunt CJ at CL).

It must not be overlooked that whatever arguments there be about the degree of remorse shown by the plea, the strength of the Crown case will have no bearing upon that part of the discount which is to be allowed by virtue of utilitarian considerations: see *R v Thompson*; *R v Houlton* (2000) 49 NSWLR 383, [137]-[138] (Spigelman CJ); *R v Cameron* (2005) NSWCCA 357, [22]-[24].. And a reduction in the discount because the strength of the Crown case shows that the plea reflects only limited remorse should only occur where conditions exist which justify such a conclusion.”

Although *Pajic* has been followed in numerous cases (*R v Fisher* (2009) 22 VR 343, [81]; *R v RLP* [2009] VSCA 271, [42]-[44]; *Andrick v The Queen* [2010] VSCA 238, [35]; *Ciantar v The Queen*; *Rose v The Queen* [2010] VSCA 313; [31]; *Chalmers v The Queen* [2011] VSCA 436, [51]; *Cliffard v The Queen* [2011] VSCA 56, [16]), certain aspects of it were challenged in *R v Phillips* [2012] VSCA 140 one of the issues. Accordingly a Full Bench was assembled. None of the five judges dissented from the reasoning of Ashley & Redlich JJA in *Pajic*. In a joint judgment with which Maxwell P, Nettle JA & Harper JA separately agreed, Redlich JA & Curtain AJA said at [36]:

“[T]he following are the relevant matters which should inform a determination of the extent of the discount to be given for a plea of guilty:

1. A discount for the utilitarian benefit of the plea must always be allowed on the sentence to be imposed, save for the exceptional category of case.
2. The exceptional case arises where the gravity of the offending conduct is of such an order that no discount from the maximum sentence is appropriate.
3. The strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea as it does not bear upon the objective benefits of the plea: *Chalmers v The Queen* [2011] VSCA 436, [51].
4. A greater discount for the utilitarian benefit may be justified where the plea involves very considerable savings of costs to the community or where some other very significant benefit can be seen to flow from the plea.
5. It is always a question for the sentencing judge whether remorse, a willingness to facilitate the course of justice and an acceptance of responsibility are to be inferred from a plea of guilty.
6. Where there is evidence or a submission accepted by the sentencing judge as to the unqualified existence of these subjective criteria, they should be fully reflected in the discount.
7. The utilitarian benefits which flow from the plea may also inform the extent of the discount to be allowed for the offender’s willingness to facilitate the course of justice.
8. The weakness of the Crown case, if apparent, may also inform the extent of the offender’s willingness to facilitate the course of justice.
9. The sentencing judge will not need to separately deal with the objective criteria of the utilitarian benefit of the plea and the subjective criteria, unless there is reason to conclude that less than the full discount should be allowed for the subjective criteria.
10. The strength of the Crown case can only support an inference that these subjective criteria played little or no, role in the decision to plead guilty where the state of the contextual evidence on the plea permits such a conclusion.”

In *DPP v Bourke* [2020] VSC 130 at [32] Jane Dixon J accepted a substantial utilitarian value of the accused’s guilty plea in the light of public health concerns regarding the COVID-19 pandemic which may have impacted on the practical management of a jury and given that new jury trials have been suspended.

In *DPP v Carr* [2012] VSCA 299 at [70] the Court of Appeal – citing earlier decisions in *R v Bartlett* [1996] 2 VR 687, 698-9 and *Sherna v The Queen* [2011] VSCA 242 at [18], [41] & [88] as well as a number of decisions from other states – held that “a rejected offer to plead guilty to a lesser offence than that upon which the Crown has proceeded may also be considered to have a utilitarian value when the offender has ultimately been convicted of that lesser offence”.

See also *R v Rogers* [2008] VSCA 114 at [48]-[52]; *Dawid v DPP* [2013] VSCA 64 at [20]-[29].

In *Jesse Deacon (a pseudonym) v The Queen* [2018] VSCA 257 at [154] and *Jenni Smith v The Queen* [2018] VSCA 258 at [85] Kaye & T Forrest JJA & Taylor AJA cautioned against the inverse proposition, saying:

“It is well established that while remorse and related concepts such as concern for the welfare of a victim have been treated by sentencing courts as factors that may tend to mitigate sentence, their absence may not be regarded as constituting a feature of aggravation: see for example *Mune v The Queen* [2011] VSCA 231; *R v Duncan* [1998] 3 VR 208; *R v Kumar* [2002] VSCA 139. Callaway JA put the proposition succinctly: “Whilst remorse is a circumstance of mitigation, its absence is not an aggravating factor: *R v Duncan* [1998] 3 VR 208, 215; *Mune v The Queen* [2011] VSCA 231 [12].”

11.2.8.1 Remorse

In *Lyddy v The Queen* [2019] VSCA 35 the appellant had pleaded guilty to 11 armed robberies, one robbery and 1 attempted armed robbery committed over a two-week period. In sentencing the appellant to a TES of IMP8y1m/5y7m the trial judge did not accept that the appellant had demonstrated remorse. In allowing his appeal and substituting a TES of IMP7y3m/5y Kyrrou JA & Taylor JJA applied *Broadbent v The Queen* [2009] VSCA 320 and considered *Barbaro v The Queen* (2012) 226 A Crim R 354, 365-6 and held at [62]-[69] (emphasis added):

[62] “For some time, courts have drawn a distinction between the sorrow of an offender for being caught and punished, and the regret of an offender for the harm caused by his or her actions. Only the latter is remorse for sentencing purposes. If such remorse is to be relied upon as a mitigating factor, the burden falls upon an offender to identify evidence of it.

[63] In *Barbaro v The Queen* (2012) 226 A Crim R 354, 365-6 [38]–[41], this Court said the following:

‘A person wishing to rely on remorse as a mitigating factor needs to satisfy the court that there is genuine penitence and contrition and a desire to atone. In many instances, the most compelling evidence of this will come from testimony by the offender. A judge is certainly not bound to accept secondhand evidence of what the offender said to a psychiatrist or psychologist or other professional, let alone testimonials from family or friends, or statements from the Bar table.

If there is evidence of remorse, and if that remorse is genuine, it is a very important element in the exercise of the sentencing discretion. Remorse of this kind enhances prospects of rehabilitation and reduces the need for specific deterrence. An offender who pleads guilty because he or she has an accurate appreciation of the wrongfulness of his or her offending, and of its impact upon its victim or victims, and who desires to do what reasonably can be done to repair the damage and to clear his or her conscience, is someone to whom mercy — in the form of a material reduction in what would otherwise be an appropriate sentence — is very likely due.

But sentencing discounts, and especially significant sentencing discounts, should not be given unless remorse is established by proper evidence, or unless on a proper basis the judge is content to relieve the offender of the need to discharge that burden. In adopting the necessary “precision of approach...in complying with the obligation to take the plea of guilty into account”, sentencing judges should approach with caution assertions that the plea itself is a sufficient basis for a conclusion that remorse is present, warranting a discount over and above that which is to be granted on the basis of utility. As Redlich JA and Curtain AJA point out in *Phillips*, “[t]he conduct and statements of the offender over time provide a more informative and precise guide than the plea alone as to whether genuine and deep contrition exists”.

We respectfully agree with Redlich JA and Curtain AJA that “[i]n every case the genuineness of the contrition and the time and manner in which it is manifested in association with the plea of guilty will require evaluation by the sentencing judge in the light of the overall complexity of the facts before the court”.

[64] It is clear that the time at which a sentencing judge is to determine whether an offender has demonstrated genuine remorse in this sense is subsequent to the offending. As this Court observed in *Broadbent* [2009] VSCA 320 at [19]:

‘[W]e do not think that Broadbent’s (admitted) lack of consideration for others at the time of the offending justified any “qualification” of the Court’s acceptance of the remorse which he expressed subsequently. In our view, Broadbent’s expressions of “deep remorse” — to which both the prosecutor and defence counsel had drawn attention — reflected his subsequent realisation of, and deep regret for, the very lack of consideration for others which had characterised the offending. The expressions of remorse were couched in unusually emphatic terms. There being no suggestion by the prosecutor in the course of the plea that Broadbent’s remorse was other than genuine and heartfelt — as it appeared to be — he was entitled to have it given full weight in the sentencing process.’

[65] It is beyond doubt that at the time of his offending the appellant well understood the impact of his continuing actions upon his victims. But this was neither an aggravating factor of his offending (*Broadbent* at [18]) nor relevant to the task of the judge in assessing whether he had demonstrated genuine remorse.

[66] While the fact of the appellant's "ice" use was not mitigatory of his conduct, it is relevant to describing that conduct as a spree. Over a short period of time, the appellant's ongoing focus was the repeated need to obtain money for illicit drugs or to pay drug debts.

[67] When that spree ended with his arrest and remand, the appellant moved his focus to the broader consequences of his actions. **It is from the conduct of the appellant at that time and subsequently that the assessment of his claimed remorse should have been made.**

[68] The judge was not bound to accept the evidence of remorse as relied upon by the appellant, and did not. However, this rejection of evidence of remorse was not made because her Honour was not satisfied by that evidence. Rather, as accepted by the respondent, the judge decided not to accept the evidence of remorse because it was inconsistent with a lack of remorse at the time of offending. In this regard, her Honour erred.

[69] In our view, the evidence available to her Honour as to the expressions and actions of the appellant subsequent to the offending should have anchored a finding that the appellant had demonstrated a measure of remorse. This is apparent from his words and demeanour in the recorded interview, which, as we have said, we have watched. It is also demonstrated by the appellant's expression of regret to Dr Scally and his then counsel. The evidence did not support a finding of "deep regret" but in the circumstances of the case, a measure of remorse was established."

11.2.8.2 Discount for guilty plea and/or admission of offence

In *R v Robertson* [2005] VSCA 190 at [12] Chernov JA – with whom Maxwell P & Callaway JA agreed – cautioned against the granting of a sentencing discount which was "illusory":

"Given his full and frank admissions to the police about the offending conduct, I think that his pleas of guilty evidenced genuine remorse, his acceptance of responsibility for the offending conduct as well as a willingness to facilitate the administration of justice. I consider that these factors justify, in this case, a sentencing discount that is considerably greater than 'minimal'. But, even if it could be properly said that the pleas of guilty did not demonstrate genuine remorse and acceptance of responsibility by the appellant, they do nevertheless show a willingness on his part to facilitate the course of justice and, for that reason alone, a discount greater than "minimal" would have been warranted in this case. On either basis, the sentencing discount should not be illusory but should be seen to be reflected in the sentence imposed."

In *R v DTR* [2005] VSCA 291 at [9] Buchanan JA – with whom Callaway & Vincent JJA agreed – noted that the appellant had pleaded guilty at the first opportunity, had regretted his actions immediately and was clearly truly remorseful. At [11] His Honour referred with approval to *R v Ellis* [1986] NSWLR 603 at 604 where Street CJ said:

"Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward to sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence."

In *R v Doran* [2005] VSCA 271 at [14] Buchanan JA – with whom Eames & Nettle JJA agreed – explained that the consequences of the appellant's voluntary confessions of crimes which might otherwise not be detected were that "they reduce the need for a sentence to personally deter the appellant, they increase the prospects of his successful rehabilitation and they demonstrate genuine remorse for his actions". See also *Ryan v R* (2001) 206 CLR 267 especially at 295 per Kirby J; *R v Brazel* (2005) 153 A Crim R 152 at 159 per Callaway JA; *R v CLP* [2008] VSCA 113 at [22]-[24] where Neave JA noted that "weight should also be given to an admission of sexual offences because it may help the victims to recover from the harm caused to them". See also *JBM v The Queen* [2013] VSCA 69 at [39]-[50].

In *R v DW* [2006] VSCA 196 Nettle, Neave & Redlich JJA said at [19]:

“In our view the judge was entitled to take into account, as a factor which limited the discount to be allowed for the appellant's plea of guilty, that the appellant was so little concerned about the effects of his offending upon his granddaughter that he should choose to subject her and her parents to the ordeal of a committal hearing and, worse, prolonged cross-examination. It is one thing to plead guilty at the door of the court when it looks like the game may be up. The law takes the view that that is worth a discount. But it is quite another to plead guilty immediately and thereby save the victims and the community any further burden. That is likely to attract a much larger discount and a good deal more respect.”

In *R v Guthrie & Nuttall* [2006] VSCA 192 at [75]-[79] Chernov, Vincent & Redlich JJA - adopting dicta from *R v Hall* (1994) 76 A Crim R 474 and *R v Ioane* [2006] VSCA 86 – held that it was a sentencing error to balance the plea of guilty against the seriousness of the offence as the sentencing judge had done when he said: “The extreme gravity of your conduct outweighs the benefit to which you might otherwise be entitled for your plea of guilty.”

The sentencing remarks of King J in *R v Williams* [2007] VSC 131 make it clear that it is “pragmatic and utilitarian” to give a discount to an offender who has pleaded guilty even though he had no genuine remorse for his crimes. In sentencing the offender to life imprisonment with a minimum of 35 years on 3 counts of murder and one count of conspiracy to murder, her Honour said at [129]:

“I do intend to impose a minimum term, but that is on the basis of one significant factor only, which are your pleas of guilty to these offences. Whilst I find that you do not have any genuine remorse for the crimes, I am still obliged to take into account in your favour that you have entered pleas of guilty. It is pragmatic and utilitarian to give you a discount for entering those pleas, for by doing so you have prevented this Court from spending anywhere between 5 to 10 years hearing your trials and the appeals from those trials. Equally you have released the police officers involved in this task force to move onto other pressing cases that need investigating, and enabled those in the Office of Public Prosecutions to pursue other prosecutions. The amount of money that has been saved as a result is considerable. That behaviour must be encouraged. It must be made clear to all charged with offences, of whatever type, that if they do enter a plea of guilty to the offences that they will receive a real and significant discount. Without your pleas of guilty I would not have imposed a minimum term for these offences, even allowing for the other mitigating material upon which your counsel relied.”

In *R v BF* [2007] VSCA 217 the Court of Appeal held at [31] & [52]-[57] that the appellant's early guilty plea entitled him to some reduction of sentence and that “he was entitled to an added element of leniency because his admission of digitally penetrating his niece [who was herself uncertain whether she had been penetrated] provided the basis for the charge of digital rape: *R v Ellis* (1986) 6 NSWLR 603, 604 per Street CJ.” However, the Court of Appeal noted at [56] that the appellant's admission should not be given as much weight as the admission to offences against unknown victims in *Ryan v R* (2001) 206 CLR 267, 272 [12] (McHugh J), 295 [95]-296 [98] (Kirby J) or the admission of an offence to which the offender had not previously been linked in any way in *R v Brazel* (2005) 153 A Crim R 152, 159 [21] per Callaway JA; [2005] VSCA 152. See also *R v Marcus* [2004] VSCA 155 (appellant who pleaded guilty to cocaine importation was entitled to leniency because he had disclosed two previous offences unknown to authorities); *R v Doran* [2005] VSCA 271 (appellant who was being investigated for particular sexual offences admitted committing other offences against children).

In finding specific error in *R v Andrick* [2010] VSCA 238 – a case in which the appellant had pleaded guilty to two counts of theft, two counts of obtaining property by deception, one count of burglary and one count of attempting to obtain property by deception – Weinberg JA (with whom Ashley JA agreed) said at [34]:

“A discount of only six months on a putative sentence of six years and six months, and six months on a putative non-parole period of five years, does not adequately reflect the utilitarian value of a plea of guilty, still less accord sufficient weight to such remorse as might otherwise be thought to attached to that plea.”

Other cases in which the mitigatory effect of a plea of guilty has been discussed include *R v Gray* [1977] VR 225; *R v Rostom* [1996] 2 VR 97; *R v Donnelly* [1998] 1 VR 645; *Cameron v R* (2002) 209 CLR 339; *R v Diep* [2003] VSCA 203; *R v Saw* [2004] VSC 117 at [36]; *DPP v Bennett* [2004] VSC

207 at [33] per Cummins J; *R v Bulger* [1990] 2 Qd R 559; *R v Tan* (1993) 117 FLR 38; *Pavlic v R* (1995) 5 Tas R 186; *R v Tasker & Tasker* (2003) 7 VR 128 {[2003] VSCA 190}; *R v Ly* [2004] VSCA 45 at [19]-[22] per Coldrey AJA; *R v Taing* [2004] VSCA 46; *R v Kittikhoun* [2004] VSCA 194 at [9]; *R v Stephen Mark Makin* [2004] VSC 485 at [25]-[28]; *R v Nikodjevic* [2004] VSCA 222 at [28]-[33]; *R v HNT* [2005] VSCA 12 at [14]; *R v Brazel* [2005] VSCA 56 at [21]-[22]; *R v Le*; *R v Nguyen* [2005] VSCA 284 at [8], [13] & [17]; *R v Sullivan* [2005] VSCA 286 at [26]; *R v Slattery (Sentence)* [2008] VSC 81 at [35]; *R v Morrison* [2011] VSC 311 at [27]; *R v Coombes* [2011] VSC 407 at [75]-[83]; *R v Sherna* [2011] VSCA 242 at [16]-[22] & [52]-[97]; *DPP v Breuer* [2011] VSCA 244 at [17]-[22]; *R v Rintoull* [2011] VSCA 245 at [34]-[36]; *John Gordon v The Queen* [2013] VSCA 343 at [31]-[42] & [70]-[72]; *Hunter v The Queen* [2013] VSCA 385 at [13]-[24] & [107]-[135]; *DPP v Green* [2020] VSCA 23 at [74]-[78].

Until 30/06/2008 it had been the law in Victoria that a sentencing judge was not obliged to quantify any discount which he or she had given for a plea of guilty: see e.g. dicta of the Court of Appeal in *R v McIntosh* [2005] VSCA 106 [25] (Chernov JA), [30] (Batt JA) and *R v Rowlands* [2007] VSCA 14 at [10]. However that was altered by s.362A of the CYFA, introduced as and from 01/07/2008 by s.4 of the Criminal Procedure Legislation Amendment Act 2008 (Vic) [Act No.8/2008]. That section provides:

362A Sentence discount for guilty plea

- (1) If-
 - (a) in sentencing a child, the Court imposes a less severe sentence than it would otherwise have imposed because the child pleaded guilty to the offence; and
 - (b) the sentence imposed on the child is or includes a youth attendance order, a youth residential centre order or a youth justice centre order-
the Court must state in respect of-
 - (c) each offence; or
 - (d) if an aggregate sentence is imposed in respect of two or more offences, those offences-
the sentence that it would have imposed but for the plea of guilty.
- (2) In the case of a sentence other than a sentence referred to in subsection (1)(b), the Court may state the sentence that it would have imposed but for the plea of guilty.
- (3) If the Court makes a statement under this section, it must cause to be noted in the records of the Court in respect of-
 - (a) each offence; or
 - (b) if an aggregate sentence is imposed in respect of two or more offences, those offences-
the sentence that it would have imposed but for the plea of guilty.
- (4) The failure of the Court to comply with this section does not invalidate any sentence imposed by it.
- (5) Nothing in subsection (4) prevents a court on an appeal against sentence from reviewing a sentence imposed by the Court in circumstances where there has been a failure to comply with this section.

Section 6AAA of the Sentencing Act 1991 (Vic), introduced on the same day by s.3 of the amending Act, imposes a broadly similar obligation on a Court sentencing an offender under the Sentencing Act to a term of imprisonment or imposing a fine exceeding 10 penalty units or an aggregate fine exceeding 20 penalty units. Ironically s.6AAA is less onerous on a court ordering imprisonment under the Sentencing Act than is s.362A on a court ordering sentences of detention on a child under the CYFA in that s.6AAA(2) does not require the court to make a declaration in respect of each individual offence whereas s.362A(1)(c) requires the Children’s Court to make a declaration in respect of each individual sentence of detention.

In his ruling on s.6AAA handed down on 22/07/2008 in *R v Flaherty (No 2)* [2008] VSC 270; (2008) 19 VR 305 Kaye J held at [8]:

- It was not the intention of the Criminal Procedure Legislation Amendment Act 2008 (Vic) to abrogate, in its entirety, the fundamental approach to sentencing, as an “instinctive synthesis” of all relevant circumstances (see e.g. *R v Williscroft* [1975] VR 292, 300).
- It was not the intention of the legislature that s.6AAA should operate to make sentences either more or less severe.
- It was the clear legislative intention that the sentencing judge should identify, in terms of an actual period of imprisonment, the effect on a sentence of a plea of guilty. The underlying object of

s.6AAA appeared to be to advance the public interest in guilty persons pleading guilty, and to provide for a conspicuous reward to those who do so.

However, his Honour went on to discuss the considerable difficulties in putting that legislative intention into effect, describing the process at [11] as “artificial and difficult from an intellectual point of view” and referring at [13]-[14] to the divergent approaches of the Courts of Criminal Appeal in NSW and South Australia in quantifying an appropriate ‘discount’. At [15] his Honour concluded:

“[I]n the circumstances of this case, it is not possible to hypothesise, realistically, what sentence I would have imposed on the prisoner if he had not pleaded guilty, but if all the other circumstances of the case were the same. Nonetheless, in pronouncing sentence, I must endeavour to do so, in order to comply with s 6AAA, and to inform the prisoner of the term of imprisonment he has been spared as a result of his guilty plea. The only method by which I can achieve that object is to determine, first, the appropriate sentence to be imposed on the prisoner by an instinctive synthesis of all the circumstances, including his guilty plea, as attended by remorse and an endeavour to be cooperative. I have then attempted to identify how much longer the sentence would have been if the prisoner had not pleaded guilty. In that way I have, somewhat artificially, arrived at the hypothetical sentence postulated by s 6AAA, if the prisoner had not pleaded guilty. Doing the best I can, I estimate that the prisoner’s guilty plea, which I consider to be made with remorse and with the intention to facilitate the course of justice, has operated to reduce the prisoner’s head sentence, and minimum non-parole period, each by a period of two years. Thus, hypothetically, if the prisoner had not pleaded guilty, for the purposes of s 6AAA, I state that I would have imposed a sentence of 23 years’ imprisonment with a minimum non-parole period of 18 years.”

A similar approach has been adopted in *R v Churchill, McGillivray and Whittaker* [2008] VSC 393 at [37] per Kaye J and in *R v Diver* [2008] VSC 399 at [67] per Coghlan J. See also *R v Cedric* [2011] VSCA 258 at [37]-[41]; *SD v The Queen* [2013] VSCA 133 at [63].

In *R v Johnston* [2008] VSCA 133 at [17], Nettle JA (with whom Buchanan & Ashley JJA agreed) pointed out that s.6AAA says “nothing of the additional discount which is to be allowed for a plea of guilty and cooperation with the Crown”.

In *R v Whitlow* [2009] VSCA 103 at [47] Dodds-Streeton JA (with whom Redlich JA agreed) held that there was no requirement that the reduction of a sentence announced pursuant to s.6AAA must apply proportionately to the head sentence and the non-parole period but rather that the contrary was more the norm:

“In my opinion, a significantly greater or arithmetically disproportionate reduction of the non-parole period (compared with the head sentence) due to a guilty plea, particularly where it promotes or bespeaks rehabilitation, is consistent with, rather than precluded by, the principles expressed in applicable authorities.”

In *R v Burke* [2009] VSCA 60 the Court of Appeal rejected a submission that the ‘notional’ sentence announced in accordance with s.6AAA is appealable, holding at [30] that this notional sentence “is not part of the sentence imposed”.

There appears to be a conflict of authority on whether the discount allowed on a plea of guilty is examinable for specific error rather than merely being a particular ground of manifest excessiveness. In *R v Scerri* [2010] VSCA 287 Maxwell P & Buchanan JA held that it was not so examinable. In *R v Howard* [2009] VSCA 281 at [15] the Court of Appeal held that where a sentencing judge has grossly undervalued the importance of the discount for pleading guilty, it may be viewed as a sentencing error and the sentencing discretion re-opened. In *R v Ciantar and Rose* [2010] VSCA 313 at [36] Nettle & Bongiorno JJA left the question open, stating that to the extent that there is a difference between *Howard* and *Scerri*, it should be resolved in the context of a case where it is likely to effect the outcome. In *R v Rizzo* [2011] VSCA 146 at [33] the Court of Appeal (Warren CJ, Neave JA & Lasry AJA) referred to *R v Scerri* with apparent approval. In *R v Saab* [2012] VSCA 165 the Court of Appeal (Buchanan, Weinberg & Mandie JJA) discussed the cases of *Burke*, *Scerri*, *Howard*, *Ciantar and Rose* & *Rizzo* – as well as the cases of *Orbit Drilling Pty Ltd v The Queen* [2012] VSCA 82 at [67], *Lunt v The Queen* [2012] VSCA 62, *Cedric v The Queen* [2011] VSCA 258, *Phillips v The Queen* [2012] VSCA 140, *DPP (Vic) v Terrick* (2009) 24 VR 457,459-60, *Gorlachencharau v The Queen* [2011] VSCA 432, *Pesa v The Queen* [2012] VSCA 109 & *R v Giles* [1999] VSCA 208 – and favoured the *Scerri* dicta, holding at [58]: “We think that the line of authority holding that a s 6AAA statement is generally not to be taken to exhibit error should be followed.”

11.2.8.3 Assistance to authorities (Informer's discount)

In *R v QMN; R v WD* [2004] VSCA 32 at [30]-[31] O'Bryan AJA said:

"It is sentencing principle that an informer is entitled to an informer's discount when the circumstances of assistance given to the police are made known to the sentencing court. A substantial discount should be given to an offender who volunteers useful information about offences not known to the police: *R v Macedo* [unreported, Court of Criminal Appeal, 04/02/1993] at 7.

Leniency is extended to an informer, firstly because it is in the interests of the community to encourage informers, secondly because the informer is exposed to a risk in prison and within the community when the informer's conduct becomes known: *R v Shane Anthony Pividor and Bruce Alan Dale* [2002] VSCA 174 at 7."

In *R v Bright* [2006] VSCA 147 at [11] Bongiorno AJA, with whom Buchanan & Nettle JJA agreed, said:

"Co-operation with authorities in the prosecution of other criminals is a mitigating factor of a high order. The discount given to a person who pleads guilty and assists or offers to assist in other prosecutions is sometimes extremely large indeed, particularly perhaps in a drug case. See *R v Ritter* [2000] VSCA 135 and *R v Rostom* [1996] 2 V.R. 97."

In *R v DS* [2005] VSCA 99 the Court of Appeal re-sentenced the appellant, allowing a substantial discount for her assistance to the authorities, her giving of evidence in court and her provision of an undertaking to provide co-operation to the authorities in the future. At [19] Chernov JA (with whom Batt & Vincent JJA agreed) noted in relation to "the obviously significant help that she has provided to the police and immigration authorities" that "serving a term of imprisonment will be of particular difficulty for the appellant given her cultural background and isolation in Australia".

In *DPP v Karipis* [2005] VSCA 119 at [9] the Court of Appeal considered the 17 year old respondent's **willingness** to supply information regarding his co-offenders was relevant even though the information was of no real assistance.

R v Mr Z [2005] VSC 90 may well represent the high-water mark for discounts for past & promised future assistance to the authorities. In sentencing Mr Z to 3 years' imprisonment wholly suspended for 3 years upon his pleading guilty to a charge of trafficking in a commercial quantity of amphetamine, Teague J said at [8]:

"Your choice to assist the authorities has several implications. It warrants a very large reduction in the sentence imposed for purely utilitarian reasons dictated by the public interest. It is now imperative that you be provided with a high level of protection. If it had not been for the co-operation, past and future and the other mitigating factors, you would have been sentenced by me to a period of imprisonment of at least eight years. Given the significance of the co-operation and other matters, it was understandable that, at the plea hearing, [the prosecutor] should say that a sentence of imprisonment, wholly suspended, was within the range of appropriate sentencing dispositions."

In *R v DJ* [2007] VSCA 148 at [14]-[15] Maxwell P said:

"The passages which his Honour has read from the letter which was before the sentencing court underline the quite exceptional courage which the appellant has shown, and has been required over some years to continue to show. He has, in my view, performed a notable public service by giving evidence, on successive occasions, about a violent killing in jail. The risks of giving evidence in relation to a crime of that kind are well known.

There is a clear public policy behind encouraging, and recognising, that kind of cooperation in the solving of crime. Given that the evidence was in such strong terms about the quality of the assistance given, it was in my opinion incumbent on the sentencing court to identify very clearly the character of the assistance, to acknowledge its public importance, and to make quite clear that a significant discount has been applied."

In *R v Johnston* [2008] VSCA 133 Nettle JA (with whom Buchanan & Ashley JJA agreed) pointed out at [16]-[19] that generally Victorian courts have not quantified the informer discount:

[16] "By and large courts in this state have been loath to quantify the amount of such informer discount as they may allow. Despite observations of McGarvie J in *R v Perrier* (No 2) [1991] 1 VR 717 and *R v Nagy* [1992] 1 VR 637, 644-5 as to the desirability of

identifying the extent of the discount, other judges have castigated the idea as inconsistent with the notion of intuitive synthesis (*Ibid.* 638 Crockett J, with whom Phillips J agreed); *R v Schioparlan and Georgescu* (1991) 54 A Crim R 294, 305 (Young CJ). More recently, this Court has recognised that it may be acceptable to identify the amount of a discount in some circumstances: *R v ZMN* (2002) 4 VR 537, 542 (Charles JA). But in *R v Markarian* (2005) 228 CLR 357,375 the majority of the High Court restricted such occasions to simple cases in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters. See too *R v Sahari* [2007] VSCA 235 at [18] per Kellam J. This is not such a case. It is a complex case in which the need for denunciation, general deterrence and just punishment must be weighed against the social utility of granting substantial sentencing discounts to offenders who agree to inform: *R v Su* [1997] 1 VR 1,77.

[17] Following *Markarian*, Parliament amended the Sentencing Act 1991 to require sentencing judges to state the sentence and non-parole period which but for a plea of guilty would have been imposed: s.6AAA. But those amendments say nothing of the additional discount which is to be allowed for a plea of guilty and cooperation with the Crown...

[18] There is also a further difficulty that, in the absence of legislative prescription or authoritative appellate pronouncement, there is no necessarily correct amount of the informer discount in a given case. While there are decisions which suggest a discount of 50%, or perhaps even as much as two thirds (see e.g. *R v Perrier (No 2)* [1991] 1 VR 717, 726 (McGarvie J), it is inevitable that circumstances will differ between cases. For example, in some cases the quality of information which an informer is able to provide to authorities may be of such limited utility that any discount would be thought of as excessive: *R v Cartwright* (1989) 17 NSWLR 243, 252-3; *R v Su* [1997] 1 VR 1, 78-9. In others, it could be that the information which the informer is able to provide is so valuable, and the risks to which he may expose himself by informing are so great, that a discount of 50% would not be enough: *R v Lindstrom* [2008] NSWCCA 160 at [58]-[60]. Other relevant considerations include the nature and gravity of the crime, the offender's moral culpability, prevalence and the need for deterrence of the crime in question (*R v Downie and Dandy* [1998] 2 VR 517, 520-522; cf *R v Lim and Ko* [1998] VSCA 54 [31]-[34]) and whether it is perceived that there is a need to encourage offenders to inform against other offenders concerning crimes of that kind.

[19] Under a more perfect sentencing regime, the level of informer discount might be worked out as a matter of social policy and provided for expressly in legislation. But as it is, sentencing judges must make do with their own conceptions of what is desirable. Effectively, the only safeguard is the relatively rough and ready measure of manifest excessiveness or inadequacy as a ground of appeal."

See also *R v Crossley* [2008] VSCA 134 where Ashley JA (with whom Buchanan & Nettle JJA agreed) after quoting with approval some of the above dicta of Nettle JA in *R v Johnston* said at [31]: "In this instance, I think that the informer's discount should be accounted considerable, though not of the highest order."

In *Azaan Rosales (a pseudonym) v The Queen* [2018] VSCA 130 the applicant had provided assistance to the authorities categorized by the Court of Appeal as "medium level assistance". In refusing leave to appeal against a sentence of IMP7y/4y on a charge of attempting to possess a commercial quantity of methamphetamine, Priest & Beach JJA said at [25]-[27]:

"The principles relating to the sentencing of offenders who render assistance to authorities were recently discussed in *DPP v Cooper* [2018] VSCA 21 at [42]-[45] (Weinberg, Priest and Beach JJA). As was there observed, the extent of any sentencing discount given to an informer will, of course, vary from case to case: *Cottee v The Queen* [2010] VSCA 285, [23]. In *R v Johnston* (2008) 186 A Crim R 345 a discount of fifty per cent on sentence was thought to be justified because of the very high level of assistance provided to authorities. There is, however, no standard discount, so that the assessment of an appropriate discount cannot be approached in a mechanical or mathematical way: *R v Kohunui* [2009] VSCA 31, [25] and compare ss 16A(2)(h) & 16AC of the *Crimes Act 1914* (Cth). It is the genuine cooperation of the person furnishing the assistance which is important (whether or not the information turns out in fact to have been effective), although the information must be such as could significantly assist the authorities: *R v Freeman* (2001) 120 A Crim R 398, 405 [37] (Coldrey AJA).

Given the seriousness of the applicant's offending, had it not been for the applicant's assistance to authorities, we would have considered the sentence imposed on him to have been remarkably lenient (if not inadequate). It is his assistance to authorities which justifies the imposition of the same sentence upon him as was imposed on his co-offender (whose offending, we accept, was of a lower order than the applicant's).

In those circumstances, we are not persuaded that the principle of parity has been infringed, or that the sentence imposed on the applicant is otherwise manifestly excessive. Moreover, we are not persuaded, in any event, that any different sentence should now be imposed."

In *Collins (a pseudonym) v The Queen* [2018] VSCA 131 the applicant had provided eye witness information clearly identifying his co-offenders in a serious arson and had done so at an early stage. He was the only offender to have done so. The prosecutor accepted that the applicant's cooperation was of "high value". The applicant had also given an undertaking to assist, after sentencing, law enforcement authorities in the prosecution of offences. Allowing an appeal against a TES IMP5y6m/2y6m on charges of arson and handling stolen goods, the Court of Appeal imposed a TES IMP3y4m/20m and declared pursuant to s.6AAA(2) of the Sentencing Act that "but for the applicant's pleas of guilty and his cooperation" the Court would have imposed a TES IMP8y/5y.

In *Safi Haamid (a pseudonym) v The Queen* [2018] VSCA 330 the Court of Appeal rejected the applicant's submission that the discount of approximately 30% 'wrapped up' both in his guilty plea and his cooperation was inadequate. At [24]-[25] the Court said:

"The principles governing the discount on sentence for an offender who cooperates with the authorities are well known...For the purposes of the current application, it suffices to refer to the following:

- (a) There is no set 'tariff' or standard discount to be provided for cooperation: *R v Cartwright* (1989) 17 NSWLR 243, 255–6 ('*Cartwright*'); *R v Johnston* (2008) 186 A Crim R 345, 350–1 [18], [21] ('*Johnston*'); *DPP v Cooper* [2018] VSCA 21 [45] ('*Cooper*'); *Ooi* [2018] VSCA 78 [54].
- (b) Factors relevant to the determination of the discount to be provided include:
 - i. the quality and reliability of the information provided by the offender and its value to law enforcement authorities: *Johnston* (2008) 186 A Crim R 345, 350 [18]; *Collins v The Queen* [2018] VSCA 131 [23] ('*Collins*');
 - ii. whether the offender fully and frankly discloses all relevant information of which he or she is aware: *R v Su* [1997] 1 VR 1, 79 ('*Su*'); *R v Golding* (1980) 24 SASR 161, 173 ('*Golding*');
 - iii. whether, in addition to providing information, the offender has undertaken to continue to provide assistance and to give evidence against other offenders: *Cooper* [2018] VSCA 21 [45];
 - iv. the nature and gravity of the offences disclosed by the information provided by the offender and the number of people implicated: *Johnston* (2008) 186 A Crim R 345, 350 [18];
 - v. the nature of the offender's involvement in the offending in respect of which he or she provides information and his or her moral culpability: *Johnston* (2008) 186 A Crim R 345, 350 [18];
 - vi. the extent to which the offender and his or her family are exposed to the risk of harm as a result of the offender's cooperation: *Cartwright* (1989) 17 NSWLR 243, 255; *Cooper* [2018] VSCA 21 [45]; *Collins* [2018] VSCA 131 [24]; and
 - vii. whether the offender's cooperation has already achieved positive law enforcement outcomes, such as recovery of stolen or dangerous goods, the interception of a shipment of illicit drugs, the prevention of an act of terrorism or the arrest or conviction of offenders: *Golding* (1980) 24 SASR 161, 173.
- (c) The offender is entitled to a discount even if his or her motive is self-interest. However, if the motive is remorse, contrition, acceptance of responsibility or rehabilitation, a greater discount may be warranted based on the application of normal sentencing principles: *Cartwright* (1989) 17 NSWLR 243, 252.
- (d) The discount to be provided to a 'true informer' may be as high as 66 per cent: *Cottee v The Queen* [2010] VSCA 285 [23] ('*Cottee*'); *Cooper* [2018] VSCA 21 [43]. An example of a 'true informer' is a person who is a member of an organised crime syndicate who provides information against other members of the syndicate in circumstances where his or her personal safety, and that of members of his or her family, is placed at grave risk.

- (e) There are a number of cases in which a discount of 50 per cent has been provided: See, eg, *Johnston* (2008) 186 A Crim R 345, 350 [20].
- (f) The magnitude of any discount provided is not always apparent. Unlike the discount for a plea of guilty which must be quantified under s 6AAA of the *Sentencing Act 1991*, s 5(2AC) of that Act provides that a sentencing court need not quantify any discount provided for cooperation.
- (g) As long as the offender provides genuine cooperation, the fact that, for reasons unconnected to the offender, the cooperation is ultimately not required to achieve a law enforcement outcome does not disentitle him or her to a discount: *Cartwright* (1989) 17 NSWLR 243, 253; *R v Freeman* (2001) 120 A Crim R 398, 405 [37] ('*Freeman*'); *DPP v Nazari* [2010] VSCA 293 [31]–[32]; *Cottee* [2010] VSCA 285 [24]. An example is where the offender undertakes to give evidence against a co-offender but is not required to do so because the co-offender decides to plead guilty: *Cartwright* (1989) 17 NSWLR 243, 253; *Freeman* (2001) 120 A Crim R 398, 405 [37].
- (h) The discount allowed for cooperation will necessarily affect both the head sentence and the non-parole period: *R v Duncan* [1998] 3 VR 208, 214–5 ('*Duncan*').

The Court will give considerable weight to any assessment in a letter of assistance in relation to matters such as the value of the offender's assistance and the degree of risk to his or her safety. However, the Court will make its own assessment of these matters."

At [34]-[48] the Court discussed four ways in which references to the applicant's cooperation with authorities might be addressed in sentencing remarks and ultimately preferred separate confidential and public versions of sentencing remarks, the former fully explaining how cooperation informed exercise of the sentencing discretion.

Other cases in which an informer's discount has been discussed include *R v Gavin James Brown* [2005] VSC 63 and the cases cited therein by Whelan J at [9]: *R v Culleton* [1999] VSC 478; *R v Drummond* [2000] VSC 206; *R v Rees* [2002] VSC 37; *R v Newton* [2002] VSC 182; *R v Miller* [2002] VSC 456; *R v Stanbury* [2003] VSC 93; *R v Hewitt* [2004] VSC 487 at [12]; *R v Hentschel* [2005] VSC 6 at [11]-[12]; *R v Tania Lee-Anne Herman* [2005] VSC 234 at [11]; *R v Miller* [2006] VSCA 140 at [11]; *R v Tame Kohonui* [2007] VSC 180 at [36]; *R v John Kohonui* [2007] VSC 181 at [34]; *R v Herbert* [2007] VSC 264 at [16] & [20]; *R v EDB* [2008] VSCA 18 at [13]; *R v Koumis & Ors* [2008] VSCA 84 at [13]-[18]; *R v CP* [2008] VSCA 272 at [16]-[17]; *Safi Haamid (a pseudonym) v The Queen* [2018] VSCA 330 at [24]-[27] & [34]-[48]; *Anderson v The Queen* [2019] VSCA 42 at [66]-[69] & [76]; *Niko Robers (a pseudonym) v DPP Cth* [2019] VSCA 230 at [7] & [12]-[15]; *Levy v The Queen* [2020] VSCA 44 at [73]-[75].

11.2.8.4 Undertaking to give evidence against co-accused

In *R v Johns* [2010] VSCA 63 the trial judge had given the accused a less severe sentence than she would otherwise have imposed because of her undertaking to give evidence against a co-accused but said that "it will not be as substantial a discount as would have been the case had [she] been able unreservedly to accept [the] undertaking". Allowing an appeal the Court of Appeal held that assessment of the likelihood of the undertaking being fulfilled is irrelevant in sentencing the undertaker. At [11]-[12] Buchanan JA (with whom Maxwell P & Harper JA) agreed said:

"In my view there is a distinction between evaluating the assistance which an offender can give and assessing whether an undertaking to give assistance will be fulfilled. The former is a factor to be taken into account in determining an original sentence. See for example *R v Johnson* 2008 [VSCA] 133, [18] (Nettle JA); *R v Cartwright* (1989) 17 NSWLR 243, 252-3 (Hunt and Badgery-Parker JJ). The latter may found a later appeal by the Director.

In my view the existence of the safeguard of appeal by the Director rules out consideration of the likely performance of the undertaking in sentencing the person who has given it. Parliament has determined that the matter is to be judged with the benefit of hindsight. Accordingly I consider that the sentencing judge erred in taking into account a matter to the prejudice to the applicant which was strictly irrelevant."

In *DPP v Mann* [2006] VSCA 228 the respondent had failed to comply with an undertaking he had given at the sentencing hearing to give evidence against a co-accused. At [10] Warren CJ said: "When the respondent gave the undertaking, he in effect entered into a contract with the community. He breached that agreement and falls to be considered for re-sentencing." Referring to *DPP v Akkari* [2003] VSCA 98, *DPP v DJT* [2005] VSCA 270 & *DPP v Kolalich* [2006] VSCA 208, the Court of Appeal said that the principles which apply to re-sentencing upon breach of undertaking to assist authorities are as follows:

- (1) A more severe sentence will be imposed unless exceptional circumstances arise.
- (2) In re-sentencing a respondent, the constraints of the principles of double jeopardy do not arise.
- (3) The sentence cannot exceed that which the judge at first instance specified would have been imposed but for the undertaking.
- (4) Threats made in prison do not alter the fact that a respondent has failed to pay the price of the reduced sentence given at first instance.

See also *DPP v Tong Yang* [2011] VSCA 161; *DPP (Cth) v Carey* [2012] VSCA 15 at [42].

In *DPP v DJT* [2005] VSCA 270 the Court of Appeal allowed a Crown appeal following failure by the young respondent to honour an undertaking to give evidence against an alleged co-offender. There had been a delay in serving the notice of appeal and the respondent had already been released on parole. The respondent was described by the Court of Appeal as “damaged and more than usually vulnerable”. However, he had “made a real effort, whilst in prison and since his release, to turn his life around”. There had been threats to the respondent in prison if he gave the promised evidence. In declining to impose no different sentence but in merely increasing the head sentence and not the non-parole period, the Court of Appeal noted at [12]:

“The threats that were made in prison do not alter the fact that the respondent failed to pay the price for the reduced sentence that the judge gave him, but they do bear on an assessment of his character. To go back on an undertaking because one fears for one’s personal safety is a very different matter from deciding that one simply does not wish to assist the authorities.”

In *R v James Lee Briggs* [2010] VSCA 82 the sentencing judge had imposed a total effective sentence on 3 presentments involving charges of intention & recklessly causing serious injury, armed robbery and theft of 5 years imprisonment with a non-parole period of 3 years. His Honour had said that but for the guilty pleas, the undertaking to give evidence, the indications of remorse and ‘all other relevant matters,’ he would have imposed total effective sentence on all three presentments of 10 years’ imprisonment with a non-parole period of 7 years. Ultimately the respondent had breached his undertaking to give evidence against his co-offender. His excuse was that he had been placed in cells with his co-offender prior to the hearing. In re-sentencing the respondent to 7 years imprisonment with a non-parole of 4 years, Habersberger AJA (with whom Redlich & Harper JJA agreed) said:

[24] “It goes without saying that the respondent should not have been placed in this situation. It is very worrying that counsel for the Director stated that this was not an isolated event. When a prisoner makes the difficult decision to give evidence against another offender, he or she is entitled to expect that the authorities will take the appropriate steps to provide the necessary protection for the co-operating prisoner. Anything less may give rise to a breach of the duty of care owed to every prisoner, but in particular to a prisoner who has agreed to give evidence. To say that this situation was brought about by ‘human error’ is simply not good enough. This failure was particularly inexcusable when the respondent, with the assistance of his solicitor, had made every effort to maximise the chances of him giving the evidence against Kelly.”

[59] The re-sentencing of the respondent is not *tabula rasa* as the sentence cannot exceed that which the judge at first instance would have imposed but for the undertaking: *DPP v Mann* [2006] VSCA 228 at [8] & [10] per Warren CJ. The purpose of s.567A(1A) and (4A) is not punitive but to enable the sentence to be adjusted to the extent considered appropriate: *DPP v S [No.2]* [2009] VSCA 127 at [20] per Vincent, Nettle and Redlich JJA.

[60] ...Although the respondent is no longer entitled to a discount for the undertaking to give evidence, he is still entitled to the full benefit of the mitigating factors to which I have referred. First, he did plead guilty and he is clearly entitled to an appropriate discount for that.

[61] Secondly, the respondent’s remorse was to a large degree evidenced by his willingness to assist the authorities. It is apparent, however, that as the respondent’s failure to comply with that undertaking was due primarily to matters beyond his control, the failure to fulfil the undertaking should not alter the finding that there were genuine feelings of remorse expressed by the respondent at the plea.

[62] Thirdly, there is no reason not to continue to give weight to the learned sentencing judge’s remarks about the possible rehabilitation of the respondent. Whilst the giving of false evidence at Kelly’s committal hearing could reflect on the prospects of the respondent’s rehabilitation it is not a major consideration, in my opinion, when one takes

into account the circumstances of the respondent at that time. Through no fault of his own, he was placed in an invidious situation.”

In *DPP v Connally* [2010] VSCA 301 the Court of Appeal imposed a wholly suspended sentence of 2y in lieu of a 3y adjourned undertaking on a charge of being an accessory to murder. Nettle JA (with whom Hansen JA & Ross AJA agreed) said at [16]:

“The respondent having been sentenced on the basis of an undertaking to give true evidence for the Crown, and he having repudiated his undertaking by giving false evidence to the extent I have identified, the respondent stands to be re-sentenced. The onus is upon the respondent to show by way of exceptional circumstances why the sentence which was imposed on him should not now be increased to reflect all or part of the discount which the judge allowed: *DPP v DJT* [2005] VSCA 270, [12] (Callaway JA); *DPP v S [No2]* [2009] VSCA 127, [22].”

See also *R v Dimitrakis* [2010] VSC 614; *R v Yang* [2011] VSCA 161; *R v Johnson* [2012] VSCA 38; *DPP v Duhovic* [2017] VSC 689 at [65]-[70]; *Bonnie Kate Sawyer-Thompson v The Queen* [2018] VSCA 161 at [48]-[56] per Maxwell P & Tate JA.

11.2.9 Relevance of risk to offender’s safety while in custody / relevance of protective custody

In *York v The Queen* [2005] HCA 60 the appellant, who had pleaded guilty to serious drug offences, had cooperated with prosecuting authorities to secure a conviction in relation to a very brutal execution style murder. There was “clear and unchallenged” evidence that the appellant’s life would be endangered in prison. She had been sentenced at first instance to a wholly suspended term of imprisonment because of that risk. On an Attorney-General’s appeal the Queensland Court of Appeal, by majority, re-sentenced the appellant to serve a term of actual imprisonment. The High Court allowed the appellant’s appeal and restored the trial judge’s sentence. In holding that the safety of the prisoner is a relevant sentencing consideration, Mc Hugh J said at [21]-[23]:

[21] “With great respect, the Court of Appeal erred in finding that ‘the risk to a criminal’s safety whilst in prison’ was not a consideration that was relevant to whether ‘the otherwise appropriate penalty, namely imprisonment, ought not be imposed’. In fixing an ‘appropriate penalty’, a sentencing judge is entitled to take into account any matter that ensures that, to some extent, the fixing of the sentence ‘discharge[s] the true function of the criminal law and the purposes of punishment’ [*Leach* (1979) 1 A Crim R 320 at 327] in the instant case. The common law’s conception of the “purposes of punishment” is settled. Sentences are imposed to further ‘the public interest’ [*Ball* (1951) 35 Cr App R 164 at 165] – which may include the rehabilitation of the prisoner – and to enhance the liberty of society by ensuring ‘the protection of society’ [*Veen v The Queen [No 2]* (1988) 164 CLR 465; *Leach* (1979) 1 A Crim R 320 at 327; *R v Jackway*; *Ex parte Attorney-General* [1997] 2 Qd R 277] from the risk of a convicted criminal re-offending [*R v Morris* (1958) 76 WN (NSW) 40; *R v Radich* [1954] NZLR 86] or others engaging in similar criminal activity [*R v McCowan* [1931] St R Qd 149; *R v Skeates* [1978] Qd R 85; *R v McGlynn* [1981] Qd R 526; *R v Radich* [1954] NZLR 86].

[22] The common law’s conception of liberty is not limited to ‘liberty in a negative sense’, that is, ‘the absence of interference by others’ [Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990) at 55]. It extends to a conception of liberty in a ‘positive’ sense, which is ‘exemplified by the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others.’ [*op.cit.*, p.57]. Thus, sentencing judges must impose sentences that are apt, not merely to prevent a convicted criminal from interfering with others, but also to enable the prisoner’s rehabilitation so as to resume citizenship in the free society [*Duncan v The Queen* (1983) 47 ALR 746; *Bell* (1981) 5 A Crim R 347 at 351-352]. They must seek to ensure that each and every citizen, including a convicted criminal, ‘is properly safeguarded by the law against the predations of others.’ [Braithwaite and Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (1990) at 57]. That means that a sentencing judge must endeavour not only to protect society from the risk of a convicted criminal re-offending but also to protect the convicted criminal from the risk of other prisoners re-offending while in jail.

[23] The common law’s equal concern for the physical safety of each citizen makes it appropriate for a sentencing judge to take into account the grave risk that a convicted criminal could be killed while in jail. What weight should be given to the risk of a prisoner

being killed or injured will depend on all the circumstances of the case including the likelihood of its occurrence.”

In *R v Bangard* [2005] VSCA 313 all 3 members of the Court of Appeal held that the trial judge had been in error in entirely disregarding the fact that the offender was in protective custody as a result of having been assaulted in prison. At [14] Buchanan JA relied on the cases of *R. v. Roston* [1996] 2 VR 97; *R. v. ZNN* (2002) 4 VR 537; *R. v. Slater* (2001) 121 A Crim R 369 at [26]-[29]; *R. v. Fraser* [2004] VSCA 145 at [15] & *R. v. Wilhelm* [2005] VSCA 192 at [5] in holding:

“In my view his Honour ought not to have entirely dismissed what was a factor relevant to sentence. It was an administrative arrangement which the courts do take into account as a matter of course in sentencing. The fact that the appellant was unable to predict the duration of the need for his protection did not wholly devalue its relevance.”

Eames JA agreed at [35] and Nettle JA agreed at [38].

On the other hand, in *R v Stevens* [2009] VSCA 81 Maxwell P, Vincent JA & Hargrave AJA held at [22]-[23] that the circumstances giving rise to the placing of a prisoner in protection are clearly relevant as are the actual restrictions which result [cf *R v Males* [2007] VSCA 302]. However, the appellant’s placement in protection was attributable to his own past conduct and conformed with his own wishes. Accordingly no significance can be attributed to it when considering the sentence to be imposed.

In *DPP v Milson* [2019] VSCA 55 Priest & Weinberg JJA found that sentences of IMP 5y and IMP 12m on charges of intentionally causing serious injury and robbery were manifestly inadequate but nevertheless exercised a residual discretion and dismissed the appeal. At [58]-[59] their Honours said:

“[A] far more significant feature mitigating the respondent’s sentence is the undeniable fact that the respondent’s custody had been more burdensome for him than for other prisoners. He was stabbed in the neck (and underwent necessary surgical intervention); had spent a year or so in solitary confinement, being permitted to leave his cell for only an hour a day; and had other restrictions imposed upon him. Thus, unlike those cases where, for example, a sentencing judge is required to make a prediction of whether an offender’s custody may be more burdensome because of impaired mental functioning [*R v Verdins* (2007) 16 VR 269] the burdensome nature of the respondent’s confinement has empirically been shown. It is not a matter of prediction or mere speculation.

Perhaps ironically, the respondent’s time on remand had also gone some way towards demonstrating his good prospects for rehabilitation. In very unusual circumstances, through his direct intervention with prison authorities, he had himself moved into the mainstream prison population, where he has undertaken educational programs and shown himself to be a ‘model’ prisoner.”

11.2.10 Effect of forgiveness by the victim

By s.5(2)(da) of the *Sentencing Act* 1991 the sentencing judge must have regard to “the personal circumstances of the victim of the offence” and by s.5(2)(db) the judge must have regard to “any injury, loss or damage resulting directly from the offence”. In *R v Skura* [2004] VSCA 53 the appellant, who had been found guilty of incitement to murder her husband, was the beneficiary of a very supportive victim impact statement from him. At [48] Smith AJA said:

“It may be said that neither of the above provisions change the long-standing position that it has always been relevant for a sentencer to have regard to the impact on the victim: *R. v Mallinder* (1986) 23 A Crim R 179,183; *R. v Webb* [1971] VR 147,150. So far as the attitude of the victim to the degree of sentence is concerned, that is generally irrelevant: *R. v Pritchard* (1973) 57 Cr App R 492, 494. But evidence that the victim has forgiven the offender may indicate that the effects of the offence had not been long-lasting: *R v Marasovic* [unreported, CCA Vic, 16/2/1982]. It may mean that:

‘psychological and mental suffering must be very much less in the circumstances. Accordingly, some mitigation must be seen in that one factor’: *R v Hutchinson* (1994) 15 Cr App R (S) 134,137.

Where the offence occurs in a domestic situation, the attitude of the victim may also be relevant to the question of rehabilitation: *R v H* (1995) 81 A Crim R 88.”

In *R v Hester* [2007] VSCA 298 at [9] Chernov JA, with whom Vincent JA agreed, said:

“[T]o the extent that a victim impact statement evidences forgiveness or support for the victim those factors must be given appropriate weight: *Skura* [2004] VSCA [13] (Eames JA). In particular, a favourable or supportive victim impact statement may bear on the questions whether there has in fact been an adverse impact on the victim and on the offender’s prospects of rehabilitation: *Skura* [2004] VSCA 53; *R v Wise* [2004] VSCA 88; *R v Rowley* [2007] VSCA 94. Thus, as Smith AJA said in *Skura* at [48], evidence of forgiveness by the victim may indicate that the consequences of the offence on the victim have not been long-term or debilitating, thereby affording some mitigation: Furthermore, particularly ‘[w]here the offence occurs in a domestic situation, the attitude of the victim may be relevant to the question of rehabilitation’.”

While agreeing generally with Chernov JA, Neave JA added a cautionary note at [27]:

“It is a common pattern of behaviour for perpetrators of domestic violence to express penitence and persuade their victims to reconcile. For a number of complex reasons which have been discussed in the social science literature dealing with this issue [see the Victorian Law Reform Commission, *Review of Family Violence Laws Report* (2006) 32-36; and Shirley Patton, *Pathways: How Women Leave Violent Men* (2003) 36] many victims are assaulted on several occasions before they summon the courage to leave an abusive relationship. Often they require considerable support in order to do so. In my view, these are matters which should be given considerable weight by a judge who is considering the weight that should be given to a victim impact statement made by a person who has been the victim of domestic violence. I therefore agree with the comments of Simpson JA in *R v Glen* (Unreported, NSW Court of Criminal Appeal, Grove & Simpson JJA and Loveday AJ, 19 December 1994) at p.4 that evidence of forgiveness of the victim of domestic violence should be treated with extreme caution.”

In *R v Sa* [2004] VSCA 182 the appellant, a 28 year old Australian citizen of Samoan descent, had pleaded guilty to one count of aggravated burglary and one count of intentionally causing serious injury to his 47 year old cousin, also of Samoan descent. One of the grounds of the appeal was that the trial judge had not given sufficient weight to the victim’s forgiveness of the appellant. In rejecting that ground Callaway JA said at [5]: “The community and not just the immediate victim of an offence, has a right to peace and order: *Attorney-General v. Tichy* (1982) 30 SASR 84 at 93 per Wells J.” And Eames JA, with whom Callaway & Buchanan JJA agreed, said:

[38] The statement of his Honour that the attitude of the victim could not ‘govern’ the sentencing approach was consistent with the principles stated in *Skura*. In the present case, however, there was good reason why the judge would be cautious in evaluating the weight to be given to the evidence of the victim. In the first place, he was not the only victim of the appellant’s crime; the two children also witnessed what must have been a horrifying incident, although there was no evidence of any long lasting adverse effects on the children. Crimes of violence frequently create alarm and distress to people other than the immediate victims, and in assessing the need for general deterrence a sentencing judge must have regard to the impact of crime more broadly than merely upon the immediate victim.

[39] An additional reason for being cautious about the weight to be given to the evidence of the victim related to the nature of [his] evidence. One reason why courts do not allow the wishes of the victim to determine the sentence to be imposed is that the victim might not always be able to assess what is in his or her own best interest. For example, when considering what weight to give to factors of general and specific deterrence in a case of a woman assaulted by her partner a sentencing judge would be minded to have regard to the imperatives which might motivate a battered wife to plead for leniency towards her attacker. In such circumstances the sentencing judge might be cautious about giving undue weight to such a plea for leniency.

[40] In the present case, the victim was himself in a difficult position among other members of the Samoan community, and his acceptance of the apology might have been motivated by a range of considerations.’

In *R v LFJ* [2009] VSCA 134 Maxwell P & Kellam JA approved the sentencing judge’s reliance on dicta of the NSW Court of Criminal Appeal in *R v Rowe* (1996) 89 A Crim R 467 when holding at [15]: “The importance of general deterrence in such cases [viz. incest] overrides any minor relevance that evidence of forgiveness might have.”

In *R v Wise* [2004] VSCA 88 the 34 year old appellant had stabbed his 17 year old partner. She gave evidence that she loved the appellant and wanted him home with her and their son and that she believed herself to be at fault with respect to the assault because she had been suffering post-natal depression and amphetamine psychosis. Eames JA said at [36]: "The support offered to the appellant by his victim is also a significant factor when assessing his prospects of rehabilitation. It is, of course, an unfortunate fact that victims of violent, drunken partners, to their own cost, often seek to forgive their partner and to resume a dangerous relationship. The courts must offer protection even when the potential victims deny its need, but the forgiveness of an offender by a victim of crime and the positive effect that has on prospects of rehabilitation is not an irrelevant factor in sentencing."

See also *R v Lidonnici* [2007] VSC 3 at [20]; *The Queen v CLP* [2008] VSCA 113; *DPP v Marsh* [2011] VSCA 6; *R v Koljatic-Bestel* [2011] VSC 124 at [22]-[24]; *Treloar v The Queen* [2020] VSCA 6 at [20]-[21].

11.2.11 Effect of mental illness / mental disorder / intellectual disability

Though each of the following cases deals with adult offenders - some of whom were young - the principles enunciated therein are no less relevant for juvenile offenders.

11.2.11.1 Effect of mental illness/mental disorder – Cases prior to *R v Verdins* (2007) 16 VR 269

In *R v Tsiaras* [1996] 1 VR 398 at 400 the Court of Appeal, in allowing an appeal against sentence by a 29 year old man and after referring to *R v Anderson* [1981] VR 155 & *R v Man* (1990) 50 A Crim R 79, held:

"Serious psychiatric illness not amounting to insanity is relevant to sentencing in at least five ways.

- First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective.
- Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
- Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence. The illness may have supervened since that time.
- Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such.
- Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."

In *R v Ross* [2005] VSC 428, in sentencing a schizophrenic woman for the manslaughter of her mother, Kellam J held at [41] that each of the five factors identified by the Court of Appeal in *R v Tsiaras* had application and accordingly that - to the extent that the interests of society permitted and the interests of the offender required - the sentence to be passed was reduced from what would otherwise be appropriate.

Differing opinions have been expressed by judges as to whether psychologists, as opposed to psychiatrists, are qualified to diagnose mental illness. Opinions that psychologists are not so qualified are to be found in *R v Kucma* [2005] 11 VR 472 at 482; [2005] VSCA 58 at [26] per Batt JA; *R v MacKenney* (1983) 76 Cr App R 271; *R v Forde* (1986) 19 A Crim R 1; *R v Peisley* (1990) 54 A Crim R. The contrary view is to be found in *R v Whitbread* (1995) 78 A Crim R 452; *Nepi v Northern Territory* (unreported, NT Supreme Court-Martin CJ, 02/05/1997). See also Dr Ian Freckleton's article "Psychologists' entitlement to diagnose" (1998) 5 Psychiatry, Psychology and Law 159. In *R v Kucma* [2005] 11 VR 472 at 488; [2005] VSCA 58 at [57] Eames JA said that he did "not consider the issue to be beyond argument". In *R v D'Aloisio* [2006] VSC 216 at [35]-[36] Eames JA, referring to *R v Kucma*, assumed – without deciding the question – that a psychologist was entitled to make a diagnosis of major depression.

In *R v Bowen* [2002] VSCA 199 the 21 year old appellant was sentenced to 3 years imprisonment, 27 months of which was suspended. The appellant "was affected to some degree at the time of offending by a bipolar disorder". Although dismissing the appeal, the Court of Appeal - referring to *R v Champion* (1992) 64 A Crim R 244 at 254-5, *R v Giles* [1999] VSCA 208 & *R v Williams* [2000]

VSCA 174 - commented at [17] that the appellant "was entitled on account of his mental disorder to sensible moderation of his sentence".

In *R v. JAD* [2003] VSCA 132 the Court of Appeal dismissed an appeal by a 21 year old man with a lengthy criminal record against a sentence of 3 years imprisonment with a non-parole period of 18 months imposed in relation to 8 counts of burglary, 9 counts of theft, one count of aggravated burglary, one of causing an explosion, one of attempted burglary and one of obtaining property by deception. A consultant psychiatrist, Dr Ruth Vine, had said of the appellant:

"Although Mr [D] describes heavy marijuana use, it is not clear that this had significantly impacted upon his behaviour, although it is clear that the offences largely related to him seeking funds in order to purchase marijuana. In addition, although Mr [D] describes having experienced a sense of being able to see and hear spirits, and a perhaps delusional belief that he is a son of God and that something significant will happen on 16 March, it is not clear that there had been any significant change in his behaviour or deterioration in his level of psychosocial functioning. Although Mr [D] describes that his belief in spirits makes him feel powerful and unassailable, it is not clear that the behaviour which led to the current charges was significantly different from behaviour which had occurred long before such symptoms were experienced. However, it is likely that both consumption of marijuana and the symptoms he describes affected his judgment and full awareness of the consequences of his actions.

I note that Mr [D] is currently receiving antipsychotic treatment. I also note that he spent a considerable time in the Atherton Unit at Thomas Embling Hospital...[I]t would be my opinion that it is likely that he does suffer from a schizophrenic illness, and that it would be appropriate that his current treatment and access to ongoing assessment be available."

At [13] the Court of Appeal commented laconically:

"This case demonstrates, once again, the harm that can be produced by the consumption of marijuana upon those with a tendency to schizophrenia."

Counsel for the appellant, relying on the well-known dicta of Batt JA in *R v Mills*, submitted that the sentence imposed showed that rather than preferring rehabilitation to general deterrence, the judge had simply somewhat moderated general deterrence because of the manifestation of mental illness. Although the judge had accepted that the appellant's mental illness was relevant to sentencing, thus bringing into operation the principles enunciated in cases such as *R v Tsiaras* [1996] 1 VR 398, counsel submitted that the sentence should have reflected the appellant's reduced moral culpability and less weight should have been placed on general and specific deterrence. The Court of Appeal disagreed, stating at [10]:

"Her Honour noted Dr Vine's assessment that the appellant required treatment for his illness and recognized the importance of youth and therefore of his rehabilitation. Her Honour expressly noted the need sensibly to moderate general deterrence because of the possibility that he may have been suffering from mental illness in October 2002."

In *R v Gemmill* [2004] VSC 30 two psychiatrists had accepted that the accused was suffering from depression amounting to a mental illness at the time he killed his wife. One psychiatrist had classified the depression as moderate, the other as major. At [43]-[47] Osborn J performed a detailed analysis of the decisions of the Court of Appeal in *Yaldiz* [1998] 2 VR 376, *R v. Vodopic* [2003] VSCA 172 and *Ronald James Kelly* (2000) 112 A Crim R 307, in the latter of which Charles JA (with whom Winneke P agreed) said at [17]:

"In stating that it was not appropriate to place emphasis upon general deterrence, it is possible that the judge was being unduly generous to the applicant. In *Champion* (1992) 64 A Crim R 244 at 245-255 Kirby P., with whom the other members of the New South Wales Court of Criminal Appeal agreed, said that general deterrence is not eliminated, but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap, a proposition which has been cited with approval on numerous occasions in this Court. See, for example, *Richards and Gregory* [1998] 2 VR 1 at 10; *Yaldiz* [1998] 2 VR 376 at 381. The judge in this case may have intended no departure from this approach in stating that he would not place emphasis upon general deterrence."

In the course of sentencing the accused for murder, Osborn J said at [38] & [48]:

[38] "The depression from which you have suffered and continue to suffer cannot, in my view, be regarded as being equivalent in seriousness to the delusional schizophrenia referred to in the case of *R v. Tsiaras*. Nevertheless, consideration of the sentencing principles set out in that case is appropriate in the present case...

[48] [I]t is not sufficient to label your depression as serious in order to invoke the principles stated in *Tsiaras* with respect to general deterrence. There must be coherent and persuasive evidence of the link between this condition and your responsibility for your actions."

His Honour, being satisfied of the requisite link, ultimately concluded that this should lead to some **sensible moderation** of the accused's sentence:

[52] "...I do accept that as a result of your depressive condition it is likely that you will be held in stricter security and more restrictive conditions than would otherwise be the case during a custodial sentence. I also accept that your ongoing depressive condition may well aggravate the burden of loss of liberty which a custodial sentence will entail.

[53] ...[T]he fact of your depressive condition at the time of your offence and the fact of its continuation to date and likely continuation into the future lead to the conclusion that there should be some sensible moderation of your sentence but do not materially reduce your moral culpability or render the issue of general deterrence substantially irrelevant."

In *R v DTR* [2005] VSCA 279 at [17] Buchanan JA – with whom Callaway & Vincent JJA agreed – held that the offender's severe depression and suicidal tendencies should have moderated, at least to some extent, the need for the sentence to act as a general deterrence notwithstanding that his mental conditions was not as severe as that of *Tsiaras*.

In *R v Izzard* (2004) 7 VR 480; [2003] VSCA 152 the applicant was "a chronic schizophrenic and intellectually challenged". Though a psychiatrist opined that there was little, if any, direct relationship between the applicant's illness and his offending, he acknowledged that the applicant was "a significantly damaged man". At [15] Callaway JA, with whom Winneke P & Vincent JA agreed, pointed out that mental illness was a double-edged sword so far as sentencing was concerned:

"Serious psychiatric illness impacts, in a variety of ways, on the severity of sentence and the relevance of general deterrence. In a case such as this the latter is not excluded but is to be sensibly moderated: see among other authorities *R v Tsiaras* [1996] 1 VR 398 at 400; *R v Yaldiz* [1998] 2 VR 376 at 381 and 383; *R v Tramontano* (2002) 131 A Crim R 1 at [56] and *R v Bux* (2002) 132 A Crim R 395 at [33]-[40]. Mental illness is not, however, solely a mitigatory factor. It may mean that the offender, whilst deserving of compassion, is also a greater danger to the community. This was pointed out by Gleeson CJ in *R v Engert* (1995) 84 A Crim R 67 at 68 and 70-1 and, more recently, by Batt JA in *R v Bux* at [1]. It is a factor to be borne in mind in the present case and no doubt one of the reasons why [counsel for the applicant] submitted that there should be eligibility for a longer than usual period of supervision on parole."

In *R v Yaldiz* [1998] 2 VR 376 Batt JA - with whom Winneke ACJ & Hampel AJA agreed - held at 380 that the trial judge had correctly held that the principle in *R v Anderson* [1981] VR 380 was inapplicable, there being no evidence that the defendant's mental illness (a post-traumatic stress disorder resulting from an attack on him in which he had been shot in the face) had contributed to his attempted murder of his wife or that the offence was committed under its influence. After referring to *R v Anderson* [1981] VR 155, *R v Tsiaras* [1996] 1 VR 398, *R v Yilmaz* (unreported, 21 November 1996), *R v Scott* (unreported, 19 February 1996) & *R v Donamski* (unreported, 3 March 1997), Winneke ACJ added at 383:

"It is true that the courts in these cases expressed the view that serious psychiatric illness falling short of legal insanity is relevant to sentencing because, inter alia, a person suffering from such an illness is not an appropriate vehicle for general deterrence: see *Tsiaras* at 400. But it must be remembered that in each of the cases to which I have referred the accused was suffering either from schizophrenia or a schizophrenic-type illness which obscured the mental intent to commit the crime with which he had been charged. It is not appropriate to simply fasten on the words 'recognized psychiatric disorder' and then, without reference to the symptoms and consequences of that disorder, to contend that purposes of general deterrence have no part to play in the sentencing process. Whether in the particular case a psychiatric condition should reduce

or eliminate general deterrence as an appropriate purpose of punishment will depend upon the nature and severity of its symptoms and its effect upon the mental capacity of the accused.

In this case, the evidence suggested no more than that the respondent was suffering from a post-traumatic stress disorder, a condition by no means uncommon, and it was not said to interfere with the thought processes or to promote delusional behaviour. Indeed the learned judge found, and the finding is not contested, that the respondent was well aware of the nature and quality of the act charged, and well knew that what he was doing was wrong."

In *R v Connolly* [2004] VSCA 24 the sentencing judge had been provided with a number of medical reports. The earliest was that of Dr Lester Walton who expressed the opinion that the appellant was a significantly psychiatrically disturbed youth with psychological problems which could not be controlled short of in-patient care. Although Dr Walton was of the view that poly-substance abuse had produced 'recurring episodes of toxic psychosis', he did not link these to the offences for which the appellant was then before the Court. Over a year later the appellant was seen by Dr Kenny in relation to the current offences. Dr Kenny expressed the opinion that the appellant, even though only 19, had a well-established personality disorder which was not amenable to psychiatric treatment. Dr Kenny described the appellant as having no impulse control and no desire to control those impulses, especially when using drugs. The final report was from the forensic psychologist Mr Ian Joblin who agreed with the opinions of Drs Walton and Kenny, including the views of Dr Kenny that the appellant had a very disturbed personality structure and a development that was grossly impaired. At [36], Coldrey AJA - with whom Winneke P & Bongiorno AJA agreed - said:

"[T]he extent of the psychiatric material before the sentencing court was not such as to attract the operation of the principles enunciated in *R v Tsiaras* and *R v Yaldiz* so as to moderate the weight which might otherwise be given to general and indeed specific deterrence."

In *R v McConkey* [No 2] [2004] VSCA 26 the appellant had been diagnosed by a psychologist Mr Patrick Newton as meeting the criteria of major depressive disorder (moderate and chronic) and of a post-traumatic stress disorder (originating from his discovery of his brother's body after his brother had hung himself 6 years before). Mr Newton said that the appellant presented with a complex mix of psychological problems which would require ongoing attention, including anger management and personal counselling. At [20] Eames JA - with whom Buchanan JA & Smith AJA agreed - said:

"Furthermore, it was open to her Honour to conclude that the psychological state described by Mr Newton was not 'of a status that justifies mitigation of the principles of general deterrence'. The psychological state as described did not amount to a psychiatric illness, let alone an illness of such a degree as would be bound to reduce the moral culpability of the appellant: see the discussions in *R v Tsiaras* [1996] 1 VR 398, *R v Anderson* [1981] VR 155, *R v Yaldiz* [1998] 2 VR 376."

In *R v Eliassen* (1991) 53 A Crim R 391 the applicant was sentenced to 8 years imprisonment for offences including armed robbery. Subsequently he was found to be HIV positive. The Court of Criminal Appeal reduced the sentence by 1 year. Crockett J - with whom McGarvie & Phillips JJ agreed - adopted with approval dicta of King CJ in *Smith* (1987) 44 SASR 587 at 589:

"Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

In *R v Ahmed* [2005] VSCA 279 at [17]-[18] the Court of Appeal applied *R v Eliassen* in reducing from 3½ years to 3 years the non-parole period of an offender who had been sentenced on 3 counts of armed robbery and sundry offences on the basis of the receipt of fresh evidence of the offender's delusional disorder which was present but latent at the time of sentencing. In *R v Rongonui-Chase* [2004] VSCA 25 at [38] the Court of Appeal - referring to *R v Eliassen* - said, *obiter*, that had the appellant had schizophrenia or the prodromal phase thereof either at the time of sentencing or the time of appeal, that would have clearly been relevant to the disposition of a sentencing appeal.

In *R v Jones* [2006] VSCA 266 Redlich JA, with whom Vincent & Eames JJA agreed, said at [11]:

"[I]t was accepted that the sentencing court's powers at common law enabled it to take into account the burden of imprisonment on a particular offender having regard to his or her personal circumstances and any relevant circumstances which prevailed within the

correctional institution where the offender was detained. When considering the burden of imprisonment on an offender who requires psychiatric care, allowance may be made for the limited nature and quality of treatment available within our correctional institutions. See *R v Rollo* [2006] VSCA 154 at [16]-[18] per Warren CJ (with whom Buchanan & Vincent JJA agreed) and *R v SH* [2006] VSCA 83 at [22]-[23] per Warren CJ, Charles & Chernov JJA."

In *R v McDonald* [2004] VSCA 186 at [24] the applicant was described by Winneke P as having "had a fuddled mind at the time of the offending that was brought on by substance abuse" and after incarceration "a psychological disturbance...the result of *delirium tremens*...complicated by drug withdrawal". His illness had substantially resolved by the date of sentencing. The Court of Appeal held that "there was no evidentiary basis for the learned sentencing judge to treat such impairment as moderating to any relevant degree the principles of general and specific deterrence."

In *R v Saw* [2004] VSC 117, in sentencing a 64 year old offender who had pleaded guilty to murder of a cousin, Redlich J applied the **sensible moderation** formulation, saying at [35]:

"It is not disputed that at the time of this offence you were suffering from a serious depressive illness, only a few days after you had attempted suicide and having been admitted as an involuntary in-patient to a psychiatric ward. It is an illness which reduced the moral culpability of your offence. I am satisfied that your depressive illness affected your judgment and insight into your conduct and it was a substantial cause for the commission of this offence. Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed. 1999, Oxford University Press South Melbourne; *R v Tsiaras* [1996] 1 VR 398 and *Anderson v R* [1981] VR 155. I am also satisfied that the prison sentence that I must impose will weigh more heavily upon you than a person in normal mental health. *R v Danaher* [2003] VSCA 119. I have in mind the concerns expressed by Mr Newton and the recommendations contained in his report to which I have referred. I must give appropriate weight to general deterrence as an important element of the sentence that I should impose but its effect should be sensibly moderated in view of the illness from which you suffered. *Champion v R* (1992) 64 A Crim R 244 at 254-255 per Kirby P; *R v Richards & Gregory* [1998] 2 VR 1 at 10; *R v Yaldiz* [1998] 2 VR 376 at 381; *R v Kelly* (2000) 112 A Crim R 307; [2000] VSCA 59 at [17] per Charles JA and *R v Vodopic* [2003] VSCA 172 at [28]."

In *R v Bijay Shankar* [2004] VSC 132 the 27 year old accused had pleaded guilty to intentionally causing serious injury to his wife. Harper J was satisfied that he was suffering from a mental disability of uncertain extent sufficient to reduce his moral culpability. At [21] he said to the accused:

"I am satisfied that, at the time of the offence, your ability to reason was adversely affected. On the other hand, I am also satisfied that you understood what you were doing and knew that it was wrong. You were not suffering from what the cases sometimes describe as a serious psychiatric illness not amounting to insanity. Accordingly, in my opinion, it is proper, in considering the appropriate sentence to impose upon you, to conclude that your moral culpability is less than that of someone in full command of his mental faculties. At the same time, it would be equally inappropriate to equate your degree of culpability with that of a person suffering from a serious psychiatric illness."

In *R v Smith* [2004] VSC 134 at [25] His Honour adopted a similar formulation in holding that the accused's bipolar disorder, which adversely affected his capacity for judgment, reduced somewhat his moral culpability.

In *R v Bendix* [2004] VSC 133 at [38] Nettle J held, applying dicta from *R v Tsiaras*, that the offender was not an appropriate vehicle for general deterrence or denunciation:

"I regard your offence [multiple stabbing] as a serious offence of intentionally causing serious injury. It is made worse by your long history of offending. Ordinarily such an offence would call for a sentence sufficient to deter others from committing offences of the same or similar character and to deter you from offending again. The fact that you were suffering from a serious psychiatric illness, albeit falling short of insanity, means that this is not an appropriate case for the promotion of general deterrence and reduces the moral culpability of your offence and the need for denunciation of your conduct. But I consider that there still a need for specific deterrence."

In *R v Skura* [2004] VSCA 53 a psychologist had given evidence that the appellant, found guilty of incitement to murder her husband, was suffering from a severe mixed personality disorder and an adjustment disorder with disturbance of conduct and emotions. Eames JA said of this at [7]-[8]:

[7] "I agree with Smith AJA that the identified personality disorder of the applicant was not of such character as to render this an inappropriate case for the application of principles of special and general deterrence. Complaint was made that the language of the judge suggested that in his opinion only a serious psychiatric illness would be capable of having that moderating effect. I do not consider that his Honour did so conclude; indeed, it seems likely that his Honour was merely applying the principles and distinctions discussed in *R. v. Tsiaris* [1996] 1 VR 398 and *R. v. Yaldiz* [1998] 2 VR 376 and had concluded that he was not persuaded that any condition of the applicant reduced her moral culpability or caused him to eschew considerations of specific or general deterrence when sentencing her.

[8] A disorder falling short of serious psychiatric illness might well be capable of moderating the need for general or specific deterrence but the onus was on the applicant to demonstrate that it did so in this case, by establishing that its effect reduced the seriousness of the offences and the moral culpability of the applicant: *R. v. Vodopich* [2003] VSCA 172 at [28]-[29] per Eames JA, with whom Winneke P and Phillips JA agreed; see too *R. v. Danaher* [2003] VSCA 119 at [16]-[18] per Ashley AJA; *R. v. Goodwin & McGregor* [2003] VSCA 120 at [35]. His Honour did not, in fact, disregard the applicant's mental condition when having regard to the application of general and specific deterrence. He accepted that some moderation of the effect of those considerations was justified, but only to a small extent. I agree with Smith AJA that that assessment of the relevance of the disorder in this case to the offending conduct, insofar as it bore on the application of general and specific deterrence, was open to the judge: see *R. v. Cardona* [1998] 2 VR 126 at 136-137 per Batt JA."

In *R v Chambers* [2005] VSCA 34 at [32]-[33] the Court of Appeal held, applying *Champion* (1992) 64 A Crim R 244 at 255, that the appellant's borderline personality disorder should have led to general deterrence, as a sentencing consideration, being "sensibly moderated" in the sentence imposed on him for 2 counts of arson causing death.

In *R v Sebalj* [2006] VSCA 106 the Court of Appeal reduced to 12 years with a 9 year non-parole period a sentence of 15 years imprisonment with a 12 year non-parole period imposed on the applicant who had been found guilty of the murder of his partner ([2004] VSC 212). The applicant had been in an acute psychotic state at the time of the offence although it was unclear whether that was attributable to the effect of drugs upon a vulnerable individual or whether it was a manifestation of his subsequently diagnosed schizophrenia. There was no rational motive for his conduct, it being accepted that there was a loving relationship between the applicant and the victim. The applicant demonstrated genuine remorse. He had no predisposition to violent behaviour and good prospects of rehabilitation. At [14] Vincent JA, with whom Maxwell P agreed, said:

"As this Court has made clear, in *Tsiaras* and in a number of other cases, concepts of denunciation and general and specific deterrence can only assume limited significance in the determination of an appropriate sentence in cases of this kind. Nevertheless, as [the prosecutor] submitted, it is important to bear in mind that where the psychotic state of an applicant was the consequence of his ingestion of drugs or other conduct deliberately chosen by him, the extent to which it can be asserted that his level of moral culpability is reduced may become very much problematic. Whatever be the situation in other cases, what is clear is that the applicant did all that he could do to address the situation with which he was confronted, and over a number of days prior to the commission of the offence."

At [18]-[21] Maxwell P said:

[18] "Considerable attention was paid on the plea to the question whether it should be concluded that a diagnosis of schizophrenia was applicable to the applicant at the time of the offence. As indicated in the course of argument, I consider that in view of the uncontested psychiatric evidence before the court on the plea, it was not necessary to decide whether the explanation for the applicant's psychotic state lay in the process of withdrawal from drug taking or in the existence, or the onset, of a condition later diagnosed as schizophrenia.

[19] The decision of this Court in *Tsiaras* and the propositions there laid down were expressed by reference to 'serious psychiatric illness not amounting to insanity'. As Vincent JA has said, there can be no doubt that someone in a psychotic state is, at that

time, properly described as suffering from serious psychiatric illness. As I understand the state of psychiatric knowledge, it has been established for many years that psychosis is an archetypal instance of mental illness for the purposes at least of the *Mental Health Act* in Victoria: see in this regard the decision of the Mental Health Review Board in the appeal of Garry Ian Patrick Webb (also known as Garry Ian Patrick David), Decisions of the Mental Health Review Board Victoria (1987-1991) Volume 1 at 177-178.

[20] It is to be recalled that the evidence of the psychiatrist, which was accepted on all sides at the plea, was as follows:

‘It is in my view reasonable to conclude that at the time he killed Ms McKenna it is more likely than not that [the applicant] was experiencing psychotic symptoms of an order of severity sufficient to deprive him of the knowledge of the wrongfulness of his actions in that he could not reason regarding the wrongfulness of his actions, as perceived by reasonable people, with a moderate degree of sense and composure.’

That finding makes it clear why the *Tsiaras* principles would be applicable whether or not the diagnostic category of schizophrenia applied to the applicant at the time of the murder. A person in the condition so described is severely disturbed and, in an important respect, out of touch with reality.

[21] It would, in my opinion, detract from the utility and flexibility of the propositions set out in *Tsiaras* if there were to be undue focus on the classification of the particular condition, that is, on whether or not it was a recognised psychiatric illness of one kind or another. What *Tsiaras* does, if I might say so with respect, is to set out clearly and succinctly a set of propositions which provide guidance to sentencing judges. What matters in any given case is not the label to be applied to the psychiatric condition but whether and to what extent the condition can be shown to have affected the offender’s mental capacity at the time of the offence (see *R v Yaldiz* [1998] 2 VR 376 at 383; *R v Toni Vodopic* [2003] VSCA 172 at [28]) and/or at the time of sentence.”

In *R v Flower* [2005] VSC 462 at [42]-[43], the Crown did not dispute that the accused was suffering from a serious psychiatric illness, namely psychosis. However the prosecutor argued that the relevant principles do not apply in cases in which the illness had been brought about by the accused’s own conduct – in this case drug-taking – as opposed to “organic causes”. Hollingworth J rejected the distinction and proceeded “on the basis that, theoretically, the relevant principles may apply to somebody suffering from a serious psychiatric illness which is substantially self-induced”.

For further discussion on the effect of mental illness or mental disorder on sentencing in cases prior to the watershed judgment of the Court of Appeal in *R v Verdins*, see *R v Hill* [2004] VSCA 116 at [18]-[22] per Eames JA with whom Charles JA agreed; *R v Rendle* [2004] VSC 201 at [41]-[43] per Kellam J; *R v Hasan Huseyin Alipek & Jason Maxwell Saltmarsh* [2004] VSC 206 at [44] per Nettle J; *R v Wilson* [2004] VSC 468 at [38] per Redlich J; *R v Maccia* [2005] VSCA 20 at [28]-[32] per Winneke P; *R v Dent* [2005] VSCA 42 at [12]-[13] & [16]-[17] per Nettle JA; *R v King* [2005] VSCA 39 at [22]-[24]; *R v Rendle* [2005] VSCA 52 at [8]; *R v Verdins* [2005] VSC 479 at [25]-[26]; *R v Stenhouse* [2006] VSC 147 at [21] per Nettle JA; *R v D’Aloisio* [2006] VSC 216 at [49]-[50] per Eames JA; *R v Lewis* [2007] VSCA 24 at [13]-[16]; *R v Kasulaitis* [1998] 4 VR 224; *R v Roberts (Sentence)* [2006] VSC 122 at [32]-[35]; *R v Mukhtar Mohammed Ahmed* [2006] VSCA 200 at [13] & [16]-[29]; *R v Rollo* [2006] VSCA 154 at [17]; *DPP v Kabo* [2006] VSC 340 at [12]-[13]; *R v Micetic* [2006] VSCA 176 at [41]; *R v Duy Duc Nguyen* [2006] VSCA 184 at [24]; *R v Sita* [2006] VSC 323 at [26]; *R v Williams* [2007] VSCA 208 at [58]-[68]; *R v Vardouniotis* [2007] VSCA 62 at [20]-[33]; *R v Davey* [2010] VSCA 346.

11.2.11.2 Effect of mental illness/mental disorder – *R v Verdins* (2007) 16 VR 269 & later cases

In *R v Verdins* – *R v Buckley* – *R v Nat Viet Vo* (2007) 16 VR 269; [2007] VSCA 102 [hereafter referred to as *R v Verdins*] Maxwell P, Buchanan & Vincent JJA commenced their judgment by stating:

“The proper exercise of the sentencing discretion frequently calls for a consideration of the offender’s mental state at the time of the offending or at the time of sentence or both.”

The Court then reviewed *R v Tsiaras* and a large number of the cases based on it and said at [5]:

“The sentencing considerations identified in *R v Tsiaras* are not – and were not intended to be – applicable only to cases of ‘serious psychiatric illness’. One or more of those considerations may be applicable in any case where the offender is shown to have been suffering at the time of the offence (and/or to be suffering at the time of sentencing) from

a mental disorder or abnormality or an impairment of mental function, whether or not the condition in question would properly be described as a (serious) mental illness.”

At [8] the Court said:

“The sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious. See A Frieberg, “*Out of Mind, Out of Sight: The Disposition of Mentally Disordered Persons Involved in Criminal Proceedings*”, (1976-77) 3 Monash U L Rev 134 at 135-6; R G Fox, “*Sentencing the mentally disordered offender*”, (1986) 60 Law Institute Journal 416 at 417; I Potas, *Just Deserts for the Mad* (Australian Institute of Criminology, 1982) Ch 2. There may be differences of expert opinion and diagnosis in relation to the offender. It may be that no specific condition can be identified. **What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.**” [emphasis mine]

And at [32] the Court restated in a somewhat revised form the guiding principles which *R v Tsiaras* had laid down:

“Impaired mental functioning, whether temporary or permanent (‘the condition’), is relevant to sentencing in at least the following six ways:

- (1) The condition may reduce the moral culpability of the offending conduct, as distinct from the offender’s legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
- (2) The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
- (3) Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
- (4) Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both. See, for example, *Payne* (2002) 131 A Crim R 432 at [43].
- (5) The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
- (6) Where there is a serious risk of imprisonment having a significant adverse effect on the offender’s mental health, this will be a factor tending to mitigate punishment.”

In *The Queen v Guode* [2020] HCA 8 at [6] the High Court approved and adopted the above summary from *R v Verdins* of “the ways in which a mental disorder or abnormality or an impairment of mental function, whether temporary or permanent, may be relevant to sentencing”. In so doing the High Court noted, with a number of examples, that the *Verdins* “summary has consistently been adopted by intermediate appellate courts elsewhere in Australia” and included a reference to *Muldrock v The Queen* (2011) 244 CLR 120 at 137-139 [50]-[55] per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

In *R v Rattya* [2008] VSCA 149, in the course of agreeing with the primary judgment of Buchanan JA, Nettle & Redlich JJA added at [24]:

“Although *Verdins* purported to restate the law (see paragraph [31]) – not extend it – it did attribute a greater degree of significance to a prisoner’s mental condition at the time of sentencing, and likely mental condition throughout the period of sentence, than until then had generally been appreciated (see paragraphs [27]-[30]).”

In *R v Azzopardi, R v Baltatzis, R v Gabriel* [2011] VSCA 372 Redlich JA (with whom Coghlan & Macaulay AJJA agreed) said at [19]:

“There is, generally speaking, no duty on a sentencing judge, in the absence of explicit submissions by counsel, to embark upon an inquiry as to whether any principles in *Verdins* might be enlivened by the evidence tendered on the plea: *R v Zander* [2009]

VSCA 10, [36] (Nettle JA); *Wassef v R* [2011] VSCA 30, [18] (Redlich JA). Where a prisoner is represented by counsel, a sentencing judge will not ordinarily be required to consider any possible effects of psychological or psychiatric disability which may go in mitigation of penalty, other than those expressly relied on by counsel: *R v Zander* [2009] VSCA 10, [36] (Nettle JA).

In *R v Martin* [2011] VSC 217 it was not disputed that the principles of *Verdins'* case would have been applicable. However the Crown submitted that the reduction in the accused's legal and moral culpability had already been reflected in the Crown's acceptance of a plea of guilty to defensive homicide as opposed to murder with which he had originally been charged and that to take further account of a reduction in the accused's moral responsibility would amount to "double counting". Curtain J rejected this submission. At [27] her Honour said:

"The sentencing function resides in the Court, and the sentencing judge is, in the words of Winneke P in *R v Newman and Turnbull* (1997) 1 VR 146 at 150, "entitled and indeed bound to take into account all the circumstances which are relevant to the commission of the offence with which the prisoner has been charged". In those circumstances, the decision of the Director to file an indictment alleging one count of defensive homicide and to accept a plea to that charge in resolution of the matter does not eliminate or obviate the necessity to give due weight to your moral and legal responsibility as enunciated in *Verdins'* case in the sentencing process."

Applying the *Verdins'* principles in *R v Brooks* [2008] VSC 70, Coghlan J concluded at [40]-[41] that although there was little about the defendant's dysthymia – considered in conjunction with his borderline intellectual functioning - which would make him an inappropriate vehicle for general deterrence or operate to reduce his moral culpability, it would nonetheless make the serving of a long term of imprisonment harder for him. And in *R v Johnstone* [2008] VSC 584 at [37]-[38] Coghlan J also considered that *Verdins'* applied only to the limited extent that a prisoner's adjustment disorder may make prison more onerous for him at least in the short term.

In *R v Foster* [2009] VSC 124 in sentencing the accused to 14y/10y imprisonment for murder, Osborn J said at [33]:

"In my view the combination of Post Traumatic Stress Disorder, serious depression and alcoholism is such as to bring your case within the first category contemplated in *R v Verdins*. The cumulative effect of these conditions was to impair your mental functioning in a manner which reduced the moral culpability of the offending conduct as distinct from your legal responsibility for that conduct. In turn your cumulative condition affects the punishment which is just in all the circumstances."

Just as certain pre-*Verdins'* cases - examples of which are *R v Yaldiz* [1998] 2 VR 376 and *R v Connolly* [2004] VSCA 24 – discussed the need for a nexus to be shown between the offending and the offender's mental condition, so too there are several post-*Verdins'* cases in which the *Verdins'* sentence moderation has not been applied because of lack of evidence of the requisite nexus.

In *R v Charles* [2011] VSCA 399 at [162] Robson AJA (with whom Redlich & Harper JJA agreed) summarized the following principles which may be discerned from the authorities when dealing with the establishment of a link between a mental condition and the offending conduct:

1. The *Verdins'* principles are and should be regarded as exceptional: *R v Vaudreu* [2009] VSCA 262, [37] (Ashley JA).
2. The onus lies on the offender to establish the facts to enliven the *Verdins'* principles on the balance of probabilities as a mitigating factor: *R v Romero* [2011] VSCA 45, [18].
3. Cogent evidence, normally in the form of an expert opinion, is ordinarily necessary if the principles in *Verdins'* are to be enlivened: *R v Romero* [2011] VSCA 45, [18] (Redlich JA).
4. It is always necessary to consider how the particular condition affected the mental functioning of the offender at the time of the offence and how it is likely to affect him or her in the future: *R v Romero* [2011] VSCA 45, [13] (Redlich JA).
5. The offender must establish that the offender's disability had the effect of impairing the offender's ability to exercise appropriate judgment, or impairing the offender's ability to make calm and rational choices or to think clearly at the time of the offence: *R v Romero* [2011] VSCA 45, [13] (Redlich JA).

6. *Verdins* has no application in respect of a mental condition postulated to have existed at the time of the offending unless the condition relied upon can be seen to have some 'realistic connection' (*R v Vaudreu* [2009] VSCA 262, [37] (Ashley JA)) with the offending; or 'caused or contributed' (*DPP v Patterson* [2009] VSCA 222, [46] (Maxwell P, Redlich JA, and Vickery AJA); *Bennett v The Queen* [2011] VSCA 253, [61] (Ashley, Redlich and Hansen JJA)) to the offending; or is 'causally linked' (*Bennett v The Queen* [2011] VSCA 253, [60] (Ashley, Redlich and Hansen JJA)) to the offending."

In *R v Carroll* [2011] VSCA 150 at [9]-[27] Maxwell P (with whom Buchanan JA agreed) discussed the appellant's mental condition and its relevance to his offending – multiple counts of stalking, burglary, theft, aggravated burglary and using telephone to menace committed with a sexual motivation against twelve different victims over eight months. At [19] his Honour spoke of "the rigour with which arguments of [the *Verdins*] kind must be assessed". He continued:

"As is now well-recognised (*R v Robazzini* [2010] VSCA 8, [42]), diagnostic labels are, by themselves, of no assistance to a sentencing judge. What matters is what the expert evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time: *Verdins* (2007) 16 VR 269, [8]; *R v Zander* [2009] VSCA 10, [29].

Where reliance is placed on [*Verdins*] proposition 1, concerning moral culpability, the question for the Court is whether the evidence establishes – on the balance of probabilities – that the impairment of mental functioning did contribute to the offending in such a way as to render the offender less blameworthy for the offending than he/she would otherwise have been. Very often, this question is approached as one of causation. Did the evidence establish a causal connection between the impairment of mental functioning and the offending for which sentence is to be imposed? (*Ashe v The Queen* [2010] VSCA 119, [14], [19]; *Davey v The Queen* [2010] VSCA 346, [25]; *MC v The Queen* [2011] VSCA 2, [20]-[21]; *Bowen v The Queen* [2011] VSCA 67, [28], [29], [33]; *DPP v HPW* [2011] VSCA 88, [28], [63]; *Pettiford v The Queen* [2011] VSCA 96, [32]-[34].)

There was no evidence of that kind in the present case."

In *R v Martin* [2007] VSCA 291 the Court of Appeal agreed with the sentencing judge that the offender's moral culpability was not reduced by reason of his psychotic state in the particular circumstances of that case but rejected the proposition that self-induced psychosis could never be a mitigating factor. At [19]-[21] Maxwell P and Nettle & Redlich JJA said:

"We would not...endorse the general proposition...that psychosis (or other mental illness) which is drug induced can never be a mitigating factor because it is the result of the offender's own (illegal) act.

Cases can be imagined where the offender's psychotic state is drug-induced but is nevertheless treated as lessening the offender's culpability. For example, the offender might have had no awareness – because of a lack of prior knowledge or experience – that the ingestion of a particular drug might trigger a psychotic reaction. In such a case, the resultant impairment of mental capacity might be regarded as involuntary, notwithstanding that the taking of the drug was a voluntary act. Again – as in the case of *Sebalj* [2006] VSCA 106. – the psychosis might occur in the course of the offender's attempts to withdraw from the use of the drug which was, nevertheless, the cause of the psychosis. In *Sebalj*, the drug-induced psychosis was seen as substantially reducing the offender's level of culpability for what he did while under the influence of paranoid delusions.

As these examples illustrate, the critical factor in determining the significance of drug-induced psychosis for sentencing purposes is the degree of foreknowledge on the part of the offender. There is an obvious parallel in this respect with sentencing for offences committed while under the influence of alcohol, where the concept of 'reckless intoxication' has been developed."

In *DPP v Arvanitidis* [2008] VSCA 189 the respondent at the time of a police siege was delusional, paranoid, fearful of attacks by terrorists and had considered himself licensed by the Government to possess a gun and shoot police as a consequence of self-induced 'ice' intoxication. Commenting with approval on *R v Martin*, Redlich JA (with whom Buchanan & Nettle JJA agreed) said at [27]-[29]:

“To lose the benefit of *Tsiaras* and *Verdins*, it was not necessary that the respondent have foreknowledge that the psychotic symptoms would cause him to behave in the precise manner in which he offended or make him generally dangerous or violent. If the respondent was aware that by taking the drug, his judgment would be so affected that he would behave irrationally or that it would affect his ability to exercise control, his self-induced mental state would not constitute a mitigating circumstance: *R v Martin* [2007] VSCA 291 at [18]–[30]; *R v Gagalowicz* [2005] NSWCCA 452 at [36] It was for the respondent to establish on the balance of probabilities that he did not know that the drug would have such effects. This he failed to do. The respondent’s foreknowledge regarding the potential for paranoia, persecutory delusions, and other forms of disorganised thought was sufficient to preclude the operation of the principle stated in *Tsiaras* and *Verdins*. The sentencing judge correctly found that the respondent’s drug induced psychosis at the time of offending was not a mitigating circumstance which reduced his moral culpability.”

In *R v Shafik-Eid* [2009] VSCA 217 it was clear from both the circumstances of the offences, the appellant’s later disclosed history and a report of a clinical forensic psychologist that the appellant was suffering from quite severe psychological – or even psychiatric – difficulties at relevant times. However, the sentencing judge considered that the appellant’s pre-existing psychological state would not on its own have contributed to the commission of the offences of reckless conduct endangering life and making threats to kill for which he was sentenced to 5 years imprisonment with a non-parole period of 3 years. The judge concluded that these offences were committed because the ‘additional ingredient’ of significant drug abuse had occurred and that the reduction in moral culpability and the significance of that on general deterrence was only “very minor”. In holding that nexus had not been established between the appellant’s mental condition and the commission of the offences, Lasry AJA (with whom Nettle & Redlich JJA agreed) said at [27]:

“In my opinion it was appropriate to limit the effect of the principles identified in *Verdins* as the sentencing judge did. It could not be said that the appellant’s psychological condition was directly responsible for the offending. For *Verdins* principles to apply, the appellant had to show that the mental condition had directly contributed to the commission of the offences. The fact that the appellant’s drug taking was a consequence of his mental condition did not establish that nexus.”

At [28]-[29] Lasry AJA referred with approval to the aforementioned decisions of the Court of Appeal in *R v Martin* [2007] VSCA 291 and *R v Arvanitidis* [2008] VSCA 189 and at [30] stated:

“[T]o bring the appellant within the contemplation of the analyses in *Martin* and *Arvanitidis* it would have required him to establish on the balance of probabilities, that there was a lack of foresight by him as to the consequences of consuming the drugs he did on both occasions.”

In *R v White* [2009] VSCA 177 a similar issue arose. At [17] Lasry AJA (with whom Buchanan & Dodds-Streeton JJA agreed) said: “No submission was made on behalf of the appellant seeking to specifically link the appellant’s diagnosed condition to the offending, therefore, the evidence regarding his condition is simply part of the background.”

In *R v Miller* [2010] VSC 326 at [43] Coghlan J said:

“I was urged, because of the matters set out by Mr Ball, I should have regard to the principles in *R v Verdins* when sentencing you. That case makes it clear that psychiatric conditions which lead to impaired mental functioning may lead to a reduction in sentence. Although I am prepared to accept and take into account your psychological condition, I do not accept that the *Verdins* principles can be applied in your case. I say that because at the very root of your offending is your addiction to alcohol. You know where excessive drinking leads you. It may be that in certain circumstances such a position would be a matter of aggravation. I have not been urged to do so and I do not do so.

In *R v Grossi* [2008] VSCA 51 at [49]-[56] the Court of Appeal rejected an argument that the line of authority that little or no weight will usually be given to an offender’s gambling addiction must now give way in light of the principles espoused in *Verdins* and held that properly analysed there is no tension between those principles and the authorities which have dealt with gambling addiction.

In *R v Johnstone* [2007] VSCA 193 at [32] Maxwell P, with whom Kellam JA & Whelan AJA agreed, said:

“Given the potential significance of questions of impaired mental functioning, as explained in *Verdins*, judges should feel no hesitation in ordering an independent report of that kind if, having regard to the principles in *Verdins*, they apprehend that such a report may shed light on the applicability of one or other of those principles to the case at hand.”

In *DPP v O’Neill* (2015) 47 VR 395; [2015] VSCA 325 the Court of Appeal (Warren CJ, Redlich & Kaye JJA) discussed and analysed the history of the *Tsiaras/Yaldiz/Verdins*’ principle before summarising “the scope and limitations of those principles” at [70]-[83] as follows:

- (1) The principles are enlivened only where the offender suffers from an impairment of mental functioning. Whether there should be any moderation of general deterrence, and if so its degree, will depend upon the nature and severity of the impairment of mental functioning. It is important to keep in mind that, in *Verdins*, and in this Court’s subsequent application of *Verdins*, the Court has consistently stated that the principles in *Verdins* relate to offenders who suffered from ‘mental impairment’ or ‘impaired mental functioning’, whether at the time of the offending or at the time of sentence. While the Court in *Verdins* regarded the particular diagnostic label as not being determinative, the principles expressed have always been confined to cases in which the offender suffered an impairment of his or her mental functioning. They do not apply to personality disorders such as those from which the respondent suffered. **[Note: This exclusion of personality disorders from the Verdins’ principles is no longer good law: see section 11.2.11.4 below.]**
- (2) Second, in order for the first, second, third and fourth principles enunciated in *Verdins* to have application to the sentencing task, there must be a connection between the impairment to mental functioning and the appellant’s moral culpability or the need for general and specific deterrence. If the mental impairment existed at the time of the offending, it must have some ‘realistic connection’ with the offending; or have ‘caused or contributed’ to the offending; or be ‘causally linked’ to the offending.
- (3) Third, to show the necessary connection to the offending and to so enliven limbs one to four of *Verdins*, the offender must establish that the mental impairment affected the offender’s ability to appreciate the wrongfulness of the conduct, or obscured the offender’s intent to commit the offence, or impaired the offender’s ability to make calm and rational choices or to think clearly at the time of the offence.
- (4) Fourth, the fifth and sixth limbs of *Verdins* may operate where the existing impairment will make prison more onerous, or where prison may exacerbate the mental condition, if the expert evidence establishes the significance of the impairment to the imposition of a prison sentence.
- (5) Fifth, cogent evidence, normally in the form of an expert opinion, is necessary to establish the existence of the mental impairment, either at the time of the offence, or at sentence, or both, and the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.
- (6) Sixth, the assessment by the sentencing judge must be undertaken with rigour, as was made clear in *Verdins* itself and has since been repeatedly emphasised by this Court on appeal.
- (7) Seventh, an existing mental impairment at the time of sentence may require appropriate moderation of general deterrence, if it is determined that by virtue of that mental impairment the offender is not an appropriate vehicle for general deterrence. Whether that is so ‘depends upon the nature and severity of its symptoms and its effect upon the mental capacity of the accused’.
- (8) Eighth, a moderation of general deterrence will not ordinarily be required where the condition arises after the offence as a reaction to the discovery of the offender’s crime or the prospect of a lengthy term of imprisonment.

In *Wheeldon v The Queen* [2018] VSCA 344 the appellant had been diagnosed “as suffering from a ‘severe personality disorder’ rather than a psychotic illness”. At [33] the Court of Appeal noted that “counsel acknowledged that – on the authority of *DPP v O’Neill* (2015) 47 VR 395 – the diagnosis of personality disorder did not engage the sentencing principles identified in *R v Verdins* (2007) 16 VR 269.”

In *Davies v The Queen* [2019] VSCA 66 the Court of Appeal at [689] & [699] applied *Verdins* and the third of the above propositions from *O’Neill* and held:

“[T]he judge did not err in concluding that the applicant’s autism spectrum disorder or post-traumatic stress disorder did not justify any diminution in the weight to be accorded to the concepts of general deterrence, specific deterrence and denunciation...”

Certainly, the applicant well understood the nature of the acts that he was performing, and he well understood that what he was doing was wrong, in that it was illegal. As noted, the applicant is of high intellectual capacity. His conduct during the trial, and during the plea, provided an adequate foundation for the conclusion that the applicant had a proper understanding as to the legal wrongfulness of his actions. For those reasons, the appropriate diminution of the applicant's moral culpability, by reason of his condition, would not be substantial. However, in our view, it was not immaterial, and the judge erred in concluding that the applicant's subjective culpability remained very high and was not diminished, at all, by reason of his condition."

For further discussion on the effect of mental illness or mental disorder on sentencing in cases subsequent to *R v Verdins*, see *R v Howell* [2007] VSCA 119 at [12]-[25]; *R v Elias* [2007] VSCA 125; *DPP v BW* [2007] VSCA 171 at [11]; *DPP (Cth) v Rowson* [2007] VSCA 176 at [27]-[32]; *R v Johnstone* [2007] VSCA 193 at [24]-[32]; *R v Strezovski* [2007] VSCA 260 at [25]; *R v Wise* [2007] VSCA 266 at [16] & [34]; *R v Parton* [2007] VSCA 268 at [11]-[16]; *R v Christopher* [2007] VSCA 290 at [34]-[35]; *DPP v Ralph* [2007] VSCA 305 at [24]-[26]; *R v Do* [2007] VSCA 308 at [7]-[8]; *R v Atik* [2007] VSC 299 at [37]-[40]; *R v JED* [2007] VSC 348 at [43]; *R v Tresize* [2008] VSCA 8 at [17]; *R v Dupuy* [2008] VSCA 63 at [34]-[35]; *R v Laracy (Sentence)* [2008] VSC 67 at [34]-[36] & [54]; *R v Charles Imadonmwoyi* [2008] VSCA 135 at [18]-[27]; *R v Puc* [2008] VSCA 159 at [23]-[33]; *DPP v Weidlich* [2008] VSCA 203 at [17]-[25]; *R v Fitchett* [2008] VSC 258 at [25]-[38]; *R v Piper* [2008] VSC 569 at [66]; *R v Zander* [2009] VSCA 10 at [26]-[33] & [36]; *DPP v Vincent* [2009] VSCA 87 at [27]; *R v Kinnear* [2009] VSCA 104 at [19]; *R v Cheney* [2009] VSC 154 at [57]; *R v Baxter* [2009] VSC 180 at [35] & [52]; *DPP v Fox (Sentence)* [2009] VSC 189 at [19] & [22]; *DPP v Lewis* [2009] VSC 334 at [24]; *R v Hosking* [2009] VSC 549 at [47]-[54]; *R v Alexopoulos* [2010] VSCA 52 at [55]; *R v Secombe and Butkovic* [2010] VSCA 58 at [106]-[111]; *R v Londrigan* [2010] VSCA 81 at [24]-[27]; *DPP (Cth) v Parfrey* [2010] VSCA 212 at [28]; *R v Dutton* [2010] VSC 107 at [40]; *R v Traycevska* [2010] VSC 270 at [34]-[37]; *R v Davis* [2010] VSC 274 at [26]-[31]; *R v Fitchett* [2010] VSC 393 at [23]; *R v Gray* [2010] VSCA 312; *R v Ashton* [2010] VSCA 329; *R v Davey* [2010] VSCA 346; *R v Koelman* [2010] VSC 561; *R v Plail* [2010] VSC 600 at [34]-[40]; *R v Dimitrakakis* [2010] VSC 614 at [45]-[57]; *R v Fletcher & Or* [2011] VSCA 4; *R v Glascott* [2011] VSCA 109 at [142]-[146] & [160]-[161]; *R v Patrick James Keane* [2011] VSCA 156 at [26]-[32]; *DPP v Caruana* [2011] VSCA 180 at [8]-[13]; *R v Gerrard* [2011] VSCA 200 at [38]-[40]; *R v Pato* [2011] VSCA 223 at [18]-[33]; *R v Mune* [2011] VSCA 231 at [14]-[32]; *R v Kavanagh* [2011] VSCA 234 at [7]-[12]; *R v Bennett* [2011] VSCA 253 at [59]-[66]; *R v Pyrczak* [2011] VSC 219 at [45]-[46]; *R v Acar* [2011] VSC 310 at [59]; *R v Coombes* [2011] VSC 407 at [59]-[74]; *R v Grimmett* [2011] VSC 506 at [17]-[22]; *DPP v Green* [2011] VSCA 311 at [19]-[30]; *R v Downey* [2011] VSC 672; *R v Filippi, Kosterman and Vergados* [2011] VSCA 438 at [51]-[55]; *R v Shaw* [2012] VSCA 78 at [44]-[50]; *R v Sikaloski* [2012] VSCA 130 at [26]-[43]; *R v DM* [2012] VSCA 227 at [20]-[32]; *DPP v Lucas* [2012] VSCA 245 at [21]-[22]; *R v NJ* [2012] VSCA 256 at [3] & [58]; *DPP v Rancie* [2012] VSCA 258 at [27] & [32]; *R v Hill* [2012] VSC 353 at [38]-[39]; *R v Oakley* [2012] VSC 392 at [36]; *R v Kosian* [2012] VSC 426 at [31]-[39]; *R v Potter* [2012] VSC 511 at [37]-[48]; *R v Scott* [2012] VSC 514 at [28]; *R v Van Zoelen* [2012] VSC 605 at [21]; *O'Toole v The Queen* [2013] VSCA 62 at [34]-[52]; *R v Benjamin* [2013] VSC 668 at [26]; *R v Wallis* [2013] VSC 721 at [32]-[34]; *R v West* [2013] VSC 737 at [31]; *Barton v The Queen* [2013] VSCA 360; *Johnston v The Queen* [2013] VSCA 362 at [8]-[16]; *Aggelidis v The Queen* [2014] VSCA 6 at [35]-[37]; *TS v The Queen* [2014] VSCA 24 at [22]-[43]; *Monaghan v The Queen* [2014] VSCA 82 at [44]-[53]; *R v Kemp* [2014] VSC 631 at [24]-[40]; *R v Umar* [2014] VSC 645 at [51]-[58]; *Jason William Caldwell v The Queen* [2014] VSCA 274 at [49]-[60]; *Lee James Matthews v The Queen*; *Tuyet Thi Vu v The Queen* [2014] VSCA 291 at [60]-[64] & [89]; *Jamieson v The Queen* [2014] VSCA 294 at [27]-[32]; *Christopher Dean Binse v The Queen* [2016] VSCA 145 at [51]-[53] & [68]-[70]; *R v Naddaf* [2018] VSC 429 at [86]-[92]; *R v Pavlis* [2018] VSC 440 at [27]-[29]; *Bret Wilson v The Queen* [2018] VSCA 219 at [53] & [59]-[60]; *Alexander Holland (a pseudonym) v The Queen* [2018] VSCA 241 at [21]-[22] & [29]-[31]; *Price v R* [2019] VSCA 8 at [19] & [35]-[68]; *R v Natale* [2019] VSC 30 at [35]-[44]; *R v Missen* [2019] VSC 32 at [58]-[73]; *R v Giannioudis* [2019] VSC 75 at [43]-[45]; *R v Astbury* [2019] VSC 97 at [28]-[32] & [36]-[38]; *R v Phan* [2019] VSC 153 at [43]-[55]; *DPP v Tuite* [2019] VSC 159 at [38]-[39]; *Teryaki v The Queen* [2019] VSCA 124 at [60] applying *R v Eliassen* (1991) 53 A Crim R 391; *R v Willis* [2019] VSC 398 at [34]-[40] & [53]; *Campbell v The Queen* [2019] VSCA 158 at [42] & [57]; *Sanyasi v The Queen* [2019] VSCA 227 at [37] & [44]; *Bausch v The Queen* [2019] VSCA 235 at [39]; *R v Solmaz* [2019] VSC 530 at [84]-[100]; *DPP v Gilmour* [2019] VSC 766 at [43]-[45]; *R v Eckersley* [2020] VSC 22 at [91]; *Akon Guode v The Queen* [2020] VSCA 257; *Haberman v DPP* [2020] VSCA 286 at [33]-[45].

11.2.11.3 Effect of intellectual disability

The *Tsiaras* principles, discussed above, specifically relate to the sentencing of persons suffering from serious psychiatric illness not amounting to insanity. In *R v Williams* [2000] VSCA 174 Buchanan JA - with whom Ormiston & Chernov JJA agreed - concluded at [11] that the first, third and fourth of the *Tsiaras* principles also applied to the sentencing of an offender who, although not psychiatrically ill, had an IQ of 63, a grossly inadequate personality, was socially inept and functioned only in an extremely child-like way. The Court of Appeal concluded that both general and specific deterrence had limited relevance in that case. In *R v Roadley* (1990) 51 A Crim R 336 the offender had minimal appreciation of the consequences of his behaviour and limited (possibly non-existent) impulse control. He had the mental age of a five or six year old child. At 343 the Court of Appeal, citing *R v Anderson* [1981] VR 155, held that mental illness was to be equated with intellectual disablement for sentencing purposes and concluded that "little weight" should be given to general deterrence in such cases. See also *R v Van Do Bui* [2005] VSCA 121 at [5]-[7].

In *R v Verdins* (2007) 16 VR 269 at [26] the Court of Appeal (Maxwell P, Buchanan & Vincent JJA) specifically included impaired mental functioning within its guiding principles in certain instances:

"Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of-

- (a) impairing the offender's ability to exercise appropriate judgment (*R v Hamid* [2002] VSCA 9 at [11] per Buchanan JA {with whom Winneke P and Vincent JA agreed}; *R v Cunliffe* [2000] VSCA 146 at [30] per Phillips JA {with whom Charles & Buchanan JJA agreed}; *R v Ibrahim* [2001] VSC 210 at [19] per Coldrey J cf *R v Walsh* [2006] VSCA 87 at [24]; *Ayoubi v R* [2006] NSWCCA 364 at [27]);
- (b) impairing the offender's ability to make calm and rational choices (*R v Chambers* (2005) 152 A Crim R 164 at 173) or to think clearly (*R v Tran* [2003] VSC 165 at [14]);
- (c) making the offender disinhibited (*Ayoubi v R* [2006] NSWCCA 364 at [27]);
- (d) impairing the offender's ability to appreciate the wrongfulness of the conduct (*R v Sebalj* [2006] VSCA 106 at [21]; *Hurd v R* [1988] Tas R 126 at 132 per Cox J);
- (e) obscuring the intent to commit the offence (*R v Yaldiz* [1998] 2 VR 376 at 383; *R v Swingler* [2001] VSCA 26 at [13]); or
- (f) contributing (causally) to the commission of the offence (*R v Walsh* [2006] VSCA 87 at [22]; *Payne* (2002) 131 A Crim R 432 at 442 [36], [40] per Steytler P; *Thompson v The Queen* (2005) 157 A Crim R 385 at 396 [53] per Steytler P).

As we have said, this is not to be taken as an exhaustive list."

In *R v Wise* [2007] VSCA 266 Ashley JA, with whom Redlich JA & Curtain AJA agreed, said at [16]:

"It can be accepted that intellectual disablement may be equated with mental illness (*R v Williams* [2000] VSCA 174), this enlivening in a particular case considerations mentioned in *R v Tsiaras* [1996] 1 VR 398 and in *R v Verdins* [2007] VSCA 102. But the question will always be whether, in the particular case, it has been shown that the accused person's moral culpability, or the significance of general or specific deterrence, is reduced because of intellectual disablement."

At [34] Redlich JA sounded a note of caution:

"I would not want to be taken as accepting that an intellectual disability will necessarily give rise to the conclusion, in all cases, that there was impaired mental functioning which should reduce the offender's moral culpability. Whether it does so or not will depend upon whether the conditions expressed in paragraph [26] of the joint judgment in *Verdins* have been satisfied."

In *R v Ulla* [2004] VSCA 130 the appellant Ulla was 22 years old and had a very lengthy criminal history. He had been admitted to a psychiatric hospital in 1997 as an involuntary patient after violent behaviour and threatened suicide. On assessment he was found to have an IQ of 61 and was diagnosed as having borderline antisocial personality disorder and being opiate dependent. In 2003 he was assessed by a psychologist as functioning at a mild or moderate level of intellectual disability and he was granted a Disability Support Pension. He has moderately severe verbal specific amnesia, a result of solvent abuse. He has limited numeracy and literacy skills, was educated only to year 8 standard and has never been employed. Although allowing an appeal against sentence for other reasons, Eames JA - with whom Batt & Vincent JJA agreed - said at [27]:

"In *R. v. Bux* [2002] VSCA 126 I discussed the principles in some detail and held at [33]:

"Where an offender suffers a significant intellectual disability the principle of general deterrence is not eliminated altogether, but must be sensibly moderated: *R. v. Champion* (1992) 64 A Crim R 244 at 254-255 per Kirby P. Principles of general and specific deterrence cannot be given the emphasis that they might otherwise have in sentencing an offender. The extent of the amelioration of the factors of general and specific deterrence may depend upon a range of matters, most importantly the extent of the intellectual disability. In *R. v. Champion* at 254-255 Kirby P, with whom the other members of the Court agreed, considered the decision of the Court of Criminal Appeal in *R. v. Letteri* [Unreported, Court of Criminal Appeal, New South Wales, 18 March 1992]. In that case Badgery-Parker J, with whom Gleeson CJ and Sheller JA agreed, had held that less weight should be given to general deterrence in such a case, and that in an extreme case a severe intellectual handicap might, indeed, mean that general deterrence was totally outweighed by other considerations."

In *R v BTP* [2006] VSC 374 at [23], Kellam J applied dicta of the Court of Appeal in *R v Ulla* in stating that "although an intellectual disability does not mean that general deterrence has no application, that sentencing principle does require to be moderated sensibly in such circumstances".

In *R v Rajinder Kumar* [2004] VSC 527 the defendant did not suffer from a mental illness but had a low intellectual capacity. At [25] Harper J had regard to the defendant's low intellectual capacity in two ways:

"First, it will make prison weigh more heavily on you than it might on a more intellectually gifted person (who, for example, might acquire a good knowledge of the English language more easily than you). Secondly, I should sentence you on the basis that in your case general deterrence is not to be discarded altogether, but neither is it to be given its usual significance."

In *DPP v Byrnes* [2005] VSCA 63 the 19 year old respondent had pleaded guilty to detention and sexual penetration of a child aged five years. At age 11 the respondent had been deemed eligible to receive a disability support pension as a result of intellectual impairment. At age 13 he was diagnosed by a child psychiatrist as suffering from Attention deficit and Hyperactivity Disorder and Oppositional Defiant Disorder. At age 19 he was reassessed by a forensic psychiatrist who said: "... the respondent's thinking was normal and there was no evidence of disorders of perception. He impressed me as a man of probable borderline low intelligence, but not significantly intellectually impaired. He had a good vocabulary, was able to think abstractly and has a good knowledge of matters relevant to his way of life and court procedures." Chernov JA, with whom Winneke P & Charles JA agreed, held at [19] that the *Tsiaras* principles did not apply, in part because of lack of any nexus between the symptoms of the defendant's mild intellectual disability and his moral culpability:

"[T]he principles enunciated in *R v Tsiaras* and *R v Yaldiz* do not operate here to moderate the weight that should be given to the sentencing principles to which I have referred, given that the respondent did not suffer a recognisable psychiatric illness and that, in any event, there is nothing in the material that shows that the symptoms of his mild intellectual disability bore on his moral culpability in committing the offences: see for example *R v Vodopic* [2003] VSCA 172 at [28] per Eames JA. In *Tsiaras* this Court was concerned with the effect of a serious psychiatric illness not amounting to insanity on the sentencing disposition. In that case, the applicant suffered from schizophrenia and this Court rejected the conclusion of the sentencing judge that the applicant "knew and appreciated what he was up to". The principles in *Tsiaras* were, in a sense, a development of what this Court said in *R v Anderson* [1981] VR 155, where the offender was suffering from paranoid psychosis or paranoid schizophrenia at the time he committed the offences and, in the circumstances, the Court held that he was not a suitable vehicle for general deterrence: see also *R v Meyers* [2001] VSCA 237 and *R v Gorman* [Court of Appeal, unreported, 10 August 1995 per Hayne & Charles JJA and Crockett AJA. In the present case, however, the applicant did not suffer a serious psychiatric illness and, plainly enough, knew that what he did was wrong. Importantly, as I have said, the evidence did not relate such mental impairment as the applicant may have had to the offending conduct. For completeness, I note, in this regard, Dr Senadipathy's conclusion to which I have referred, namely, that the respondent's intellectual disability did not contribute to his antisocial behaviour."

In *DPP v Lovett* [2008] VSCA 262 the accused had an I.Q. of 70 and was described as being “severely intellectually disabled”. At [37] the Court of Appeal spoke about the significance of intellectual disability for the moderation of general deterrence as follows:

“Intellectual impairment has long been recognised as having a moderating effect on general deterrence. In *R v Yaldiz* [1998] 2 VR 376, Batt JA discussed the effect on general deterrence of mental impairment and intellectual disability in these terms:

‘... [G]eneral deterrence is not eliminated but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap.’

In *Champion* (1992) 64 A Crim R 244, 254, Kirby P said [emphasis added]:

‘It is imputed to the general community that it will understand that a *person with the intellectual capacities of a child* will need to be deterred but may need special attention in order that the deterrence will be effective. Moreover, the full understanding of the authority and requirements of the law, which may be attributed to the ordinary individual of adult intellectual capacities, cannot be expected of a person who, although adult in bodily form, [retains] the intellectual capacities of a child. *Because the constraints which may be demanded of a person with ordinary adult intellectual capacities may not operate, or operate as effectively, in the case of a person with significant mental handicaps*, the community (reflected by the judges) applies to such people the principles of general deterrence in a way that is sensibly moderated to the particular circumstances of their case. General deterrence still operates ... It is in place for the protection of the community and the victims of offences which the community rightly takes most seriously. But as that principle falls upon a person such as this applicant, it is necessarily a consideration to which less weight can, and therefore should, be given.

This dicta from Lovett was approved by the Court of Appeal in *R v Derrick Jon Leeder* [2010] VSCA 98. In that case the appellant had an I.Q. of 67. At [33] & [39] of his judgment Maxwell P (who agreed with Buchanan JA in the disposition of the appeal) made a strong statement that intellectual disability ought be treated in the same way for sentencing purposes as mental illness:

[33] “Moral culpability and general deterrence apart, the appellant’s disability attracted the operation of Principle 5 in *R v Verdins* (2007) 16 VR 269. That is, imprisonment imposes a greater burden on someone who is functioning with the brain power of an eight year old. That aspect does not appear to have been taken into account on sentence, although it was adverted to on the plea...

[39] Finally on the issue of intellectual disability, it seems to me important to ensure that this species of mental impairment is addressed with the same rigour and specificity as necessary in relation to the more familiar area of mental illness. The use of labels such as ‘mild’ or ‘moderate’ or ‘severe’ intellectual disability does not assist the sentencing court in deciding whether, and if so to what extent, sentencing considerations are affected by the condition of the particular person. What the Court needs to know is how the disability (is likely to have) affected the mental functioning of the particular offender at the time of the offending (or in the lead-up to it) and/or how it is likely to affect him/her in the future. As with mental illness, so with intellectual disability, there is scope for considerable refinement of expert opinion, and therefore of argument before sentencing courts, about how these matters are to be taken into account.

In *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 the High Court discussed the relevance of mental retardation in the sentencing of a 30 year old mentally retarded man who had pleaded guilty to one count of sexual intercourse with a child aged under 10 years. At [53]-[54] the Court said:

“In *R v Mooney* [unreported, Victorian Court of Criminal Appeal, 21 June 1978 at 5], cited in *R v Anderson* [1981] VR 155 at 160, Young CJ, in a passage that has been frequently cited, said this:

‘General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others.’

In the same case at 8, Lush J explained the reason for the principle in this way:

‘The significance [of general deterrence] in a particular case will, however, at least usually be related to the kindred concept of retribution or punishment in which is involved an element of instinctive appreciation of the appropriateness of the sentence to the case. A sentence imposed with deterrence in view will not be acceptable if its retributive effect on the offender is felt to be inappropriate to his situation and to the needs of the community.’

The principle is well recognised: *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476-477. See also *R v Anderson* [1981] VR 155; *Scognamiglio* (1991) 56 A Crim R 81; *R v Letteri* unreported, New South Wales Court of Criminal Appeal, 18 March 1992; *Engert* (1995) 84 A Crim R 67; *Wright* (1997) 93 A Crim R 48. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. See *Engert* (1995) 84 A Crim R 67 at 71. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community.”

In *R v Tran* [2012] VSCA 110 at [15]-[24] the Court of Appeal discussed the above extract from *Muldrock* and held at [16]: “[W]e do not consider what was said in *Muldrock* to have altered any of the principles summarised in *Verdins*. *Muldrock* contemplates expressly that the question of a causal relation between mental illness and the commission of an offence will often arise. It is then said that such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason will, in most cases, substantially lessen moral culpability.” At [23]-[24] the Court said:

[23] “*Muldrock* makes a general statement – the application of which will be worked out through the cases – that the causal question is less likely to arise with a mentally retarded offender. As was emphasised in *Verdins*, however, the task for the sentencing judge in every case is to examine what the evidence shows about the particular condition and how it affected the mental functioning of the offender, either at the time of the offending, or at the time of sentencing, or both...”

[24] The case-by-case approach to mental impairment issues was eloquently described by Gleeson CJ in *Engert v The Queen* (1995) 84 A Crim R 67, 68:

“...It is...erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.”

For further discussion on the effect of intellectual disability on sentencing see *R v Evans* [2007] VSCA 76 at [5]; *R v Foster* [2007] VSCA 85 at [15]; *R v Norris* [2007] VSCA 241 at [15]-[26]; *R v McIntosh* [2008] VSCA 242 at [84]-[110]; *R v Kulla Kulla* [2010] VSC 60 at [64]-[65]; *R v Filippi, Kosterman and Vergados* [2011] VSCA 438 at [29]-[39]; *R v Sokaluk* [2012] VSC 167 at [51]-[64]; *DPP v Miller* [2012] VSCA 265 at [15]-[24]; *DPP v Hamdache* [2014] VSC 158 at [56]; *Luchian v The Queen* [2019] VSCA 145 at [45]-[48]; *Ng v The Queen* [2019] VSCA 147 at [67]-[73]; *Piacentino v The Queen* [2019] VSCA 153 at [18]-[34]; *Bertram Morin v The Queen* [2019] VSCA 301 at [37]-[45].

11.2.11.4 Effect of personality disorder

In *Daylia Brown v The Queen* [2020] VSCA 212 the applicant (‘DB’) pleaded guilty to four charges of arson. The first three charges concerned the lighting of fires in a department store and two supermarkets in Melbourne, over the course of several hours on 18 December 2018. The fourth charge involved much more serious offending. DB set fire to a house in which she had previously lived, as a result of which the property was destroyed. Expert evidence presented to the sentencing judge established that DB was suffering — at the time of the offending and at the time of sentence — from a severe personality disorder. In the opinion of the defence expert, Dr Andrew Carroll, a consultant forensic psychiatrist, DB’s personality disorder constituted an impairment of her mental functioning and had ‘strong causal links to the offending’. The judge accepted that evidence, which was not challenged. However, his Honour considered himself bound by the Court’s decision in *DPP v O’Neill* (2015) 47 VR 395; [2015] VSCA 325 to hold that the *Verdins* principles were not engaged. But

for that constraint, his Honour said, he would have given 'very considerable weight' to the *Verdins* considerations.

At [6] a full bench of the Court of Appeal (Maxwell P, Niall, T Forrest, Emerton & Osborn JJA) held that an offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *Verdins*. At [4]-[6] the Court said [emphasis added]:

[4] "DB sought leave to appeal to this Court. Her principal contention was that, if the judge was right to regard the decision in *O'Neill* as standing for 'the broad proposition that personality disorders do not enliven *Verdins* principles', this Court should hold that *O'Neill* was wrongly decided.

[5] In the event, the Director of Public Prosecutions conceded in her written case that, in view of the expert evidence led before the judge, a blanket exclusion of personality disorders from the *Verdins* framework could not be sustained. The Director agreed with the submission for DB, that the approach laid down in *Verdins* should apply to personality disorders as to other conditions. That is, whether an offender's personality disorder engaged any of the *Verdins* principles should depend not on the particular diagnostic label attached to it but on what the expert evidence before the sentencing court showed about how the condition affected the offender's mental functioning at the time of the offending and/or about how it would affect the offender in the future.

[6] After hearing argument, we concluded that both the applicant's submission and the Director's concession should be accepted. **An offender diagnosed with a personality disorder should be treated as in no different position from any other offender who seeks to rely on an impairment of mental functioning as mitigating sentence in one or other of the ways identified in *Verdins*. Statements to the contrary in *O'Neill* should no longer be followed.** Whether and to what extent the offender's mental functioning is (or was) relevantly impaired should be determined on the basis of expert evidence rigorously scrutinised by the sentencing court."

See also *Steven Cooper v The Queen* [2020] VSCA 300 at [16]-[26].

11.2.12 Effect of deprived/disadvantaged background

In *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 at [37] & [42]-[45], French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ said:

[37] "An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence. In this respect in *Kennedy v The Queen* [2010] NSWCCA 260 at [53], Simpson J has correctly explained the significance of the statements in *Fernando*:

'Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.'

...

[42] It will be recalled that in the Court of Criminal Appeal the prosecution submitted that the evidence of the appellant's deprived background lost much of its force when viewed against the background of his previous offences. On the hearing of the appeal in this Court the Director did not maintain that submission. The Director acknowledges that the effects of profound deprivation do not diminish over time and he submits that they are to be given full weight in the determination of the appropriate sentence in every case.

[43] The Director's submission should be accepted. The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

[44] Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the

discretion so difficult: *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 476 per Mason CJ, Brennan, Dawson and Toohey JJ; [1988] HCA 14. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

[45] The point was made by Gleeson CJ in *Engert* in the context of explaining the significance of an offender's mental condition in sentencing (1995) 84 A Crim R 67 at 68:

'A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. In a given case, facts which point in one direction in relation to one of the considerations to be taken into account may point in a different direction in relation to some other consideration. For example, in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.'

In *Marrah v The Queen* [2014] VSCA 119 at [16] Redlich & Tate JJA said:

"Circumstances of deprivation, abuse and other social disadvantage occurring during an offender's formative years are more than matters of historical significance to the administration of justice. The effects of such social disadvantage do not generally diminish with the passage of time, and are likely to have profound and lasting consequences. The common experience of the law is that very frequently such disadvantage precedes the commission of crime, and often explains and contributes to an offender's criminal behaviour. The frequency with which criminal conduct can be explained by such disadvantage does not relieve each sentencing judge of the obligation to take such matters into account. Though they do not provide an excuse for offending behaviour, they must be given due weight in the sentencing calculus. That is not to say that an offender's social disadvantage has the same mitigatory relevance for all of the purposes of punishment. It may so explain the offender's conduct that the offender's moral culpability may be substantially reduced, yet it will increase the importance of protecting the community from the offender. It will not diminish the need for the sentence to vindicate the dignity of a victim and reflect the community's disapproval of the offending."

In *R v Wills* [2020] VSC 155 at [80] Coghlan JA referred with approval to the above dicta and added at [81] that he did not regard *Wills' Case* as one where it might be said that the offender's disadvantaged background increased the importance of protecting the community from the offender. Rather he regarded the offender's background as operating to reduce his moral culpability.

In *DPP v Lyons & Lyons* [2018] VSC 488 the 47YO female offender was found guilty after a jury trial of attempting to murder by drugging with sedatives and subsequently of murdering an intellectually impaired mother of four young children with the motive of enabling the offender to be the mother of the children. The victim had been violently bashed to death by a co-offender with the agreement of the female offender. The female offender had had an impoverished upbringing. In categorizing her as having high moral culpability and in sentencing her to TES IMP30y/23y, Kaye JA said at [73]:

"The principles of sentencing, that have been recently considered by the High Court, in its decisions in *R v Bugmy* (2013) 249 CLR 571 and *Munda v Western Australia* (2013) 249 CLR 600 provide that an individual's deprived and disadvantaged background may, in an appropriate case, mitigate an offender's sentence. In the present case, the offending by you was committed very much in a quasi-family setting. Your history reveals that you suffered significant disadvantage and deprivation during your formative years. The effects of the dysfunctional family, in which you grew up, were complicated by your low intelligence and your lack of normal socialisation. It is clear that those effects have endured. In that way, your culpability, for the two offences for which you have been convicted, while particularly high, is less substantial than if you were a person who had had the advantage of a normal upbringing, and who was of average intellectual capacity."

In *R v Giannioudis* [2019] VSC 75 Taylor J said at [41]-[42]:

"[A]s conceded by the Crown, the *Bugmy* principles are relevant to the sentencing exercise. Your childhood and early adulthood can only be described as horrendous. Not only did you suffer physical and sexual abuse, you carried an intolerable burden of silence about that abuse as well as the drug addiction of your parents and the lifestyle accompanying it. That addiction was visited upon you with your first breath. When at last you had access to appropriate medical assistance and, aged only 15 years of age, gathered the enormous courage to tell your mother of the sexual abuse you had suffered, she called you a liar and excised you from the family, preferring to live with one of your abusers and render you homeless.

You have suffered, to use the phrase of the High Court, 'profound childhood deprivation' and tragically, that will leave its mark on you throughout your life."

In *DPP v Green* [2020] VSCA 23 the Court of Appeal dismissed a DPP appeal against the adequacy of a sentence of IMP11y/8y6m on a 41-year-old man (37 at the time of the offending) who had pleaded guilty to 21 charges, comprising armed robbery, attempted armed robbery, attempted kidnapping, being a prohibited person in possession of a firearm, theft and obtaining property by deception. The respondent had a lengthy criminal history and had used a firearm in the course of some of the armed robberies. Holding that the sentence was "particularly lenient" but "not manifestly inadequate", the Court noted the respondent's dysfunctional family environment and that he had developed moderately severe post-traumatic stress disorder with panic attacks and dissociative symptoms consequent upon the abuse and neglect that he had experienced in youth custody. He also had a diagnosis of multiple substance abuse. The severe abuse he had suffered had a material causative role in his offending. Speaking of the principles outlined by the High Court in *Bugmy v The Queen* (2013) 249 CLR 571; [2013] HCA 37, Maxwell P and Priest & Kaye JJA said at [83]-[84]:

"Those principles apply with equal force to a case such as this, in which the respondent was subjected to significant abuse and degradation during the important formative years of his life. While, on the plea, and on this appeal, the respondent did not rely on his condition of PTSD as directly mitigating his culpability in the offending in the sense discussed in cases such as *Verdins*, nevertheless the principles outlined in *Bugmy* are relevant. In essence, in the present case, the respondent's subjective culpability for his offending could not be realistically equated with that of person who committed the same offences, but who had had the advantage of a normal, stable and regular home environment, and who had not been subjected to sexual and physical abuse of the kind experienced by the respondent while in custody. In that way, the respondent's background constituted an important mitigating circumstance in the determination of the sentences: *DPP v Drake* [2019] VSCA 293, [32] (Maxwell P, Priest, Kaye, T Forrest & Emerton JJA); *DPP v Heyfron* [2019] VSCA 130, [57]-[58] (Priest, Kaye & T Forrest JJA).

In addition, and importantly, the abuse perpetrated on the respondent, and the conclusions by Dr Brann, were also relevant to an evaluation of the weight to be given to the respondent's lengthy criminal history. In particular they explain, at least in part, the respondent's pattern of repeat offending over a period of more than two decades.

See also *DPP v Hodgson* [2019] VSCA 49, esp. at [46] & [73]-[77]; *DPP v Michaela Snow (a pseudonym)* [2020] VSCA 67 at [67]-[79]; *Haberman v DPP* [2020] VSCA 286 at [71]-[74]; *Julian Lockyer (a pseudonym) v The Queen* [2020] VSCA 321 at [62]-[65]; *Re Stacey Edwards* [2019] VSC 234 at [84]; [2020] VSCA 339 at [24]-[27].

11.2.13 Effect of ill health and/or age

In *Smith* (1987) 44 SASR 587 at 589 King CJ said-

"The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the Correctional Services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health."

The above dictum from *Smith* was referred to with approval by the High Court in *Bailey v Director of Public Prosecutions* (1998) 78 ALR 116 and was applied by the Court of Appeal in *R v Emanuel* [2005] VSCA 60 at [18]:

“His ill health was also a factor tending to mitigate punishment since it could reasonably be inferred from the evidence that imprisonment would be a greater burden on the offender by reason of the state of his health.”

In *R v Van Boxtel* [2005] VSCA 175; (2005) 11 VR 258 at [29]-[33] Callaway JA (Ormiston & Charles JJA agreeing) and in *R v Sharp* [2005] VSCA 226 at [25] Nettle JA Chernov JA & Harper AJA agreeing) approved and applied the above dicta from *Smith*. In *R v Sharp* the Court of Appeal agreed with counsel for the appellant that the test is not one of avoiding cruel and inhumane punishment.

The dictum from *Smith's* case was also applied by Coldrey AJA in relation to a partial paraplegic in *R v Boyes* (2004) 8 VR 230 at 239-240; [2004] VSCA 97 at [43]-[46] where His Honour broadened the dictum to areas other than ill health and said of the test:

[46] “What must be determined is whether the impact of the prison regime will be more burdensome upon a specific prisoner because of his or her particular disability. I interpolate that this may manifest itself in areas other than ill health. For example, the hardship of isolation for prisoners such as informers or paedophiles who must serve their sentences in protection or the additional psychological stress of the cultural singleton.”

In *R v George Williams* [2008] VSCA 95 at [45] the Court of Appeal sounded a warning about a potential conflict between general deterrence and mitigation of punishment on the grounds of ill-health:

“[A]s her Honour held, the appellant’s physical infirmity could not outweigh the need for a sentence imposing punishment reflective of the seriousness of the offence and the need for general deterrence. Indeed it raised an issue of particular sensitivity with respect to general deterrence. The Court could not be seen to send a message that drug trafficking by the physically infirm would be excused.”

In *R v AMP* [2010] VSCA 48 the appellant had pleaded guilty to 20 sexual offences against children over a period of 50 years and to one charge of possessing child pornography. There were 13 victims of the offences including his daughters, grandchildren, nephews and nieces, the child of family friends and Sudanese children whom he met through his involvement with the Church of Nazarene. At the time of sentencing the appellant was aged 71. Having been diagnosed with bladder and prostate cancer, his bladder was removed and he had to pass urine through a bag in his abdominal wall. Although his cancer was in remission, he was confined to a wheelchair. In upholding a sentence of 14 years imprisonment with a non-parole period of 9 years, Redlich & Neave JJ said at [53]-[55]:

[53] “As this court said in the recent decision of *RLP* [2009] VSCA 271 at [39], the conjunction of the appellant’s advanced years and ill health are to be approached with these propositions in mind:

1. The age and health of an offender are relevant to the exercise of the sentencing discretion.
2. Old age or ill health are not determinative of the quantum of sentence.
3. Depending upon the circumstances, it may be appropriate to impose a minimum term which will have the effect that the offender may well spend the whole of his remaining life in custody.
4. It is a weighty consideration that the offender is likely to spend the whole or a very substantial portion of the remainder of their life in custody.
5. Other sentencing considerations may be required to surrender some ground to the need to exercise compassion to take account of the real prospect that the offender may not live to be released and that the offender’s ill health will make his or her period of incarceration particularly onerous.
6. Just punishment, proportionality and general and specific deterrence remain primary sentencing considerations in the sentencing disposition notwithstanding the age and ill health of the offender.
7. Old age and ill health do not justify the imposition of an unacceptably inappropriate sentence.

[54] It was necessary for her Honour to give weight to the fact that the applicant’s ill-health [*R v Van Boxtel* (2005) 11 VR 258] would make prison more burdensome to

him than to a healthy person without his disabilities. Her Honour was also required to have regard to the fact that the offender was aged 71 at the time of the sentencing and might not survive a lengthy prison sentence [*R v Bazley* (1993) 65 A Crim R 154, 158]. However, as has been said on many occasions, age alone 'cannot be permitted to justify the imposition of an unacceptably inappropriate sentence' [*R v Gregory* [2000] VSCA 212, [21] (Winneke P); *R v Whyte* (2004) 7 VR 397, 405 (Winneke P)].

[55] Her Honour was required to impose a substantial total effective sentence to take account of the gravity of the offending, its effects on the victims and the weight to be given to general and specific deterrence. In our opinion the total effective term of 14 years' imprisonment does not indicate that her Honour gave insufficient weight to the applicant's age and ill-health."

In *R v Bollen* [2014] VSC 651 Lasry J sentenced a 71 year old truck driver to IMP 5y/2y6m for culpable driving and 4 x negligently causing serious injury arising from "a tragic 19 seconds of inattention after a lifetime of responsible professional driving". At [59]-[60], after referring to *Okutgen v R* (1982) 8 A Crim R 262 at 265-6, his Honour cited with approval the following dicta from *R v Bazley* (1993) 65 A Crim R 154 at 158-9: "The age of an offender is no doubt a relevant sentencing consideration. It may, in some cases, be of considerable significance. But it cannot be allowed to be a justification for the imposition of an unacceptably inappropriate sentence."

In *R v Barci and Asling* (1994) 76 A Crim R 103 the Court of Criminal Appeal (Southwell, Hampel & Hansen JJ) held that even where an offender brought his injuries upon himself, if they were directly resultant from the commission of the crime itself, "they must fairly be regarded as constituting some punishment for the criminality". In *R v Natale* [2019] VSC 30 the 87 year old offender had shot himself in the stomach in the aftermath of the offending. As a result he had various surgeries and complications had arisen. At [45]-[49] Taylor J discussed the relevance of this injury and held:

"[Y]our injury was not sustained during the course of your offending nor was it directly resultant of it. Rather, it was a self-inflicted wound made, by choice, in response to your own actions.

Nonetheless, I take into account the ongoing pain and discomfort you experience as a result of that injury, as well as your other, age-related health issues."

See also *R v PFG* [2006] VSCA 130 at [56]-[61]; *R v DW* [2006] VSCA 196 at [32]; *DPP v Downing* [2007] VSCA 154 at [13]; *R v Strezovski* [2007] VSCA 260 at [28]-[30]; *R v RGG* [2008] VSCA 94 at [29]-[41]; *R v Kuoth* [2010] VSCA 103 at [20]; *R v Charles Hargrave* [2011] VSCA 404 at [250]-[257]; *R v AWP* [2012] VSCA 41; *R v RSJ* [2012] VSCA 148; *R v CCR* [2012] VSCA 163 at [71]-[74]; *R v Brennan* [2012] VSCA 151 at [88]-[92]; *Director of Public Prosecutions (Cth) v Barbaro & Zirilli* [2012] VSCA 288 at [53]-[58]; *Tony Smith v The Queen* [2018] VSCA 208 at [28]-[35]; *DPP v Drake* [2019] VSCA 293 at [10]-[13] & [30]-[34].

11.2.14 Effect of delay

In *R v Tiburcy & Ors* [2006] VSCA 244 Maxwell P, with whom Warren CJ & Buchanan JA agreed, said at [3]:

"In my opinion the sentencing of each applicant called for the application of the principles eloquently stated by Chernov JA in *R v Cockerell* (2001) 126 A Crim R 444 at 447 where His Honour said:

'The Courts have...recognised that that such delay which, as here, cannot be attributed to the offender, constitutes a powerful mitigating factor at a number of levels – see, for example, *Miceli* [1998] 4 VR 588 at 591; (1997) 94 A Crim R 327 at 329-330, *Todd* [1982] 2 NSWLR 517, *Schwabegger* [1998] 4 VR 649 at 659 per Vincent AJA, *MWH* [2001] VSCA 196, *Blanco* (1999) 106 A Crim R 303 at 306 per Wood CJ at CL, with whom Bell J and Smart AJ agreed. First, and perhaps foremost, where there has been a relatively lengthy process of rehabilitation since the offending, being a process in which the community has a vested interest, the sentence should not jeopardise the continued development of this process but should be tailored to ensure as much as possible that the offender has the opportunity to complete the process of rehabilitation. Secondly, from the point of view of fairness to the offender, the sentence should reflect the fact that the matter has been hanging over his or her head for some time, thereby keeping the offender

in a state of suspense as to what will happen to him or her. As Wood CJ at CL said in *Blanco*:

'... it remains the fact that it is highly desirable that the prosecuting authorities act promptly where they have evidence of serious criminality. If they fail to do so, then they must expect that circumstance to be taken into account in sentencing. It is in the public interest that those who are suspected of serious criminality be brought to justice and be brought to justice quickly, particularly where there is a strong case available against them.'

In *R v Nikodjevic* [2004] VSCA 222 Ormiston JA, with whom Callaway & Vincent JJA agreed, said at [21]-[22]:

[21] ...there are many circumstances which need to be taken into account to determine what is 'undue' delay, and further factors must be considered in seeing whether such delay in fact 'should work in favour' of a particular prisoner. As Callaway JA said in *R v MWH* [2001] VSCA 196 at [18]: 'It is the effects of delay that are important for sentencing'. Thus the principle, assuming it should be described as such, is often expressed in terms of the delay between 'offending' and sentencing: see, for example, the passage from the judgment of Street CJ in *R v Todd* [1982] 2 NSWLR 517 at 519-520 cited with approval in the High Court in *Mill v R* (1988) 166 CLR 59 at 64. However, with great respect, one should be cautious about recognising the time between *offending* (as such) and sentencing except for certain specific purposes which were analysed with some care by Callaway JA in *MWH*. Thus it may show reformation of character over a significant period of a kind which would make rehabilitation largely irrelevant and greatly reduce, if not extinguish, the need for specific deterrence to be recognised in the sentence...

[22] Delay in sentencing, nevertheless, may be otherwise significant if the delay has occurred between the detection and charging of an offender and the time of sentencing, where the offender can fairly say that the sentence has been hanging over him or her for an unreasonable time, or where that person had chosen to reorganise his or her life upon an acceptance of guilt for the matters charged. Thus it is put forward not infrequently as a factor to be considered in the case of first offenders who have committed serious offences, for which they may feel uncertain whether they will be required to serve any term of imprisonment at all. The truth of the matter, however, is that every case is different and the factors seen properly to affect the exercise of the sentencing discretion will vary according to circumstance. One should therefore be cautious about asserting that there is a right to some automatic discount in every case of asserted delay. The most that can be said is that where the prosecuting authorities have in fact unduly delayed bringing the matter to court, there is much more likely to be such a discount, without the need to have regard to its particular consequences."

Their Honours held at [27] that in the circumstances of that case there was no undue delay, no delay of a kind which the judge was obliged to take into account and that the various reasons for rejecting such a claim were so strong as to be obvious. In *DPP v Taylor* [2005] VSCA 222 at [19] Nettle JA, with whom Eames JA & Hollingworth AJA agreed, approved and applied the above dictum from *R v Nikodjevic*.

In *R v MWH* [2001] VSCA 196 at [18] Callaway JA said: "It is the effects of delay that are important for sentencing." In *R v Truong* [2005] VSCA 147 at [15], referring to *R v MWH*, the Court of Appeal spoke of "the existence of a substantial interval between the commission of an offence and the date of imposition of sentence [which] can be seen to operate, in one sense at least, in the offender's favour, as it has permitted the individual to demonstrate significant rehabilitation and to reconstruct his life in a more satisfactory fashion."

In *R v Ferguson* [2008] VSCA 257 at [28] the Court of Appeal said:

"In *R v Merrett, Piggott & Ferrari* (2007) 14 VR 392 Maxwell P reviewed the authorities concerning the relevance of delay as a mitigating factor in sentencing, especially in circumstances where the offender has been on bail during the period of delay and, in that time, has engaged in an effective process of rehabilitation by participating in the community without further offending. The unfairness of serious criminal charges hanging over the head of the offender for a long period is also a relevant consideration. With reference to *R v Liang and Li* (1995) 124 FLR 350, 356 cited by Vincent AJA in *R v Schwabegger* [1998] 4 VR 649,659 {see also *R v Cockerell* (2001) 126 A Crim R 444 at

[10] per Chernov JA}, Maxwell P stated that delay constitutes 'a powerful mitigating factor' {(2007) 14 VR 392 at [35]}.

In *Stalio v R* (2012) 46 VR 426, 441 [54] the Court of Appeal said: "It would be wrong for a prisoner to be sentenced to a substantially higher sentence than an offender who committed like offences at or about the time of the offences in issue, simply because of the lapse of time." See also *R v Hague* [2018] VSC 323 at [44]-[45].

For further discussion on the effect of delay in sentencing see *R v Cain* [1974] VR 759 at 767; *Mill v The Queen* (1988) 166 CLR 59 at 64; *R v Tuan Quoc Truong* [2005] VSCA 147 at [15]; *R v Carmody* [2006] VSCA 139 at [14]-[18]; *R v Lanteri* [2006] VSC 225 at [77]; *R v Merrett, Piggott & Ferrari* (2007) 14 VR 392; *R v Rowley* [2007] VSCA 94 at [32]-[38]; *R v Tezer – R v Davis* [2007] VSCA 123 at [36]-[48]; *R v Rackley* [2007] VSCA 169 at [34]-[36]; *R v Cavkic, Athanasi & Clarke* [2007] VSC 289 at [68]-[70]; *R v Slattery (Sentence)* [2008] VSC 81 at [32]-[34]; *R v Zancan* [2009] VSCA 11 at [32]-[34]; *R v Thompson* [2009] VSCA 13 at [24]-[33]; *R v Wright* [2009] VSCA 27; *R v RL* [2009] VSCA 95 at [54]-[58]; *DPP v McInnes* [2009] VSCA 144 at [10]-[12]; *R v ONA* [2009] VSCA 146 at [34]-[47]; *DPP v WRJ* [2009] VSCA 174 at [14]-[24]; *R v NJD* [2010] VSCA 84 at [71]-[74]; *R v Malikovski* [2010] VSCA 130 at [43] & [52]-[53]; *R v Barrett* [2010] VSCA 133 at [32]-[38]; *R v Hennessy* [2010] VSCA 297; *R v Chandler & Paksoy* [2010] VSCA 338 at [16]; *R v Patrick James Keane* [2011] VSCA 156 at [7]-[18]; *R v Bourne* [2011] VSCA 159 at [24]-[33]; *R v Andrews* [2011] VSCA 191 at [8]-[9]; *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 at [65]; *DPP v Murray* [2011] VSCA 232 at [7]-[8]; *R v Day* [2011] VSCA 243 at [11]-[22]; *R v Tansey* [2012] VSC 221 at [54]-[56]; *DPP v TP* [2012] VSCA 166 at [67]-[77]; *DPP v Miller* [2012] VSCA 265 at [25]-[30]; *Russell O'Brien (a pseudonym) v The Queen* [2014] VSCA 94 at [69]-[73]; *Davies v The Queen* [2019] VSCA 66 at [700]-[713] & [769]; *DPP v Tuite* [2019] VSC 159 at [33]-[34]; *Nicos Kiril (a pseudonym) v The Queen* [2019] VSCA 133 at [40]-[45]; *Mush v The Queen* [2019] VSCA 307 at [96]-[98].

11.2.15 Relevance of gambling addiction

In *R v Huynh & Others* [2004] VSCA 128 - the Court of Appeal was dismissive of the gambling addiction of one of the defendants, a 30 year old female Kim Ngoc Ta. At [58] Eames JA, with whom Batt & Vincent AJA agreed, said: "The fact that an offender had a gambling addiction and that played a part in the commission of the offences is a matter upon which little if any weight might be given by a sentencing judge: *DPP v. Raddino* (2002) 128 A Crim R 43, at [26]-[27]; *R. v. Atalla* (2002) 132 A Crim R 531, at [13]-[14]."

In *R v Luong & Ors* [2005] VSCA 94 at [26] Winneke P (Charles & Chernov JJA concurring) said:

"Whether or not an addiction to gambling can mitigate a sentence by reflecting upon the offender's 'moral culpability' and the aspect of general deterrence will, as it seems to me, very much depend upon the nature of the crime and the circumstances of the offending. For my own part, the concept that an appropriate sentence for widespread heroin trafficking should be moderated by the prisoner's gambling addiction is not one which should loom large in the exercise of the Judge's discretion. It may be that crimes of dishonesty precipitated by gambling addiction will attract a different view (see *Novak* (1993) 69 A Crim R 145 per Vincent J); although the Court of Criminal Appeal in this State rejected the idea that *Novak* should become authority for the proposition that a gambling addiction reduced the relative importance of the element of general deterrence even in crimes of dishonesty. In *R v Martin* (1994) 74 A Crim R 252, Southwell J said (at page 257):

'As it seems to me there is no logical distinction to be drawn, so far as evidence of addiction is concerned, between the commission of an armed robbery to obtain funds to feed on the one hand an addiction to heroin and on the other an addiction to gambling. The same can be said where the offence is not that of armed robbery but a theft in breach of trust. In the latter type of case at least it would, in my opinion, be an unusual case where evidence of addiction to gambling will significantly reduce the importance of the element of general deterrence.'

Similar views have been adopted by this Court in the cases of *R. v. Chamberlain* [unreported, Court of Criminal Appeal, 23/05/1996]; *Limb* [unreported, Court of Criminal Appeal, 13/03/1997]; *Dawsan* [unreported, Court of Criminal Appeal, 27/05/1997] and *Pascoe* [unreported, Court of Criminal Appeal, 29/04/1998]. In the case of *R v Dawsan*, I said, with the concurrence of Brooking JA and Ashley AJA:

‘In my view, it will be a rare case where a court will find that a person’s gambling habit will be available to that person for the purposes of mitigating the sentence which would otherwise be appropriate.’”

In *R v Grossi* [2008] VSCA 51 the Court of Appeal rejected an argument that the line of authority that little or no weight will usually be given to an offender’s gambling addiction must now give way in light of the principles espoused in *Verdins*. After discussing a large number of cases including *R v Do* [2007] VSCA 308, Redlich JA, with whom Vincent & Neave JJA agreed, held at [56]:

“Properly analysed, there is in my view no tension between the principle explained in *Verdins* and those authorities which have dealt with gambling addiction. Evidence may establish that an offender suffers from an impulse control disorder in the form of pathological gambling listed in DSM-IV-TR, the essential feature of which is ‘persistent and recurrent maladaptive gambling behaviour that disrupts personal family or vocational pursuits’. The relevance of the disorder to the sentence to be imposed, is then to be assessed in accordance with the principles restated in *Verdins*. That assessment will generally lead to the conclusion that the presence of a gambling addiction should not, on that ground alone, result in any appreciable moderation of the sentence. There are a number of reasons why that will be so. Firstly in most cases, the nature and severity of the symptoms of the disorder, considered in conjunction with the type and circumstances of the offending, will not warrant a reduction in moral culpability or any moderation of general deterrence. Secondly, it will frequently be the case that crimes associated with gambling addiction will have been repeated and extended over a protracted period. The long term chase to recoup losses is characteristic of those with such a disorder. Thirdly, in cases involving dishonesty, the crimes will commonly be sophisticated, devious, and the result of careful planning: *DPP v Bulfin* [1998] 4 VR 114, 131; *R v Atalla* (2002) 132 A Crim R 531 (Vincent JA with whom Winneke P and Charles JA agreed). Fourthly, the gravity of such offences, if there is a breach of trust or confidence, will commonly attract an increased penalty making such offences more appropriate vehicles for general deterrence. Fifthly, when offences of this nature are committed over extended periods, the prominent hypothesis will be that the offender has had a degree of choice which they have continued to exercise as to how they finance their addiction: *R v Telford* [2005] SASC 349, [30]; *R v De Stefano* [2003] VSC 68, [56] (Kellam J). This has often provided a reason for a general reluctance to temper the weight given to general deterrence or to reduce moral culpability because an offender has found it difficult to control their gambling obsession. Finally, and perhaps most importantly, the nexus of the addiction to the crime will often be unsubstantiated. The disorder will not generally be directly connected to the commission of the crime, the addiction providing only a motive and explanation for its commission. Hence, by contrast to a mental condition that impairs an offender’s judgment at the time of the offence, such addiction will generally be viewed as only indirectly responsible for the offending conduct.”

See also *R v Yi Yi Wang* [2009] VSCA 67 at [17]-[18].

11.2.16 Relevance of drug addiction

In *R v Bisset* [2005] VSCA 10 the Court of Appeal dismissed an application for special leave by a 25 year old man who had pleaded guilty to one count of armed robbery, one count of kidnapping and one count of theft and had been sentenced to 6 years imprisonment with a non-parole period of 4 years. Shortly after midnight the applicant had entered a service station shop wearing a beanie pulled down over his face and carrying a steak knife. He demanded money from the young female attendant and ordered her into his car. After travelling a short distance he stopped the car and the attendant escaped without opposition. He had a total of 37 prior convictions from 9 previous court appearances. These were largely related to offences of dishonesty and drug-related matters, although many were of a relatively minor nature. He was a heroin addict and had been for 7 years. He had attended at Odyssey House on several occasions in an attempt to rid himself of drug addiction but had failed on each occasion. At [25] Nettle JA (with whom Vincent JA & Cummins AJA agreed) said: “[E]ven if there had been no kidnapping at all, a sentence of 4 years imprisonment is...well within range for armed robbery of a young female attendant of a service station in the middle of the night in circumstances which are likely to have filled her with terror.” At [26]-[27] His Honour rejected the submission that the sentencing judge had erred in failing to treat the applicant’s period of residence in Odyssey House following his release on bail as so akin to pre-sentence detention as to warrant a sentencing discount. Distinguishing *R v Cartwright* (1989) 17 NSWLR 243 at 258-9 in which the NSW Court of Criminal Appeal had equated a period of time in which a prisoner under the control of Federal police and

assisting them with their inquiries as akin to pre-sentence detention, His Honour said: “I reject the analogy...[T]he applicant’s residence at Odyssey House was voluntary: *R v. Eastway* NSWCCA, 19/05/1992; BC 9202732 at 7. He had the choice to remain in custody or to go free on bail on the condition that he reside at Odyssey House. He chose the latter.” And at [28]-[29] His Honour said:

“In the result, I see no error of principle in the sentencing judge’s sentencing remarks and I do not consider that the sentences imposed were manifestly excessive. Despite the mitigating factors of which counsel for the applicant has sought to make so much, and despite such sympathy as one might have for the applicant because of his drug addiction, it remains that the applicant’s offences were callous, calculated crimes committed against a defenceless young woman in frightening circumstances, and the community expects such offences to be met with stern and just punishment in which specific and general deterrence play considerable parts. As Winneke P pointed out in *R v Reddrop* [2000] VSCA 101 at [15]-[17]:

‘No matter how sympathetic one might be towards those who have allowed themselves to become hooked on heroin, the courts have said time and time again that crimes of violence of this sort must attract condign punishment whether or not committed for the purposes of feeding a heroin addiction.

[Such a] crime, I think, can be properly described as a callous crime committed against a defenceless young girl in frightening circumstances...[and t]he community expects such a crime to be met with stern but just punishment in which both general and specific deterrence must play their part. The maximum penalty for armed robbery has recently been increased to 25 years and thus reflects the seriousness in which it is viewed by the community.’

So therefore while the learned sentencing judge was required to take into account the several factors urged in mitigation, and his Honour did, he was required also to bear in mind that drug addiction can be no excuse for the commission of the crime. Otherwise, crimes which would violate the community’s fundamental values will be allowed to go improperly punished.”

In *R v Taslik* [2005] VSCA 35 the applicant had pleaded guilty to attempted armed robbery and recklessly causing injury (minor) to 2 persons in a city street in daytime using a Stanley knife. The sentencing judge accepted that the applicant’s continuing heroin problem explained why the attack took place but noted that there was “a difference between committing offences of dishonesty and escalating them to thefts with such force. The addiction did not materially affect the applicant’s moral culpability.” The Court of Appeal said at [22]: “His Honour’s approach to the applicant’s heroin addiction was justified by *R v. Bouchard* (1996) 84 A Crim R 499 at 501-502.

In *DPP v Smeaton* [2007] VSCA 256 Nettle JA, with whom Dodds-Streton JA & Maxwell P agreed, held at [14] that in this case the respondent’s drug-taking was an aggravating factor:

“It may be that the respondent was affected by Xanax tablets at the time of the offence, and it may be perhaps that he would not have behaved as he did if he had not taken the tablets. But that is not a mitigating circumstance in this case. Despite all the deficits by which he is afflicted, the respondent knew from previous experience that he would be prone to anger and aggression if he put himself under the influence of drugs, and yet he took the tablets. If anything, therefore, in the circumstances of this case, the respondent’s consumption of the drug was an aggravating factor {*R v Coleman* (1990) 47 A Crim R 306, 327; *R v Walker* (Unreported, VSCA 31 May 1996 - Hayne JA with whom Southwell AJA agreed); *R v Groome* [1999] 2 VR 159, 164 [23]-[24] per Batt JA with whom Tadgell and Buchanan JJA agreed; *R v Hay* [2007] VSCA 147 at [53] per Maxwell P} and, more importantly, it emphasises the need for community protection.”

At [24]-[26] Maxwell P was particularly critical of the characterization by counsel for the respondent of his client as belonging to “the world of small-time drug addicts”:

“At the end of his submission, Mr Tehan made a contention to this effect: ‘The niceties of human behaviour need to be qualified or moderated by reference to the realities of the world of small-time drug addicts.’ Mr Tehan had earlier, as I understood him, abandoned a submission that a mitigating aspect of this vicious assault was to be found in what he described as the manipulative, mutually destructive drug relationship between the perpetrator and the victim. But the later submission seemed to be an argument of the same kind, that what goes on in what Mr Tehan describes as ‘the world of small-time drug addicts’ is somehow qualitatively different, such that what he calls ‘the niceties of

human behaviour' are not to be regarded as the governing considerations when a court considers the gravity of the conduct when sentencing for it.

I regard that submission as wholly untenable. It seems to me that the phrase 'the niceties of human behaviour' is an altogether inappropriate description of the core issue in this case, which is the right of each person to be free of physical violence of any kind. That is not a matter of niceties. That is a matter of human rights. Every person, however troubled or afflicted, is entitled equally to the enjoyment of that human right. It seems to me fundamental to the rule of law that that universality be asserted and maintained.

Of course, the particular circumstances of an offender must be borne in mind...But the suggestion that this is somehow less serious, or is to be denounced less strongly, because it occurred in 'the world of small time drug addicts' is, in my opinion, a suggestion to be repudiated."

On the other hand, in *R v Van Tu Nguyen* [2008] VSCA 141 it was conceded that the appellant, who had pleaded guilty to trafficking in a large commercial quantity of heroin at the first reasonable opportunity, was at all relevant times a heavy user of heroin to which he was addicted to the extent of 1-2g per day. The only benefit he had received from the offending was a supply of drugs for his own use. In allowing an appeal and reducing a sentence Mandie AJA (with whom Vincent & Nettle JJA agreed) noted at [21]: "The Crown acknowledged the various factors indicating that the appellant had a degree of moral culpability less than that which was or would be attributable to an offender *profiteering* from large commercial quantities of a drug."

In *R v Ibrahim* [2010] VSC 333 at [19]-[21] Coghlan J discussed the relevance of addiction to sentencing as follows:

[18] "The courts have recognised that addiction may be relevant to sentencing. (See *R v Nagy* [1992] 1 VR 637, *R v Bouchard* (1996) 84 Crim App R 499 and *R v Lacey* [2007] VSCA 196.) The situation though, is perhaps best summarised by Buchanan JA in *R v McKee*, *R v Books* [2003] VSCA 16. His Honour said in that case:

' The motive for the commission of the crimes was the appellants' need for money with which to buy heroin to feed their addiction. According to the Court of Criminal Appeal in New South Wales it has been "said on countless occasions that addiction to heroin is not to be considered as effective reduction of what would otherwise be an appropriate sentence".

[19] While the existence of an overwhelming physical craving may explain the commission of a crime, for instance to obtain money to purchase heroin to still the craving, the courts' refusal to take that into account may be due to the view that the decision to begin to use drugs is said to be voluntary and the commission of crimes to feed an addiction is a likely consequence of that choice. In *R. v. Henry* (1999) 46 NSWLR 346, Spigelman CJ said:

'Self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice.'

[20] The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs. Age is relevant to the question, as Spigelman CJ acknowledged. I would add that in the case of adults, despair and low self-regard may also play a significant part in the decision to use drugs, and that condition may be the result of social or economic disadvantage, poor education, or emotional or physical abuse. An addiction to heroin may also bear upon the question of rehabilitation, where the prospects of success will often depend upon the likelihood of the addiction being successfully treated. In my view, a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated when deciding upon a sentence appropriately tailored to the personal circumstances of the offender."

In *R v Broad; R v Freeman* [2013] VSC 454 King J said at [57]-[59]:

"The behaviour demonstrated by you both in your intentional causing of serious injury to Mr Van Der Hoek was despicable, inhuman, degrading and sadistic. How you could both descend to such low levels of humanity and decency is only explicable by your consumption of the drug ice. It is truly a scourge on our society..."

It is the recent experience of this court that methylamphetamine or 'ice' has played, and is playing, an increasingly significant role in the commission of offences of this nature, involving the use of gratuitous violence, in which it appears the perpetrators have been robbed of their ordinary humanity, decency and moral compass. The offences of homicide and infliction of serious injuries now often involve frenzied attacks of 30 to 40 stab wounds or multiple punches and countless kicks to vulnerable parts of people's bodies over prolonged periods of time, most of these usually occurring as a result of explosive rage and often after the consumption of ice together with other substances and usually without any provocation, real or imagined, and unbelievably, not even a clear memory or any memory the next day of what the person has done.

Our community needs to be very concerned about the ease of manufacture of this drug, which results in the relatively easy availability of it within the community. The prevalence of its use and the horrific consequences that sometimes flow from its consumption is something that needs to be addressed by our community in an holistic approach, to deal with it as the significant problem that it has become, rather than just leaving the courts to deal with the end consequences of its use."

In *Jamel Mohtadi v The Queen* [2018] VSCA 238, in refusing leave to appeal against a sentence of IMP3y3m imposed on a charge of cultivating a commercial crop of cannabis in a hydroponic setup in a suburban house at Epping, Kyrou & Kaye JJA said at [39]-[41]:

[39] "In *R v Koumis* (2008) 18 VR 434, the Court analysed the relevance of an offender's drug addiction to the issue of moral culpability, stating at [53], [56]:

'A number of general propositions may be stated about the relevance of addiction to the question of moral culpability and whether it should be viewed as a mitigating circumstance for the purpose of sentence. Drug addiction provides no justification for the purposes of sentencing. Drug addiction is not of itself a factor that necessarily calls for a lesser sentence than would otherwise be appropriate. The sentence to be fixed has to reflect the seriousness of the crime of trafficking in substantial quantities of a drug of dependence. Denunciation and general deterrence assume particular importance as the purposes to be effectuated by the sentence. Generally speaking, addiction, and any consequential impairment of judgment, will not have any significant mitigatory effect upon those sentencing considerations.

...

The general reluctance of courts to take drug addiction into account rests in part, at least, upon the view that the decision to begin to use drugs was voluntary and the commission of crimes to feed an addiction was a likely consequence of that choice.'

See also *R v Katelis* [2008] VSCA 239, [12].

[40] The Court then proceeded to adopt the following passage from the judgment of Buchanan JA in *R v McKee* (2003) 138 A Crim R 88, 92-93:

'The extent to which a decision to experiment with drugs is freely made, in my view, bears upon the moral culpability of the offender who commits a crime as a consequence of addiction to drugs. Age is relevant to the question, as Spigelman CJ acknowledged. I would add that in the case of adults, despair and low self-regard may also play a significant part in the decision to use drugs and that condition may be the result of social or economic disadvantage, poor education or emotional or physical abuse. An addiction to heroin may also bear upon the question of rehabilitation, where the prospects of success will often depend upon the likelihood of the addiction being successfully treated. In my view, a sentencing judge may have regard to the circumstances which led to an addiction that caused the commission of the offence and to whether the addiction has continued or is being treated in deciding upon a sentence appropriately tailored to the personal circumstances of the offender.'

[41] As noted, the applicant's offending was well above that of a street level driven by desperation to traffick in a drug in order to be able to feed an uncontrollable addiction. Rather, the applicant had chosen to become involved in a sophisticated business of cultivating cannabis at a commercial level, in order to repay a drug debt, and to secure a continuing supply of drugs to himself. In doing so, he performed an important role in the drug trafficking enterprise of his supplier in the manner described by the sentencing judge in the passage to which we have earlier referred."

In *R v Giannioudis* [2019] VSC 75, in sentencing the accused on her plea of guilty to manslaughter, Taylor J said at [40]: "Your offending, whilst occurring on the street at the time you were trafficking

drugs, was not committed to satisfy your own drug addiction. Accordingly, your situation is different from that examined in *McKee*...Your drug addiction per se is not mitigatory of your conduct.”

11.2.17 Relevance of intoxication

In *R v Groom* [1999] 2 VR 159; [1998] VSCA 146 counsel for the applicant had cited the cases of *R v Coleman* (1990) 47 A Crim R 306 & *R v Walker* [unreported, Court of Appeal, 31/05/1996] in support of his submission that intoxication may be a mitigatory factor. At [1999] 2 VR at 164 Batt JA - with whom Buchanan JA agreed – rejected this submission:

“In my view the applicant’s moral culpability was not reduced by his intoxication...It is to be noted that the cases cited make it clear that there is no proposition that intoxication is a matter which will generally, let alone always, go in mitigation. I refer particularly to the judgment of Hayne JA (with whom Southwell AJA substantially agreed) in *Walker* at 5-9.

Those cases indeed go further and show, as also does *R v Sewell* (1981) 29 SASR 12 at 14-15, that intoxication may aggravate the offence by, for instance, making the events all the more frightening for the victim, preventing the victim from effectively reasoning with the assailant to desist.”

In *R v Leng Khem* [2008] VSCA 136 at [36]-[40], Pagone AJA (with whom Neave JA agreed) approved and applied the above dicta from *R v Groom*. There is dicta of Nettle JA to similar effect in *R v Howell* (2006) 16 VR 346 at 355-356; [2007] VSCA 119 at [19]-[20], citing with approval dicta in *R v Redenbach* (1991) 52 A Crim R 95, 99 and *DPP v Tucker & Lewis* (unreported, Court of Criminal Appeal, 22/09/1989). See also *R v McRae* [2008] VSCA 74 at [15]-[16] per Vincent JA with whom Ashley & Dodds-Street JJA agreed.

In *R v Angelopoulos* [2005] VSCA 258 at [35] Eames JA - with whom Callaway & Buchanan JJA agreed – said:

“Counsel accepted that there is no rule that intoxication was necessarily a mitigating factor but submitted that it nonetheless could be, in certain circumstances, in particular where a youthful first offender was involved: see *R. v. Walker* [unreported, Court of Appeal, 31/05/1996] and *R v Groom* [1999] 2 V.R. 159 at 164 [22]-[24] per Batt J. As Hayne JA noted in *Walker* the fact that an offence occurred whilst the offender was drunk may offer an explanation, in that the offence might not have occurred had he been sober. The fact that an offender was under the influence of liquor at the time of the offence might also have relevance in explaining why a person of otherwise blameless character did something out of character, thereby constituting both an explanation for the offending and a factor relevant to mitigation: see *R v Sewell* (1981) 29 SASR 12.”

See also the discussion by the Court of Appeal about reckless intoxication in *R v Hay* [2007] VSCA 147 at [33] and about self-induced intoxication in *R v Sebalj* [2006] VSCA 106 at [14], in *R v Martin* [2007] VSCA 297 at [19]-[21] and in *DPP v Arvanitidis* [2008] VSCA 189. In the latter case Redlich JA (with whom Buchanan & Nettle JJA agreed) said at [29] that dicta in *R v Martin* made it clear that when a psychiatric illness had been induced by the defendant’s ingestion of a particular drug, the Court must consider the probable consequences of the ingestion of that drug by that offender and whether the offender foresaw those consequences.

In *R v Hasan* [2010] VSCA 352 at [20]-[35] the Court of Appeal (Maxwell P, Redlich & Harper JJA) reviewed the state of the law in Victoria regarding intoxication as a sentencing consideration. The Court commenced by stating at [20]-[21]:

“It is notorious that intoxication of the offender is a common feature of violent offending in general, and of sexual violence in particular. Not infrequently, sentencing judges are faced with a submission that the offender’s intoxication made him/her behave in a manner that was ‘out of character’ and that his/her moral culpability for the offending should be seen as lessened accordingly...”

As will appear, courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce the offender’s culpability. An ‘out of character’ exception is acknowledged to exist, but it has almost never been applied. On the other hand, it is recognised that intoxication can be an aggravating factor where the offender is shown to have had foreknowledge of how he/she is likely to behave when affected by alcohol. See, for example, *R v Hay* [2007] VSCA 147, [18] (Buchanan JA), [33] (Maxwell P); *R v Martin* (2007) 20 VR 14, 20 and the cases there cited.”

The Court went on to discuss or refer to the cases of *Bradley* (1980) 2 Cr App R (S) 12, *R v Lane* (1990) 48 A Crim R 161, 165, *R v Redenbach* (1991) 52 A Crim R 95, 99, *R v Howell* (2007) 16 VR 349, 355 (Nettle JA), *R v McRae* [2008] VSCA 74, [15] (Vincent JA), *R v Rosenberger; ex parte Attorney-General (Qld)* [1995] 1 Qd R 677, 678, *De Jesus* (1986) 20 A Crim R 402, 405 (Smith J), *R v Sewell and Walsh* (1981) 29 SASR 12 (1981) 5 A Crim R 204, *R v Coleman* (1990) 47 A Crim R 306, *R v Fletcher-Jones* (1994) 75 A Crim R 381, 387, *R v Gordon* (1994) 71 A Crim R 459, 467, *Attorney-General v Davis* [unreported, Victorian Court of Criminal Appeal, 09/05/1980], *R v Argus* [unreported, Victorian Court of Appeal, 01/02/1996], *R v Phillips* [2000] VSCA 225, *Stanford v The Queen* [2007] NSWCCA 73. The Court also noted that in *DPP v G* [2002] VSCA 6, a case which concerned an offender's sexual abuse of his 14-year old step-daughter while affected by liquor, Winneke P had said at [10]:

"Nor, in my view, is the [offender's] conduct to be explained, excused or ameliorated by the fact that his lust had been provoked by the liquor which had disinhibited him."

The Court of Appeal noted that in *R v Walker* [unreported, Court of Appeal, 31/05/1996], *R v Laffey* [1998] 1 VR 155, 162 & *R v Groom* [1999] 2 VR 159, 164 the Victorian Court of Appeal had acknowledged the existence of the "out of character" exception but had held that it did not apply to the case at hand. At [33]-[35] Maxwell P, Redlich & Harper JJA concluded:

[33] "Because the out of character exception has been so rarely applied, there has been almost no judicial exploration of the circumstances in which the exception might be applicable. It seems clear enough, however, that the circumstances must be quite exceptional before intoxication at the time of offending can mitigate the offender's moral culpability.

[34] On ordinary principles, the offender would bear the onus of showing that he/she did not know what effect alcohol would have on him/her. See *DPP v Arvanitidis* [2008] VSCA 189, [34] (Redlich JA, with whom Buchanan and Nettle JJA agreed); *R v Shafik-Eid* [2009] VSCA 217, [30]. Given the widespread use of alcohol, and the fact that even a non-drinker would be well aware of its effects on a person who becomes intoxicated, this is doubtless a difficult burden to discharge. Moreover, an attempt to invoke the exception also carries with it the forensic risk that an investigation of the offender's drinking habits might lead to the conclusion that the state of intoxication was an aggravating rather than a mitigating circumstance.

[35] In our opinion, the evidence led on the plea fell far short of discharging the burden of proof which rested on the appellant to show that this conduct was out of character. As pointed out earlier, the evidence given by his sister was essentially of historical relevance only. The most obvious, and persuasive, way for the point to have been made was for the appellant himself to give evidence as to his lack of experience with alcohol and as to its unexpected effect on him on the night in question. As noted earlier, however, he chose not to give evidence. In the circumstances, the judge was fully entitled to reach the conclusion which she did."

On the other hand, in *R v Dong* [2012] VSC 525 Coghlan J treated the accused's intoxication as a mitigating factor by reducing moral culpability. At [25] his Honour said to the accused when sentencing him for attempted murder:

"It has been accepted by the courts that intoxication may act in mitigation, but it will not always do so: *R v Davis*, Court of Criminal Appeal (unreported, 9 May 1980). The principal consideration is whether or not a person does something under the influence of alcohol which they might otherwise [not] have done. That proposition will often in turn depend upon the person's previous good character. That is, the extent to which the behaviour being considered can be said to be outside ordinary behaviour. The general testimonials as to your good character are powerful. The evidence about your assistance to the Liu family was powerful. I am prepared to say in your case that intoxication does reduce your moral culpability, but that has to be seen in the light of the very clear resentment that you bore to [the victim]."

See also *R v Morrison* [2012] VSCA 222 at [15]-[21] & [24]-[25]; *R v Grant* [2013] VSC 53 at [32]-[41]; *R v Duca* [2019] VSC 371 at [45]-[54].

11.2.18 Relevance of hardship on offender's family

In *R v Michael Close* [2004] VSCA 188 at [18] Charles JA, with whom Winneke P substantially agreed, said:

"It is well-established...that the circumstances must be clearly exceptional [*Carmody* (1998) 100 A Crim R 41 at 46] before the impact on an offender's family will lead to the imposition of a lesser sentence. But this is not an absolute rule. Exceptional circumstances have been found to exist where, for example, imprisonment will result in children being left to fend for themselves as best they can without parental supervision or support [*Boyle* (1987) 34 A Crim R 202 at 205 applied in the Court of Appeal in *Yates* (1998) 99 A Crim R 483 at 486]."

In *R v Roberta Williams* [2004] VSC 429 Kellam J, in rejecting a submission that a wholly suspended sentence be imposed on a mother of 4 children who had pleaded guilty to trafficking in a commercial quantity of ecstasy, said:

"[16] I accept that in all the circumstances before me, the fact that your children will be deprived of their mother is a matter that affects you and causes you concern and hardship. That is a matter which should be taken into account in mitigation of sentence. I accept that by reason of your conduct and that of your husband, your children will suffer hardship and that in particular any term of incarceration to be served by you will cause them considerable disruption. However, I do not conclude that the circumstances of that hardship suffered by your children are so exceptional as to justify a wholly suspended sentence as submitted is appropriate by your counsel. As the Queensland Court of Criminal Appeal observed in *R v Tilley* (1991) 53 ACR 1 at 3-4:

'It is common that hardship or stress is shared by the family of an offender but that may be an inevitable consequence if the offender is to be adequately punished. An offender cannot shield himself under the hardship he or she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors. The public, which includes many people who struggle to bring up their children with moral standards, would be poorly served if the courts gave in to this temptation.'

[17] In my view, and in all the circumstances of this case, cogent and exact evidence of hardship which goes well beyond the situation of other families where a parent or parents have been imprisoned, would need to be produced before I could set aside other relevant principles of sentencing and fully suspend a sentence of imprisonment on that basis alone. The evidence before me is that your youngest daughter will be cared for by a loving grandparent. Your other three children will be cared for by their father, with whom they have a 'positive relationship' on the material before me.

[18] As Winneke P said in *Panuccio* [unreported, Court of Appeal Vic, 04/05/1998]:

'Although the court is not, both as a matter of compassion and commonsense, impervious to the consequences of a sentence upon other members of the family of a person in prison, such factors will need to be 'exceptional' or 'extreme' before the court will tailor its sentence in order to relieve the plight of those other family members. Such a principle is clearly an obvious one, because the court's primary function is to impose a sentence which meets the gravity of the crime committed by the person who is being sentenced. There will rarely be a case where a sentence of imprisonment imposed does not have consequential effects upon the spouse, children or other close family members who are dependent in one form or another upon the person imprisoned.

Thus it has been often stated that it is a general principle of sentencing that the court should usually disregard the impact which the sentence will have upon the members of a prisoner's family unless exceptional circumstances have been demonstrated. The principle has been so often stated that it does not need repeating It goes without saying I think, that the graver the crime for which the prisoner is being sentenced the more difficult it will be to find exceptional circumstances, because the relief usually sought and generally necessary to alleviate the plight of the relevant family members affected will require absolution from incarceration."

But in *R v Thao Thi Tran* [2005] VSC 220 Kaye J imposed a sentence of 3 years' imprisonment, wholly suspended for 3 years, on a mother of 3 children aged 9, 7 & 6 who was found guilty of manslaughter of the children's father whom she had stabbed 5 times. At [21] & [22] his Honour was satisfied that the defendant had acted out of a loss of self-control caused by the grave provocation to which she had been subjected and had been in fear of her own safety. At [42] his Honour said:

“Ordinarily, potential hardship to third parties as a result of a sentence is irrelevant to the question of what sentence is to be imposed on a person convicted of a crime. However, hardship to third parties, such as young children, may be taken into account as a mitigating circumstance where the hardship is ‘truly exceptional’, so that it would be an affront to common sense and human decency if the sentencing judge were to ignore it. In the present case, I consider that the plight of your three young children, and most particularly the precarious condition of your eldest son, is of such a truly exceptional character. It would be an affront to common sense and human decency for a sentencing judge to ignore such a factor. This is particularly so because, as a result of your crime, your children have been already deprived of their father.”

In *R v Thi Loang Thai* [2005] VSCA 283 the appellant had been found guilty of one count of attempting to import into Australia a traffickable quantity of heroin, a package containing 316.7g of heroin of approximately 70% purity having been posted to her from Cambodia by her husband. On appeal the sentence of 3 years and 1 day imprisonment with a non-parole period of 1 year was reduced to 2½ years imprisonment with release on recognizance after 271 days. After the accused and her husband were imprisoned, their two very young children were cared for by the accused’s sister. A clinical psychologist gave evidence that both children were showing signs of significant anxiety and distress and that from their long-term psychological point of view their well-being would be compromised by the separation. At [35] Eames JA - with whom Charles & Buchanan JJA agreed – said:

“At common law the impact of the sentence upon family members, in particular children, could be regarded as a mitigating factor only in exceptional circumstances [see *R v Pearce*, unreported, Court of Appeal-Callaway JA, Southwell & Coldrey AJJA, 19/09/1996 and although s.16A(2)(p) of the *Crimes Act 1914* (Cth) requires the court in sentencing to take into account the probable effect that a sentence would have on the family or dependants of the offender, that provision has been held, nonetheless, to also require that exceptional circumstances be shown. See *R. v. Carmody* (1998) 100 A Crim R. 41 at 45 per Tadgell JA.”

At [41] Eames JA held that the circumstances were not exceptional but acknowledged the overriding right of the Court to exercise mercy towards innocent children:

“In my opinion, as significant as they are, these circumstances are not so out of the ordinary as to amount to exceptional circumstances. I acknowledge, however, that the Court nonetheless has an overriding right, by way of the exercise of mercy towards innocent children, to take account of such matters in appropriate cases. See *Carmody* at 45 per Tadgell JA, per Callaway JA at 47.”

In *DPP (Cth) v Gaw* [2006] VSCA 51 the Court of Appeal referred with approval to *R v Sinclair* (1990) 51 A Crim R 418; *R v Matthews* [unreported, Court of Appeal, 20/03/1996]; *R v Togias* (2001) 127 A Crim R 23; *R v Holland* (2002) 134 A Crim R 451 & *R v Mangione* [2006] VSCA 34 and said at [19] & [21]:

“Hardship to an offender’s family or dependants must be truly exceptional...Hardship, even exceptional hardship, to children or other dependants is not a passport to freedom. It is simply a factor to be taken into account. In some cases it is entitled to great weight, in others [e.g. murder and serious cases of armed robbery] to hardly any weight at all.”

In *R v Nagul* [2007] VSCA 8 at [44] the Court of Appeal held that even if hardship to the offender’s family could not be taken into account for sentencing purposes because of absence of exceptional circumstances, it may be taken into consideration in determining whether mercy should be extended to the offender (as was the case in *R v Carmody* (1998) 100 A Crim R 41.& *R v Thai* [2005] VSCA 283), the exercise of mercy being part of the exercise of the sentencing discretion (*R v Miceli* [1998] 4 VR 588 at 592 per Tadgell JA and at 594 per Charles JA.; *DPP v. Carteri* [1998] 1 VR 601). Chernov JA, with whom Maxwell P & Habersberger AJA agreed, referred with approval to dicta of King CJ in *R v Osenkowski* (1982) 30 SASR 21 at

“There must always be a place for the exercise of mercy where a judge’s sympathies are reasonably excited by the circumstances of the case.”

Referring to *R v Nguyen* [2006] VSCA 184 and *R v Dooley* [2006] VSCA 269, the Court of Appeal noted that in an appropriate case mercy may be extended effectively to the family member who suffers significant hardship because of the offender’s incarceration or to both the family member and the offender. The Court also said at [45] that considerations of mercy may operate both at the level of fixing of the head sentence or of the non-parole period or both.

However, in *R v Markovic & Pantelic* (2010) 30 VR 589; [2010] VSCA 105 a bench of five judges of the Court of Appeal affirmed the common law position that there can be no residual discretion to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional. At [1]-[3] & [5] Maxwell P, Nettle, Neave, Redlich & Weinberg JJA said:

[1] “There must always be a place in sentencing for the exercise of mercy ‘where a judge’s sympathies are reasonably excited by the circumstances of the case’: *R v Osenkowski* (1982) 30 SASR 212, 212–3 (King CJ). This is a proposition of long standing and high authority, repeatedly affirmed in this Court: *Cobiac v Liddy* (1969) 119 CLR 257, 269; *R v Kane* [1974] VR 759, 766; *R v Clarke* [1996] 2 VR 520, 523 (Charles JA, with whom Winneke P and Hayne JA agreed); *Director of Public Prosecutions (Cth) v Carter* [1998] 1 VR 601, 607 (Winneke P); *R v Miceli* [1998] 4 VR 588, 592 (Tadgell JA), 594 (Charles JA). For a recent example, see *DPP v Najjar* [2009] VSCA 246, [11].

[2] The issue raised by these applications concerns the circumstances in which an offender can legitimately seek an exercise of mercy on the ground that his/her imprisonment is likely to cause hardship to members of his/her immediate family or other dependants.

[3] It has long been the position at common law that, unless the circumstances are shown to be exceptional, family hardship is to be disregarded as a sentencing consideration. The contention advanced by each of the present applicants, however, was that even if the circumstances of family hardship were not adjudged exceptional, a sentencing court could nevertheless be called on to exercise – on that ground – what is sought to be characterised as a ‘residual discretion of mercy’. Indeed, Mr Markovic argued that failure to extend sufficient ‘residual’ mercy on the ground of family hardship was an appealable error...

[5] We have concluded that the established common law position should be reaffirmed. Our reasons may be summarized as follows:

1. Reliance on family hardship – that is, hardship which imprisonment creates for persons other than the offender – is itself an appeal for mercy.
2. Properly understood, therefore, the purpose and effect of the ‘exceptional circumstances’ test is to limit the availability of the court’s discretion to exercise mercy on that ground.
3. Accordingly, there can be no ‘residual discretion’ to exercise mercy on grounds of family hardship where the relevant circumstances are not shown to be exceptional.
4. The effect *on the offender* of hardship caused to family members by his/her imprisonment raises different considerations, to which the ‘exceptional circumstances’ test has no application.”

At [20] Maxwell P, Nettle, Neave, Redlich & Weinberg JJA elaborated on point 4 in paragraph 5, distinguishing the hardship which imprisonment places upon the offender’s family from the effect on the offender of hardship caused to family members by imprisonment. The Court said:

“The effect *on the offender* of hardship caused to family members by his/her imprisonment is a quite separate matter. An offender’s anguish at being unable to care for a family member can properly be taken into account as a mitigating factor — for example, if the court is satisfied that this will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender’s prospects of rehabilitation. These are conventional issues of mitigation, and they are not subject to the ‘exceptional circumstances’ limitation.”

In *Johnson v The Queen* [2014] VSCA 283 at [31]-[46] the Court of Appeal (Santamaria JA with whom Weinberg JA agreed), although referring to and approving the above dicta in *Markovic’s Case*, refused to grant the applicant leave on this ground since the psychological evidence did not provide support for the contention that the applicant’s “anguish at being unable to care for a family member...will make the experience of imprisonment more burdensome or that it materially affects the assessment of the need for specific deterrence or of the offender’s prospects of rehabilitation”.

In *R v El-Hage* [2012] VSCA 309 the Court of Appeal noted that the stringency of the test in *Markovic v The Queen* (2010) 30 VR 589 reflects not only the inevitability of adverse impact on family but also the fact that any discounting of sentence on the grounds of third party hardship creates difficulties of unequal treatment of offenders. However, the Court found that *El-Hage’s Case* was “one of those rare cases where the high hurdle of ‘exceptional circumstances’ was surmounted:

“Not only did Mrs El-Hage’s severe mental illness mean that the two boys were effectively without any parental care, but she herself had become suicidal and the younger boy had actually attempted suicide. On the uncontested expert evidence, these extremely grave consequences were the direct result of the applicant’s imprisonment.”

In *Sara Borg v The Queen* [2020] VSCA 191 the Court of Appeal (Priest, Beach & Niall JJA) allowed an appeal by a former Court registrar against a sentence of IMP2y1m/13m imposed on charges including misconduct in public office and making & using a false document and substituted a 2y CCO. The Court held at [52] that the original sentence was manifestly excessive. Further, at [48]-[50], citing dicta of Priest and Weinberg JJA from *Cross v The Queen* [2019] VSCA 310 at [50]-[52] and *R v Markovic & Pantelic* (2010) 30 VR 589; [2010] VSCA 105, the Court said:

“In our view, the fact that the appellant currently is breast-feeding her baby (albeit that her baby is now in prison with her), and the fact that her other child will be exposed to the influence of her abusive husband (albeit that there is no evidence that to this point he has harmed the children), together are sufficient to establish exceptional circumstances. The sentencing judge should have so found...

Once the existence of some relevantly significant risk was established (the existence, but not the extent, of that risk having to be established on the balance of probabilities) that risk, even if it was less than 50 per cent, had to be considered.”

See also *R v Stanisavljevic* [2004] VSCA 144 at [28]-[31]; *R v Mitchell* [2005] VSC 219 at [26]; *R v Airey* [2006] VSCA 31 at [14]-[16]; *R v Ienco* [2008] VSCA 17 at [21]-[28]; *R v NAD* [2008] VSCA 192 at [5]-[9] & [51]-[52]; *R v Vipulkumar Gajjar* [2008] VSCA 268 at [18]-[19] & [35]-[39]; *DPP v Bourozikas* [2009] VSCA 29 at [32] and the cases cited in footnote 13; *R v Gerrard* [2011] VSCA 200 at [46], [57] & [59]-[61]; *R v El-Hage (Sentence)* [2011] VSC 452 at [47]-[49]; *DPP v MGP* [2011] VSCA 321 at [7]-[10] & [15]; *R v HAT & Ors* [2011] VSCA 427 at [68]-[71]; *Ramezani v The Queen* [2013] VSCA 71 at [23]-[32]; *R v Johnson* [2014] VSC 175 at [121]-[125]; *Cross v The Queen* [2019] VSCA 310 at [49]-[54]; *Haberman v DPP* [2020] VSCA 286 at [48].

11.2.19 Relevance of Aboriginality

In *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 at [37]-[39], French CJ, Hayne, Crennan, Kiefel, Bell & Keane JJ said:

[37] “An Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender’s sentence. In this respect in *Kennedy v The Queen* [2010] NSWCCA 260 at [53], Simpson J has correctly explained the significance of the statements in *Fernando*:

‘Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.’

[38] The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender’s conduct: *Fernando* (1992) 76 A Crim R 58 at 62 (E).. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand [at 62 (C)]. His Honour considered that where an offender’s abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor [at 62 (E)]. To do so, he said, is to acknowledge the endemic presence of alcohol in Aboriginal communities and:

‘the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.’ [at 62-63 (E)]

[39] The other respect in which Wood J proposed that an offender’s Aboriginality may be relevant to the sentencing determination is in a case in which because of the offender’s background or lack of experience of European ways a lengthy term of imprisonment might be particularly burdensome [at 63 (G)]. In each of these respects, the propositions enunciated in *Fernando* conform with the statement of sentencing principle by Brennan J in *Neal* (1982) 149 CLR 305 at 326:

‘The same sentencing principles are to be applied, of course, in every case,

irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.”

In *DPP v Taylor* [2005] VSCA 222 at Nettle JA, with whom Eames JA & Hollingworth AJA agreed, approved the relevance which the trial judge had placed on the respondent's Aboriginality. At [14] His Honour said:

“As Eames JA put it in *R v Fuller-Cust* (2002) 6 VR 496 at 520:

’79. To ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself. Not only would that offend principles of individual sentencing which apply to all offenders but in this case it would fail to identify the reasons for his offending and, in turn, the issues which have to be addressed if rehabilitation efforts are to successfully be adopted so as to ensure that he does not re-offend and, in turn, to ensure the long-term safety of the public.

80. To have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified, and not be overlooked. Exactly the same approach should be adopted when considering the individual situation of any offender, so that any issue relevant to that offender's situation which might arise by virtue of the offender's race or history would not be overlooked by a simplistic assumption that equal treatment of offenders means that differences in their individual circumstances related to their race should be ignored.

81. In *Neal v R* (1982) 149 CLR 305 at 326 Brennan J held:

‘The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of the particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the administration of justice. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the sentencing discretion of first instance or for the Court of Criminal Appeal.’”

See also *R v Wordie* [2003] VSCA 107 at [31]; *DPP v Rose* [2005] VSCA 275 at [19]; *R v McCartney* [2006] VSCA 35 at [7]-[9]; *R v Clarke* [2006] VSCA 174 at [59]-[60]; *R v Charles* [2007] VSCA 190 at [14]; *R v Morgan* [2007] VSCA 192 at [15]-[16]; *Walker v The Queen*; *Dargan v The Queen* [2019] VSCA 137 at [41], [57], [69] & [74]; *Haberman v DPP* [2020] VSCA 286 at [71]-[73].

11.2.20 Relevance of recall or risk of recall by Parole Board

In *R v Piacentino – R v Ahmad* [2007] VSCA 49 a Court of Appeal constituted by 5 judges held that-

- Where an adult offender falls to be sentenced for offences constituting breach of parole but is to be sentenced at a time when he has not had his parole revoked by the Adult Parole Board, then the sentencing judge may not have regard to the possibility that he might be later called upon by the Parole Board to serve some or all of the balance of his parole sentence {at [71] per Eames JA with whom Buchanan, Vincent, Nettle & Redlich JJA agreed}.
- The contrary decision of the Court of Appeal in *R v Orphanides* (2002) 130 A Crim R 403; [2002] VSCA 86 should no longer be followed {at [71] & [141]}. It follows that an approach to sentencing

which has applied since 2002 to the benefit of offenders has been reversed and dicta such as that in *DPP v Reid* [2004] VSCA 105 at [18]; *R v Greenslade* [2004] VSCA 213 at [31] and *R v Airey* [2006] VSCA 31 at [10] is no longer good law.

- However, a sentencing court which takes into account the fact that parole has been revoked is not having regard to any possibility or likelihood that the length of time spent in custody will be affected in the future but rather having regard to a state of affairs then in existence. In those circumstances consideration of the revoked parole period may be relevant to application of the principle of totality. {See the judgments of Buchanan JA at [3], Eames JA at [78]-[88] and Nettle & Redlich JJA at [142], the latter citing *R v ffan* [2006] VSCA 129 at [28]-[29]}.

In *R v Scholes* [2007] VSCA 303 Whelan AJA, with whom Maxwell P & Buchanan JA agreed, referred to *R v Piacentino* [2007] VSCA 49 and said at [44]:

“The sentencing judge was not entitled, in considering totality or on any other ground, to have regard to the possibility that the Adult Parole Board would take action concerning the appellant’s unexpired parole period.”

11.2.21 Relevance of likely forfeiture under the Confiscation Act

In *R v Le*; *R v Nguyen* [2005] VSCA 284 the Court of Appeal held that the sentencing judge had fallen into error in failing to take into account the fact that the appellant Le would almost certainly lose his house and car – tainted property as a result of being used for the purposes of trafficking – pursuant to the automatic forfeiture provisions of the Confiscation Act 1997 (Vic). At [12] Charles JA – with whom Buchanan & Eames JJA agreed – said:

“The judge had been informed that the Crown had placed a restraining order over Le’s house and his car. It was plainly open in these circumstances for his Honour to have regard to the likely forfeiture of Le’s interest in his house pursuant to the provisions of the *Confiscation Act*: see *R v Do* [2004] VSCA 203 at [13] per Buchanan JA; *DPP v Phillips* [2005] VSCA 112 at [7], [10], [13] & [14]. The nature of automatic forfeiture pursuant to this Act is that it will not occur until after conviction, but will occur thereafter as a matter almost of inevitability, provided the preconditions are met. As in *R. v. Do* and *DPP v. Phillips*, the appellant’s house had been used for the purpose of trafficking, which tainted the property. It followed that forfeiture would occur unless an exclusion order were made. We were told this morning that an exclusion order had been made in favour of the appellant’s wife, that the property itself had a value of approximately \$100,000 and a mortgage on it of approximately \$20,000. The forfeiture of the appellant’s interest will therefore result in a loss to him of the order of \$40,000. The appellant is a pensioner with a very limited capacity for work as a result of his injuries. To lose his interest in his house at the age of 64 is inevitably substantial additional punishment.”

In *R v Yacoub* [2006] VSCA 203 a bench of 5 members of the Court of Appeal found that the sentencing judge had erred in failing to take into account the risk of forfeiture of some or all of the appellant’s restrained assets which might well constitute a significant additional penalty. See also *R v Tabone* (2006) 167 A Crim R 18, 22 [12]; [2006] VSCA 238 at [12]; *R v Nguyen, Nguyen & Pham* [2007] VSCA 165; *R v McKittrick* [2008] VSCA 69 at [24]-[34]. However, no error is committed if the information available is insufficient to enable the sentencing judge to make an assessment of the likelihood of forfeiture or of its likely effect: *R v McLeod* [2007] VSCA 183 at [27]. Further, an offender who relies on forfeiture (whether it has occurred or is anticipated) as a mitigating circumstance will ordinarily bear the onus of establishing that it should be so regarded: *R v McLeod* at [29]; *R v Filipovic*; *R v Gelevski* [2008] VSCA 14 at [81]; *R v HAT & Ors* [2011] VSCA 427 at [55].

11.2.22 Sentencing for manslaughter / defensive homicide / attempted murder / murder

In *DPP v TY (No 3)* [2007] VSC 489 at [66] Bell J summarized the outcomes of a number of cases in which young people have been sentenced for the crimes of manslaughter & murder:

- (1) **manslaughter**: *R v KMW and RJB* [2002] VSC 93 (two accused 14YO and 16YO: 3Y good behaviour bond); *R v Woodburn* [2002] VSC 72 (18YO: 3Y youth training centre); *Director of Public Prosecutions v SJK and GAS* [2002] VSCA 131 (two accused 15YO and 16YO: 9Y/6Y); *R v Nguyen* [2003] VSC 62 (17YO: 8Y/5Y); *R v Perera* [2003] VSC 146 (17YO: 5Y/3Y); *R v Maretas* [2003] VSC 159 (18YO: 7Y/5Y); *R v Talj* [2003] VSCA 87 (19YO: 7Y/5Y); *R v PP* (2003) 142 A Crim R 369 (15YO: 5Y/2.5Y); *R v Johns* [2003] VSC 415 (19YO: 6Y/3.5Y); *R v Tipas* [2004] VSC 25 (17YO: 6Y/3Y); *Director of Public Prosecutions v Reynolds and Ors* [2004] VSC 533 (three accused 16YO and 16YO: 5Y/2Y; 18YO: 5Y/2Y); *R v LMA* [2005] VSC 152 (16YO: 5.5Y/3Y); *R v*

BTP [2006] VSC 374 (15YO: 5Y/2.5Y); *R v GM* [2006] VSC 473 (16YO: 8Y – total effective sentence 9.5Y/6Y);

- (2) **murder:** *R v JPD* [2001] VSC 204 (15YO: 16Y/12Y) (confirmed on appeal: *R v PDJ* (2002) 7 VR 612); *R v Seater* [2001] VSCA 217 (19YO: 17Y – total effective sentence 20Y/15Y); *R v Kumar* (2002) 5 VR 193 (20YO: 20Y/16Y); *R v Khoder* [2005] VSC 445 (19YO: 19Y – total effective sentence 20Y/15Y); *R v Lam & Ors* [2005] VSC 495 (several accused: 23YO: 18Y + 18Y – total effective sentence 30Y/23Y; 27YO: 18Y + 18Y – total effective sentence 30Y/23Y; 23YO: 18.5Y/15Y; 22YO: 16Y/12.5Y; 20YO: 15Y/11Y; 20YO: 15Y/11Y; 20YO: 14.5Y/10Y); *R v JH* [2006] VSC 201 (18YO: 14Y/9Y); *Director of Public Prosecutions v DJE* [2006] VSC 339 (17YO: 14Y/9Y); *R v Tran* [2006] VSC 352 (21Y: 14.5Y/10Y); and *R v Athuai* [2007] VSCA 2 (17YO: 18Y/14Y); see also *R v Redenbach* (1991) 52 A Crim R 95.

In the following paragraphs a number of cases are discussed or cited which illustrate various aspects of sentencing for manslaughter, defensive homicide, attempted murder and murder.

11.2.22.1 Sentencing for manslaughter

In *R v Mohamed & Ors* [2008] VSC 299 two young offenders, both students with evident remorse and excellent prospects for rehabilitation, were found guilty of manslaughter by unlawful and dangerous act. The deceased was killed when he ran from an altercation involving the defendants and was struck by a vehicle travelling at excessive speed. In the course of sentencing both offenders to detention in a youth justice centre for a period of 3 years, Nettle JA said at [15]-[16]:

“The nature of the crime of manslaughter is such that it may vary from ‘the very confines of murder’ {*Timbu Kolian v The Queen* (1968) 119 CLR 47, 68 (Windeyer J); *R v Osip* (2000) 2 VR 595, 610 [46] (Batt JA)} down to a merely nominal offence of involuntary homicide. Consequently, although the maximum sentence for manslaughter is 20 years’ imprisonment, the range of possible penalty is very wide indeed: *R v Moore* [2002] VSCA 33 at [16] (O’Byrne AJA). But although there is no established sentencing tariff {*R v Blackledge*, NSWCCA 12. 12. 95, BC9501665, 4}, cases in which the intended level of harm is slight and the consequences are great tend to be towards the lower end of the scale {Fox & Frieberg, *Sentencing, State and Federal Law in Victoria*, 2nd Ed at [12.218]}. In my view, the manslaughter of which you, Sharmake Aidid and MA, have been found guilty falls within that category.

It is of course a serious offence. Although, you were both youthful offenders and inexperienced, you were also educated and intelligent, and the deceased was drunk and irrational. It should have been obvious to you that, by confronting him on the roadway, you were exposing him to an appreciable risk of serious injury. I allow that you were provoked {*Okutgen* (1983) 8 A Crim R 262, 264; but cf *Pilgrim* (1983) 5 Cr App R (S) 140; *Wilson* (1981) 3 Cr App R (S) 30}. The deceased’s drunken behaviour towards you was unlawful and insulting. But in his state of drunkenness, it should have been obvious that there was no chance of persuading him of his misbehaviour, still less that he would acknowledge it. Your pursuit of him and attack on him in those circumstances necessitates a penalty which is adequate to express the court’s denunciation of your conduct and to provide general deterrence against others engaging in conduct of that kind.”

In *R v Johns* [2003] VSC 415 at [20] Nettle J said in sentencing a 20 year old offender who had been found guilty of manslaughter committed when he was 19 years of age:

"The maximum sentence for the offence of manslaughter is 20 years imprisonment. The circumstances which may give rise to a conviction for manslaughter are, however, so various and the range of degrees of culpability so wide, that it is not possible to point to any established sentencing tariff which can be applied to such cases: *R v Blackledge* [Unreported, NSWCCA, 12/12/1995] BC9501665 at 4 per Gleeson CJ. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability, and because manslaughter covers such a wide range of circumstances, and includes both voluntary and involuntary acts of homicide, the range of penalty is very wide indeed: *R v Moore* [2002] VSCA 33 at [16]."

In *R v PP* [2003] VSCA 100 the 15 year old offender had been presented on one count of murder. He was found not guilty of murder but guilty of manslaughter. He was sentenced by Nettle J to 6 years imprisonment with a non-parole period of 4 years, the sentence being based on manslaughter by unlawful and dangerous act, not on a homicide reduced from murder to manslaughter by provocation. The Court of Appeal agreed with Nettle J that all the relevant purposes of sentencing could not be

achieved by three years' detention in a youth training centre. At [13] Callaway JA (with whom Winneke P & Buchanan JA agreed) said:

"Notwithstanding the applicant's age, this was a bad example of manslaughter by unlawful and dangerous act. The melee was dying down and it was the applicant's associates who re-ignited it. The applicant then pursued the victim across the car park, armed with a knife (which involved a significant escalation from the pole that had been used to beat his brother) and stabbed him twice in the back. Just punishment, tempered by reference to the applicant's immaturity, was required and general deterrence was not irrelevant. There is a public interest in deterring violent fights and the use of lethal weapons, albeit a knife that lay ready to hand and had not been acquired for a criminal purpose. A maximum of three years' loss of liberty was not enough. (Compare *Attorney-General v. Benfield* (unreported, Court of Criminal Appeal, 13th September 1976) and *R v Misokka* (unreported, Court of Appeal, 9th November 1995) at 4-6."

At [23] His Honour concluded: "There are cases where detention in a youth training centre is an appropriate response to a homicide committed by a young person, but this was not one of them." However, the Court allowed the appeal on the basis that the non-parole period was manifestly excessive in the circumstances of the case, Callaway JA stating at [17]:

"There is no standard non-parole period (*R. v. VZ* [1998] VSCA 32 at [15]; *R. v. Pope* at [28]) but a non-parole period of four years in relation to a head sentence of six years' imprisonment is a common disposition. It usually implies that there is no special reason to emphasize the penal element of the non-parole period (as, for example, where the head sentence itself is moderate) and that there are reasonable prospects of rehabilitation without special factors. Here the head sentence was stern, the applicant's prospects of rehabilitation were outstanding and there was the ever-present need to facilitate his early release from the adult prison system if that could properly be achieved."

The sentencing discretion thus being re-opened the Court of Appeal re-sentenced the applicant to 5 years imprisonment with a non-parole period of 2½ years.

In *R v Tipas* [2004] VSC 25 the offender who was 17 at the time of the offence and 19 at the time of sentence had pleaded guilty to one count of manslaughter. Counsel for the accused referred the Court to a number of recent cases of manslaughter and in particular the decision of the Court of Appeal in *R v PP* and argued that the same sentence should be imposed. Bongiorno J disagreed at [25] "essentially, but not entirely, because the offender in that case was significantly younger...and you had armed yourself with a knife at a somewhat earlier stage of the offence than he did." In imposing a sentence of 6 years imprisonment with a longer than normal non-parole period of 3 years, His Honour said at [23]:

"As well as the matters of your youth and your prospects of rehabilitation to which I have already referred the Court must also take into account in fixing an appropriate sentence principles of deterrence and of denunciation by the community of an offence such as this which involved the taking of a human life. Violence by young men, especially violence involving the use of weapons, must be deterred by the imposition of gaol sentences commensurate with the seriousness of the offence under consideration. It must also take into account the protection of the community. In your case the Court is satisfied that if you achieve effective rehabilitation that will provide the community with the best protection possible. As it is satisfied that, as things stand, your rehabilitation is extremely likely there will be no need to consider community protection further in your case."

In *R v EJC* [2008] VSC 474 the 17 year old defendant was found guilty of manslaughter occasioned by a fist fight and was sentenced to detention in a youth justice centre for a period of 3 years. At [24]-[26] Osborn J said:

"Your actions raise significant issues of general deterrence. The combination of Saturday night alcohol and violence outside parties and entertainment venues, is one which our society must do all it can to control.

The Court, on behalf of the community it represents, must state unequivocally that it regards fist fighting between young men as both senseless and totally unacceptable. Fighting of the sort you engaged in, carries with it the ever present risk of the accidental infliction of serious injury and death.

Fighting at the age of 17 when affected by alcohol is at least, if not more stupid and dangerous, as driving at the same age in that condition. It carries with it the same underlying potential for the infliction of the tragic loss of life and serious injury."

In *GAS v The Queen; SJK v The Queen* [2004] HCA 22 the High Court dismissed an appeal against sentences of 9 years imprisonment with a non-parole period of 6 years imposed on two boys, aged 16 & 15 at the time of the offences, who had pleaded guilty to manslaughter of an elderly woman in her home. Both had been sentenced as aiders and abettors. In *R v Simpas & HR* [2008] VSC 222 at [45] King J later said that that *DPP v SJK & GAS* was a case with "many levels of depravity associated with the offence". At [23] the High Court agreed with the Court of Appeal that "it is not a universal principle that the culpability of an aider and abettor is less than that of a principal offender, and *R v Bannon and Calder* [Court of Criminal Appeal, unreported, 21/09/1993] did not decide otherwise. A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case." At [19]-[20] the High Court said:

"The Court of Appeal was right to accept that this was an extremely serious case of manslaughter, occurring in circumstances of extreme aggravation. It was common ground that the appellants were to be sentenced on the basis that the manslaughter involved killing by an unlawful and dangerous act, and that the relevant act was that of strangulation. The circumstances in which that act occurred involved home invasion, robbery, and a brutal assault on an elderly and vulnerable victim. By their pleas of guilty, expressed to be upon the basis that each admitted only to aiding and abetting, each appellant, although denying that he himself strangled the victim, admitted to being present at the act causing the death of the victim, and to providing intentional assistance or encouragement to the strangler. In *Giorgianni v The Queen* (1985) 156 CLR 473 at 506, Wilson, Deane and Dawson JJ, in a case concerning the elements of aiding and abetting manslaughter, said:

'There are ... offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. *Those offences require intentional participation in a crime by lending assistance or encouragement.* ... The necessary intent is absent if the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it.' [emphasis added]

There was, no doubt, an element of artificiality involved in sentencing each appellant on the basis that he aided and abetted the killer, in circumstances where one or the other must have been the killer. That, however, was the necessary consequence of the prosecution's decision to charge each appellant only with manslaughter in a situation where it could not prove that either of the two offenders strangled the victim, and neither admitted that he did it. But that to which each appellant was willing to admit was a very serious offence. Nowhere in his remarks on sentence did Bongiorno J spell out in detail the effect of the admissions necessarily involved in the pleas of guilty, in the circumstances of this case. When those admissions are examined in the light of what was said in *Giorgianni*, and attention is given to the nature of the unlawful and dangerous act causing death (strangulation), an act which occurred in the context of extremely aggravating circumstances, then it can be seen that the Court of Appeal was right to conclude that the sentences imposed at first instance were manifestly inadequate, and was justified in increasing the sentences as it did."

In *R v Stavreski* [2004] VSC 16 the accused had pleaded guilty to a charge of charge of manslaughter in a case in which he had used excessive self-defence to defend himself and his wife from his 26 year old daughter's attack. At [19]-[20] Redlich J said:

"[19] It is well recognised that manslaughter varies from a nominal crime to the boundaries of murder and that sentences can vary from being extremely light to very severe: *R v Osip* [2000] VSCA 237; *R v Weinman* (1987) 49 SASR 248 at 249; *R v Willisroft & Ors* [1975] VR 292 at 299; *R v Papazisis and Bird* (1991) 51 A Crim R 242 at 245. There is no tariff as to the appropriate sentence for manslaughter. In determining the appropriate sentence I am mindful of the denunciatory role of sentencing. As Gleeson CJ, President Kirby and Hunt CJ observed in *Regina v McDonald*:

'Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances calling for a wide variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has

always been recognised by the law as a most serious crime. *Regina v Hill* (1981) 3 A Crim R 397 at 402. The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectation of that system. [NSWCCA, unreported, 12/12/1995].'

[20] There are exceptional circumstances where Courts have refrained from imposing a custodial sentence for the offence of manslaughter. See for example *R v Denny* [2000] VSC 323; *R v Southwell* [2002] VSC 526; *R v Gazdovic* [2002] VSC 588; *R v Makike* [2003] VSC 340; *R v Scott* [2003] NSWSC 627; *R v Yeoman* [2003] NSWSC 194; *R v Rodriguez* 7 May 1996; *R v Bunnett* 28 October 1996; *R v Bradley* 14 December 1994. It is recognised that a non-custodial sentence in domestic provocation cases will only be imposed in exceptional circumstances: *R v Bogunovich* (1985) 16 A Crim R 456 at 460-461 per Maxwell J; *Boyle v R* (1987) 34 A Crim R 202 at 204-6; *R v Alexander* (1994) 78 A Crim R 141."

And at [27] Redlich J held that there were such exceptional circumstances in this case: "Provocation or excessive self-defence manslaughter is a serious offence and the Court must be seen to uphold the sanctity of life but this consideration and the principle of general deterrence can be accommodated in these exceptional circumstances by a sentence of imprisonment which is wholly suspended."

In *R v Natan Kaplan* [2005] VSC 372 at [12] Teague J referred to a number of English manslaughter authorities reflecting the high incidence of single punch deaths outside drinking venues.

In *R v Leatham* [2006] VSC 315 an 18 year old offender had pleaded guilty to one count of manslaughter arising from a fight with his closest friend. Describing the case as "exceptional" and taking into account the offender's age and very significant mitigating factors, Bongiorno J sentenced him to 3 years imprisonment wholly suspended for 2 years.

In *R v BTP* [2006] VSC 374 an offender who was aged 15y4m at the time of the offence was found guilty after trial of one count of manslaughter arising from the stabbing of a family friend. Taking into account BTP's age, significant intellectual disability and remorse and noting the importance of rehabilitation for a youthful offender, Kellam J sentenced him to 5 years imprisonment with a non-parole period of 2½ years.

In *DPP v Samson-Rimoni (Sentence)* [2010] VSC 111 a 19 year old offender had been found not guilty of murder but guilty of manslaughter arising from a stabbing. Lasry J sentenced him to 9 years imprisonment with a non-parole period of 5 years. At [13] & [14] his Honour said:

"I can only hope that the real lesson from this tragedy is a greater and clearer understanding of how easily and quickly the production of even a small domestic knife in a minor confrontation can end in tragedy. It takes so little for a knife such as the one you used to fatally damage vital organs.

You are now 21 years of age without prior convictions and clearly fall into the category of a young offender. Your lack of previous convictions is significant. At the time of committing this offence, you were 19 years of age. [Y]our youth is an important factor and I take it into account. I do that both in relation to the desirability to maximise your rehabilitation and also accepting the submission that your youth combined with the alcohol you had consumed is relevant in understanding why you did what you did."

In *R v AB (No 2)* [2008] VSCA 39 at [35] (2008) 18 VR 391 the Court of Appeal agreed with the trial judge that the provocation to which AB may have been subject did not take his offence outside the category of "the gravest of homicides short of murder" and added: "The nature of the offending necessarily attracted firm application of the principles of deterrence, both specific and general. It also warranted the strongest denunciation." In approving the sentence of 15 years imprisonment with a non-parole period of 13 years fixed by the trial judge, the Court of Appeal said at [48]-[49]:

"Because courts have hitherto not responded to the legislative command to increase sentences in manslaughter cases, his Honour was not fettered by the previous pattern of sentencing {*DPP v Arney* [2007] VSCA 126 [13]-[14] (Nettle JA); *R v Kalanj* (1997) 98 A Crim R 505, 510-1; *R v Boaza* [1999] VSCA 126, [17]-[18]; *Sheppard* (1995) 77 A Crim R 139, 140-1 (Fitzgerald P), 146 (Dowsett J)} but was obliged to give effect to Parliament's decision to increase the maximum penalty {*R v Musson* [1997] 1 VR 656, 660}. As the maximum sentence is reserved for the worst sort of cases – and this was

one – the increased maximum called for the imposition of a sentence higher than the general trend of those sentences relied upon by AB.

To have imposed a sentence for a manslaughter of this gravity which did not reflect the increase in the maximum penalty would have been to commit a sentencing error of a fundamental kind. By increasing the maximum penalty for manslaughter, the legislature conveyed in explicit, unequivocal language its expectation that the worst instances of manslaughter would attract a sentence approaching the maximum of 20 years.”

In *R v Reglis* [2010] VSC 58 King J sentenced the accused to 6y6m imprisonment with a non-parole period of 4y3m on a count, to which he had pleaded guilty, of manslaughter by unlawful and dangerous act involving the discharge of a firearm. At [11] & [33] her Honour said:

[11] “The sentence of a court is not something that reflects the value or worth of a human being, - it deals only with punishment of an offender for a particular offence”.

[33] “I accept that you have some prospects of rehabilitation, but as indicated, unlike Mr Cummins, I do not consider them to be very high prospects of rehabilitation, but there is hope. You need to obtain employment, stop using drugs, and become a contributing member of our community. Against all of those matters there needs to be a balance of the community need for a just and appropriate punishment, a reflection of the criminality for which you are to be punished, which is, as the defence and the Crown concur, at the lower end of the scale of punishment for manslaughter. I have read the authorities to which I have been referred, including *R v AB (No 2)* (2008) 18 VR 391; *DPP v Marcus William Phillips* [2009] VSCA 68; *DPP v John William Sypott* [2004] VSCA 9; and, *R v Robert John Osip* [2000] VSCA 237.”

In *R v John Likiardopoulos* [2010] VSCA 344 the 19 year offender had pleaded guilty to one count of manslaughter. He had fully participated in the prolonged physical abuse that caused the death of the 22 year old intellectually disabled victim and added his own touches by forcing the victim to drink toxic substances and wielded a hammer with which he struck the victim’s spine, neck, elbows and ankles. The Court of Appeal dismissed the offender’s appeal against IMP12y/9y, a sentence which was described by counsel as “the sternest head sentence ever imposed for the offence of manslaughter in Victoria”. At [173] Buchanan, Ashley & Tate JJA said:

“In our opinion, his Honour’s treatment of the applicant’s youth and the influence of his father was appropriate in the light of the circumstances of the offending. The imposition of a sentence slightly more than half the maximum sentence for this crime was not manifestly excessive. As Batt JA said in *DPP v Lawrence* (2004) 10 VR 125, 132:

“With an instance of [an offence] as grave as this one, the offender’s youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations.”

In *R v Pycszak* [2011] VSC 219 the accused pleaded guilty to one count of manslaughter of her mother by criminal negligence. She had voluntarily assumed the care of her mother who was unable by her age and incapacity to look after herself. She failed to do so which led to her mother’s death: cf. *R v Hall* (1999) 108 A Crim R 209. Remarking at [21] that “cases of manslaughter by omission are difficult conceptually”, Coghlan J sentenced her to IMP 3y of which all but 15 days already served was suspended.

In *R v Nurdag & Ors* [2011] VSC 254 the principal offender pleaded guilty to manslaughter, trafficking and firearm charges. He had prior convictions but genuine remorse. The deceased had been involved in a drug deal with two co-accused and owed money. The principal offender took a loaded firearm to the deceased’s home to pressure him in relation to money owed. A confrontation ensued and the deceased was shot. IMP 11y/8y6m. The three co-accused pleaded guilty to assisting the principal offender to flee the scene of the shooting. All were remorseful. One was young. One was suffering from ill-health, having been shot by the deceased. Each was sentenced to IMP 2y partially suspended.

In *R v RPJ* [2011] VSC 363 the accused pleaded guilty to one charge of recklessly causing injury and one charge of manslaughter. The offences occurred on consecutive Saturday nights. The accused was 17 at the time of the offences and 18 on the date of sentence. In an unprovoked attack described by Beach J as “entirely without cause and gratuitous”, the accused had struck the deceased with a clenched fist to his jaw, knocking him unconscious and causing him to fall to the ground with his head

bouncing on the roadway. The sentence imposed for recklessly causing injury was IMP 18m, that for manslaughter was IMP 6y. A non-parole period of 4y was set. Unusually, the sentence imposed for manslaughter was outside the range of IMP 3y to 5y submitted by the Crown pursuant to *R v MacNeil-Brown* (2008) 20 VR 677. On appeal [2012] VSCA 50 the Court of Appeal, citing dicta of Buchanan JA from *DPP v Ross* (2006) 166 A Crim R 97 at 106–7, [39]–[40], held that error is not demonstrated merely by proving that the sentence was outside the suggested range. However, by majority (Buchanan JA & Hollingworth AJA, Bongiorno JA dissenting), the Court of Appeal held that these sentences were manifestly excessive. On the charge of manslaughter the offender was re-sentenced to 3 years' detention in a youth justice centre. On the charge of recklessly causing injury, he was re-sentenced to 6 months detention in a youth justice centre to be served concurrently with the sentence for manslaughter. After referring with approval to *R v Mills* (1998) 4 VR 235, Hollingworth AJA said at [49]–[51]:

[49] “As the applicant fell to be sentenced for manslaughter under the Sentencing Act, general deterrence and denunciation were available to the court as sentencing purposes [ss.5(1)(b) & 5(1)(d)]. However, the applicant's conduct embodied the features of youthful impulsivity and lack of foresight that underlie the logic of not using children as vehicles of denunciation and general deterrence.

[50] Having regard to the nature of the offending, as well as the applicant's age, co-operation with authorities and early plea, genuine remorse, lack of criminal record or any subsequent offending, and good prospects of rehabilitation, I am persuaded that the learned sentencing judge placed too much weight on the factors of general deterrence and denunciation, such as to lead him to impose a sentence that was outside the range reasonably open to him. To say that, is not to ignore the terrible pain and suffering of the Lowe family.

[51] Having had regard to manslaughter sentences imposed in relation to children since 2002 (but bearing in mind that the process of comparing cases has its limitations, given the differences in offending and young offenders), I would grant leave to appeal in relation to ground 4, set aside the sentence for charge 2, and resentence the applicant to 3 years' detention in a youth justice centre.”

In *R v Tito* [2011] VSCA 303 the appellant, while intoxicated, killed his friend in a fight. He was aged 20 at the time of the offence. He had armed himself with a screwdriver. The victim was unarmed. The appellant was charged with murder but was found guilty by a jury of unlawful and dangerous act manslaughter. The Court of Appeal (Buchanan & Tate JJA, Sifris AJA dissenting) – focussing on dicta in *R v Mills* – allowed an appeal against a sentence of IMP 10y/6y3m and replaced it with IMP 8y6m/5y.

In *R v SV* [2012] VSC 478 the accused – who was aged 14 at the time of the offence (16 at the time of sentence) – had pleaded guilty at a relatively early date to manslaughter by stabbing the victim who had chased him and his group after they had thrown eggs at her house. He had no prior criminal history. Coghlan J imposed a sentence of IMP 5y6m/3y and recommended that the accused be transferred to the Youth Justice System. Other comments made by his Honour include:

[2] “Your youth will be a major feature of this sentence. The maximum term of imprisonment for the offence of manslaughter is twenty years. That maximum is a reflection of how our community regards any offence which leads to the taking of the life of another.”

[3] “This is yet another case where the availability of knives to young people through the internet and elsewhere has been shown to be a blight on our community. Many, if not most, knives are deadly weapons, as this and other cases show. The young seem to have an entirely inadequate appreciation of that fact. The legislature and the police have taken action to reduce the number of knives in the community, but there seems to me a very important role to be played by parents in preventing their children buying and having knives and in particular from carrying them. I do not single you out for any special treatment on this issue, but young men and women like you have to understand that if damage is done to others in the community by the use of weapons, it will be met with increasingly severe punishment.”

[26] “[T]his is a reasonably serious example of the offence. The matters in aggravation are that you were armed and that you had to prepare the weapon for use. On the other hand, particularly given your age, I am prepared to accept that you did not fully appreciate the consequences of your action and that you did not intend to kill [the deceased]. I am also prepared to accept that you did not arm yourself with the knife for

the direct purpose of hurting anyone. I am also prepared to accept that you acted out of panic and that, most of all, you wanted to escape.”

[40] “I regard your youth and immaturity as being very important. It has been made clear by the Court [*R v Azzopardi & Ors* [2011] VSCA 372] that it would only be in the most unusual case that the importance of youth would be entirely extinguished as a sentencing consideration. Your case is not of that kind and your youth does mitigate the penalty you are to receive, but this is a serious offence.”

[41-43] “A number of cases were pointed out to me, in particular the decision of the Court of Appeal in *JPR v R* [2012] VSCA 50 in which the Court of Appeal imposed a three year Youth Justice Centre Order. Although I have taken all the matters put on your behalf in mitigation, it cannot be avoided that this is a serious example of an unlawful and dangerous act manslaughter. Were it not for the fact that you were only 14 at the time of the offending, I would have imposed a much higher sentence...The difference between this case and a one punch manslaughter case is patent.”

In *DPP v Kilpatrick; DPP v SW* [2019] VSC 779 the two accused (young Aboriginal men aged 18 & 17 respectively at the time of the offence) pleaded not guilty to manslaughter and guilty to attempted robbery and theft of a motor vehicle. After a trial, they were convicted of manslaughter. Coghlan JA said that the trial was conducted as economically as possible and that it was reasonable for both to have conducted the trial. They were convicted on the basis that they were jointly responsible for knocking the 34-year-old victim to the road in the course of an attempted robbery and they left him there in the knowledge or belief that he was incapable of getting off the road. He subsequently died after being hit by a motor car. Each accused suffered from intellectual impairment and had a deprived upbringing. On the manslaughter charge Mr Kilpatrick was sentenced to IMP5y/3y and SW was sentenced to a 4 year Youth Justice Centre order.

See also *R v Stratton* [2008] VSCA 130 at [126]-[130].

Other cases involving sentencing for **manslaughter** include:

- *R v Pollock* [2004] VSC 189 per Warren CJ; *R v Winter* [2004] VSC 329 per Osborn J; *DPP v Reynolds & Ors* [2004] VSC 533 per Cummins J; *R v Andos & Basile* [2005] VSC 22 at [71]-[72] per Kaye J; *R v Newling* [2005] VSC 54 per Teague J; *R v Grief* [2005] VSC 60 per Teague J; *R v LMA* [2005] VSC 152 per Teague J; *R v Blundell* [2005] VSC 175 per Kellam J; *R v Thao Thi Tran* [2005] VSC 220 per Kaye J; *R v Coldbeck* [2005] VSC 187 per Hollingworth J, esp. at [40]-[42] & [62]-[63]; *R v Bangard* [2005] VSCA 313; *R v Detenamo* [2005] VSC 411; *R v Ross* [2005] VSC 428; *R v Martin* [2005] VSC 497; *R v Flower* [2005] VSC 462; *DPP v Wilson* [2006] VSC 23; *R v Celso Cuenco* [2006] VSC 7; *R v Lamb* [2006] VSC 84; *R v Nolan* [2006] VSC 85; *R v Stenhouse* [2006] VSC 147; *R v BTP* [2006] VSC 374; *DPP v Lewis* [2006] VSC 393; *R v Vandergulik* [2009] VSC 3 at [23]-[24]; *R v Smart* [2018] VSC 568 & *R v Levy* [2018] VSC 567;
- *R v Ibrahim* [2006] VSC 96 per Nettle JA [“manslaughter of the gravest kind”];
- *R v D’Aloisio* [2006] VSC 216 [assaults causing death of 6 year old son];
- *R v Randall* [2007] VSC 35 [manslaughter of mother by son];
- *R v Stein* [2006] VSC 345 [consensual bondage];
- *R v McMaster* [2007] VSC 133 [brutal systematic attacks on defacto’s 5 year old child];
- *R v Stratton* [2007] VSC 132 & *R v Helal* [2007] VSC 135 [firearm discharged in course of burglary to steal cannabis crop];
- *R v Oznek* [2007] VSC 192 [stabbing in fight re drug proceeds];
- *DPP v Arney* [2007] VSCA 126 [vicious bashing of defendant’s 5 month old baby];
- *R v Detenamo* [2007] VSCA 160 [professional weightlifter strangled sex worker];
- *DPP v Felsbourg* [2008] VSC 20 [stabbing in anger over 30 times of former boyfriend];
- *DPP v Jagroop* [2008] VSC 25 [victim pushed to ground hitting head, then dragged to position of danger, no call for assistance];
- *R v Lovett* [2008] VSC 60 [victim stabbed in neck];
- *R v Laracy (Sentence)* [2008] VSC 67 [application of ligature to defacto’s neck];
- *R v Casey* [2006] VSC 146; [2008] VSCA 53 [stabbing of brother];
- *R v Robert Shane Lovett* [2008] VSCA 262 [unpremeditated stabbing by intellectually impaired 26 yr old];
- *R v Rajbinder Singh Shahi* [2008] VSCA 281 [30 year old taxi driver who ran down passenger];
- *R v AO* [2009] VSC 13 [16 year old defendant hit deceased on head with bottle in course of armed robbery];

- *R v Kulla Kulla* [2010] VSC 60 [23 year old Aboriginal woman stabbed her partner in the chest – 6y/3y];
- *DPP v Sazdov* [2010] VSC 118 [unprovoked vicious violent attack on defenceless victims by young men acting on concert but in which accused's involvement and culpability was less than that of the co-accused];
- *DPP v Akotou* [2010] VSC 364 [22 year old Tongan man with no priors stomped or kicked deceased in head in alcohol and drug related violence outside a hotel – 10y/7y];
- *R v Polutele* [2011] VSC 381 [manslaughter by unlawful and dangerous act – 24 year old offender punched deceased in head rendering him unconscious whereupon co-accused *Akotou* stomped on deceased's head – 10y/7y];
- *R v Reid* [2010] VSCA 234 [manslaughter by criminal negligence – alcoholic man bashing alcoholic de facto wife on head with wine cup – 5y/3y];
- *R v Nghia Nguyen* [manslaughter by criminal negligence – 22 year old offender used “ice” and killed friend by discharge of firearm – previous violent convictions – 6y/4y];
- *R v Andreevski & Ors* [2010] VSC 618 [3 youthful offenders aged 22, 22 & 17 at the time of sentencing found guilty of manslaughter, recklessly causing serious injury/injury and affray in “pay-back” fight – genuine remorse and good prospects of rehabilitation – longer than usual parole period because of youth – total sentences 5y6m/3y, 6y/3y9m & 6y6m/3y6m respectively];
- *R v Borthwick* [2010] VSC 618 [victim struck by motor vehicle driven by 19 year old offender – serious example of manslaughter by criminal negligence – good prospects for rehabilitation – 7y6m/5y];
- *R v Freeman* [2010] VSC 346 [‘one punch’ – no remorse – psychiatric history – 8y6m/6y];
- *R v Docking* [2010] VSC 566 [punch to head – fractured skull – use of alcohol – previous violent convictions – 8y6m/5y6m];
- *Derek Bedson v The Queen* [2011] VSCA 379 [manslaughter & reckless conduct endangering life – 21 YO offender's intention to shoot at a motorcycle clubhouse – his brother deliberately shot two persons outside the clubhouse – good prospects of rehabilitation – 8y/5y];
- *DPP v Tate* [2011] VSC 173 [after heavy drinking session stabbed friend with steak knife being used to eat dinner – see list of comparable cases in footnotes 4 & 5 in paragraph [37] – 10y/7y6m];
- *R v Brooks* [2011] VSC 211 [victim was a friend and housemate of accused – both engaged in excessive alcohol use – accused suffered from epilepsy and schizophrenia and had memory of the events – cause of death was blunt force abdominal injuries – 8y/5y];
- *R v Bourbaud* [2011] VSC 374 [fight involving accused & deceased – single stab wound to deceased's back causing death – 9y/6y];
- *R v Grimmer* [2011] VSC 506 [female victim bashed and strangled – accused intoxicated- prior conviction for intentionally causing injury to female – 11y/8y];
- *R v McNiven* [2011] VSC 569 [44 yr old intellectually compromised and alcoholic Aboriginal woman poured petrol on older man who had touched her breasts – 7y/4y];
- *R v Saleh* [2012] VSC 120 [victim struck by motor vehicle driven by offender after earlier altercation and pelting of motor vehicles – 8½y/6y];
- *DPP (Vic) v Smith* [2012] VSC 314 [23 year old man with unblemished record hunting deer in bush with friends when accidentally mistook friend for deer and shot and killed him – 5y adjourned undertaking];
- *DPP v Kelly* [2012] VSC 398 [severe beating of victim by fists by intoxicated Aboriginal man with a long history of alcohol related previous offending – 7½y/5y];
- *R v Drummond* [2012] VSC 505 [serious and sustained attack on partner in her home and in the presence of teenage daughter – relevant prior convictions and offending occurred during operational period of suspended sentence – 10y/7y];
- *R v Scott* [2012] VSC 514 [victim struck by motor vehicle driven by angry 19 year old offender after earlier altercation between offender and other youths outside a party from which he had been excluded – 8½y/6y];
- *R v Pitt* [2012] VSC 591 [single stab to partner by 68 year old female with no prior convictions – remorse – 7y/4y6m];
- *R v Borthwick* [2012] VSCA 180 [19 year old victim struck by motor vehicle driven by 18 year old offender after a period of hostility arising from a perception by the offender that the victim was intruding on his relationship with his girlfriend – 7y6m/5y];
- *R v Kells* [2013] VSCA 7 [accused stabbed her partner once in the chest during an argument about money and mobile phones she claimed he had stolen from her – 8y/5y];
- *R v Carleton* [2014] VSC 19 [accused a long-standing alcoholic punched and stomped on victim in an outburst of anger – remorse – rehabilitation – 7y6m/5y6m];

- *R v Parker* [2013] VSC 479 [one punch manslaughter by offender on suspended sentence and family violence order at the time [8y/+6m]/6y3m];
- *R v Torun* [2014] VSC 146 [manslaughter by unlawful and dangerous act – 24 year old accused pointed gun at his girlfriend and pulled the trigger deliberately having failed, because of his drug-addled state, to remember he had loaded the gun earlier – early plea guilty – 8y/5y];
- *R v Howard* [2014] VSC 194 [loaded handgun taken by 64 year old accused to potential confrontation with victim – knowledge that daughter had been assaulted by victim the previous evening – 8y/5y3m];
- *DPP v Brandon Osborn* [2018] VSCA 207 [respondent shot partner in head at close range; no challenge to judge’s finding that respondent did not intend to discharge when he pulled trigger – 9y2m/6y not manifestly inadequate];
- *Shengliang Wan v The Queen* [2018] VSCA 217 [23YO student tried for murder but found guilty of manslaughter – played active role in organised fight about a girl and threw deceased on ground and stomped on his head five times – 11y/7y6m];
- *R v Russo* [2018] VSC 395 [manslaughter by criminal negligence – accidental discharge of firearm – 43YO accused angry at deceased for running over his dog and leaving it for dead approached deceased’s vehicle and stumbled causing barrel of gun to strike driver’s side window causing defective gun to discharge without pulling trigger – plea guilty despite arguable defence – 5y/2y6m – see also cases referred to in footnotes to [192]-[194]];
- *R v Kerry Jones* [2018] VSC 415 – 40YO accused stabbed partner in course of domestic argument – accused previously convicted of using a knife to stab a partner during a domestic dispute – genuine remorse – 9y/7y];
- *R v Naddaf* [2018] VSC 429 [manslaughter by criminal negligence – accused left his seriously injured wife on a hard tiled bathroom floor for 4-5 days – diagnosis of anti-social personality disorder, adjustment disorder and mild intellectual development disorder but disorders not causally linked to offending – 11y/8y]; [2020] VSCA 41 [leave to appeal refused];
- *DPP v Curtin* [2018] VSC 493 [plea guilty by 59YO who while intoxicated caused a single stab to chest of deceased – chronic lymphocytic leukaemia but stable long-term prognosis – 8y/6y];
- *R v Yucel* [2018] VSC 506 [plea guilty to shooting victim twice – accused had ongoing, genuine and reasonable fear of being shot – early plea – genuine remorse – 5y/3y];
- *R v O’Connor* [2018] VSC 516 [plea guilty to stabbing victim with sharpened screwdriver multiple times in the course of a dynamic physical fight – mid-range seriousness of offending – prior history of violence – 10y/7y – but for plea of guilty 12y/9y];
- *Lee v The Queen* [2018] VSCA 343 [plea guilty to manslaughter by unlawful and dangerous act – single punch to head of victim causing non-survivable brain injury – 33 year old accused with no prior convictions – 8y/5y];
- *DPP v Smith* [2018] VSC 684 [offer accepted of plea of guilty to charge of manslaughter after accused committed on but before trial of charge of murder — accused man non-consensually strangled or choked woman to death during consensual sexual activity — man physically strong and woman small and petite — killing took place in confined space of motor vehicle, rendering woman virtually defenceless — accused had previously caused physical distress to another woman during strangling and choking in similar circumstances — actions of accused associated with disrespectful, contemptuous and misogynistic views and opinions about women and deceased — limited remorse — accused buried body of victim and evaded responsibility for her death by telling lies and blaming others for the killing — as result of covert police operation, accused revealed location of victim’s grave 20 months later — 13y/10y];
- *DPP v Yucel* [2019] VSCA 53 [28 year old offender shot victim in belief he was in imminent danger of being shot himself – offender’s state of mind one of ongoing, genuine and reasonable fear – case a ‘notch’ above self-defence – early plea – genuine remorse – delay – good prospects of rehabilitation – IMP5y/3y not manifestly inadequate in unusual circumstances – appeal dismissed];
- *R v Allan* [2019] VSC 18 [23 year old offender pleaded guilty to manslaughter by unlawful and dangerous act – altercation in street – accused punched deceased to the face, causing deceased to fall a second time – accused kicked motionless deceased to the upper body and stomped on deceased’s head more than once, and multiple times again later while unconscious – accused injured in further altercation with others – objective gravity of offence severe in particularly vicious attack – prior convictions for violence – 10y/7y];
- *R v Gianniodis* [2019] VSC 75 [29 year old female heroin trafficker who had suffered profound childhood deprivation and was herself a heroin addict pleaded guilty to stabbing a former customer – reasonable prospects of rehabilitation – 8y/5y6m];
- *R v BA & Stanley* [2019] VSC 90 [killing by unlawful and dangerous act during enforcement of a drug debt – victim abandoned – attempt to dispose of body and to sever feet to manoeuvre body

into barrel – attempt to incinerate body – prior and subsequent criminal history – 11y/9y {BA} & 10y/8y {Stanley}};

- *R v Phan* [2019] VSC 153 [plea guilty to stabbing co-resident at Salvation Army Crisis Accommodation Centre – history of schizophrenia – 8y/5y6m];
- *DPP v Colton* [2019] VSC 154 [plea guilty – deceased killed in course of brutal, prolonged, unprovoked attack by 3 offenders which was instigated by the offender – prior convictions for violence – some remorse – 11y/8y];
- *DPP v Russo* [2019] VSCA 129 esp at [56]-[68] [plea guilty to manslaughter by criminal negligence – respondent shot victim in head as he approached victim’s vehicle in anger and accidentally discharged loaded shotgun – 5y/2y6m];
- *R v Samaras* [2019] VSC 120 [plea guilty – unintentional shooting of domestic partner during course of a struggle – handgun deliberately discharged by accused in close proximity to deceased – no attempt to seek medical assistance – avoidance of authorities and disposal of firearm – 11y/8y];
- *DPP v Esmali* [2019] VSC 218 [plea not guilty – 22 year old offender with numerous prior convictions – single strike or punch to the head or neck of victim – victim was a surgeon who was trying to get offender to leave a hospital – statutory minimum non-parole period per s.9C *Sentencing Act* applicable in absence of ‘special reason’ – 10y6m/10y]; [2020] VSCA 63 [leave to appeal refused];
- *R v Stacey Edwards* [2019] VSC 234 [early plea guilty to manslaughter by unlawful and dangerous act – stabbing of domestic partner – single stab wound to neck in context of family violence – drug dependency – genuine remorse – childhood disadvantage reducing moral culpability – no priors – good prospects of rehabilitation – delay – 9y/6y9m]; sentence upheld on appeal [2020] VSCA 339.
- *DPP v Ristevski* [2019] VSC 253 [plea guilty to manslaughter by unlawful and dangerous act – offender killed wife of 27 years in marital home and disposed of her body which was not found for 8 months – cause of death unable to be determined due to decomposition of body – how or why offender killed wife unknown – no priors – good prospects of rehabilitation – 9y/6y];
- *DPP v White* [2019] VSC 400 esp at [74] [plea guilty to shooting in chest in course of scuffle in which larger victim “came at” accused with a knife – 6y6m/3y6m]; [2020] VSCA 37 [DPP appeal allowed and sentence increased to 9y/6y];
- *R v Awad* [2019] VSC 706 [plea guilty – genuine remorse – excessive self-defence – single knife wound to chest of victim after consumption of drugs and recent epileptic fit – moderately extensive criminal history – imprisonment more onerous due to epilepsy – 7y/5y];
- *R v Amy Tran* [2019] VSC 822 [early plea of guilty – unprovoked attack upon elderly woman in suburban street causing substantial injuries to victim who fell on to concrete driveway – accused suffering from schizophrenia and was behaving strangely at the scene – 7y/4y6m];
- *Levy v The Queen* [2020] VSCA 44 [plea guilty – victim died from injuries sustained in course of assault by applicant and two co-offenders related to overdue rent – applicant cooperated with authorities and gave undertaking to give evidence against main offender – main offender sentenced to IMP11y – applicant sentenced to IMP7y6m/4y6m - Principle of parity infringed – applicant re-sentenced to IMP5y6m/3y6m];
- *R v Ashman* [2020] VSC 105 [49 year old Aboriginal man shot neighbour in chest in course of a struggle over a shotgun – plea guilty – remorse – general deterrence, denunciation and just punishment important – specific deterrence and community protection less important – 6y/4y];
- *DPP v Williams & Godfrey* [2020] VSC 483 [32 & 27 year old offenders fired a gun into a vehicle occupied by the deceased – plea guilty - W: IMP9y G: IMP 7y];
- *DPP v Dolhughey* [2020] VSC 704 [Young woman with personality disorder and impaired mental functioning and a history of childhood abuse and deprivation strangled a man she had met on a “dating website” – some premeditation – acquitted of murder but had offered to plead guilty to manslaughter, objectively a very serious example thereof – IMP9y/5y6m];
- *DPP v Wang (No 2)* [2020] VSC 884 [68 year old accused found guilty of killing his 57 year old sister by an unlawful and dangerous act – IMP10y/6y4m].

11.2.22.2 Sentencing for defensive homicide [now abolished]

The offence of defensive homicide was introduced by the *Crimes (Homicide) Act 2005* but was subsequently abolished in Victoria in November 2014 following a widely held perception that it was being abused by violent men.

In *R v Smith* [2008] VSC 87 the defendant pleaded guilty to the offence of **defensive homicide**. In sentencing the defendant to IMP7y/5y6m, Whelan J said:

[4] “The offence is committed where a person carries out conduct that would otherwise be murder, believing that conduct to be necessary to defend himself or another from the infliction of death or really serious injury but in circumstances where the person did not have reasonable grounds for that belief.”

[33] “Counsel for the Crown submitted that it could not be said that the offence of defensive homicide was necessarily less serious than manslaughter by unlawful and dangerous act, as where defensive homicide occurred there was an intention to kill or cause really serious injury, which was not the case where the offence of manslaughter by unlawful and dangerous act occurred. In my view the prosecutor’s submission on this issue is correct. The circumstances in which each of the two offences may be committed are so varied that it cannot be said that one is necessarily more serious than the other. When Parliament introduced the offence of defensive homicide it determined to fix the same maximum penalty (20 years) as is fixed for manslaughter.”

[35] “Counsel for the Crown referred me to two recent decisions of the Court of Appeal concerning offences of manslaughter in circumstances where there had been a stabbing {*R v Moore* [2002] VSCA 33 and *R v Deniz* [2003] VSCA 23}, to a recent decision of this Court concerning a manslaughter in circumstances said to have some similarity to this but not involving the use of a knife {*R v Holden* [2007] VSC 417} and to a decision in New South Wales concerning manslaughter under s 421 of the *Crimes Act 1900 (NSW)* {*R v Boyd* [2004] NSWSC 263}. In my view it is appropriate to have regard to the authorities relied upon by the Crown and I have done so. I have also considered the judgments of the New South Wales Court of Criminal Appeal in *R v Trevenna* [2004] NSWCCA 43, the published statistics on manslaughter sentences in Victoria {*R v Bangard* (2005) 13 VR 146, 149, & 153}, and recent Court of Appeal judgments concerning manslaughter sentences in addition to those relied upon by the Crown. I have had regard to the Court of Appeal decision in *R v AB (No.2)* [2008] VSCA 39 which was delivered after the plea in this matter. In considering this material I was mindful of the caution which is necessary when considering manslaughter sentence statistics given the very broad range of circumstances encompassed, and given the Court of Appeal’s very recent analysis of the previous pattern of sentencing for manslaughter in *R v AB (No.2)*. I was also mindful of the fact that this offence is a different offence, and of the fact that the maximum sentence for manslaughter in New South Wales is 25 years imprisonment.”

In *R v Edwards* [2012] VSC 138 Weinberg JA imposed a sentence of IMP 7y/4y6m on an offender who had pleaded guilty to a defensive homicide of her husband using a spear gun and a knife. In a footnote at [46] his Honour listed 20 sentences for the offence of defensive homicide imposed since its introduction in 2005. These range from IMP 7y to 12y with non-parole periods ranging from 4y to 8y. At [47] his Honour agreed with the characterisation of the gravity of the offending as “at the lower end of the scale for the offence of defensive homicide”, the prosecutor specifically acknowledging the offender’s culpability was “somewhat less than that of the offender in *R v Black* [2011] VSC 152” who had received a sentence of IMP 9y/6y.

Other cases of sentencing for defensive homicide include *R v Edwards* [2008] VSC 297 per Whelan J applying dicta from his own judgment in *R v Smith*; *R v Taiba* [2008] VSC 589; *R v Middendorp* [2010] VSC 202; *R v Black* [2011] VSC 152; *R v Ghazlan* [2011] VSC 178; *R v Martin* [2011] VSC 217; *R v Svetina* [2011] VSC 392; *R v Jewell* [2011] VSC 483; *R v Monks* [2011] VSC 626; *Director of Public Prosecutions v Luke John Middendorp* [2012] VSCA 45; *R v Creamer* [2012] VSCA 182 where at [38] a table of 13 sentences for defensive homicide were listed; *R v Talatonu* [2012] VSC 270; *DPP v Chen* [2013] VSC 296, especially at [32]-[35] and the cases referred to therein; *Dambitis v The Queen* [2013] VSCA 329 at [101]-[119]; *R v Koltuniewicz* [2013] VSC 650; *R v Copeland* [2014] VSC 39; *R v Drayton* [2014] VSC 92.

11.2.22.3 Sentencing for attempted murder

In *R v McIntosh* [2005] VSCA 106 at [15] the Court of Appeal described attempted murder as “a very serious offence” and cited with approval dicta of Winneke P in *Boaza* [1999] VSCA 126 at [45]:

“It goes without saying that [this] crime is, and is regarded by the community as, a most serious crime. This fact is reflected in the actions of the Parliament of this State, which has increased the maximum penalty for the crime from 15 years in 1986 to 25 years [on 1 September 1997].”

In *R v Kostov* [2004] VSC 445 Kellam J imposed a sentence of 11 years imprisonment with a non-parole period of 8 years on a man who had pleaded guilty to counts of attempted murder and

aggravated burglary in committed in circumstances where he had entered his ex-wife's home armed with an axe and attacked a friend of his ex-wife in the presence of his 11 year old son. That day his wife was to attend the Family Court in relation to divorce proceedings. The victim suffered serious injuries for which he had endured 6 operations. At [18], [19] & [21] Kellam J said:

"[T]he issue of general deterrence looms large in cases such as this. Regrettably, it is not uncommon for partners to a relationship breakdown to seek to bring violence to bear on others whom they see as being associated with that breakdown. In this case, you entered the home of your wife and children in the early hours of the morning armed with an axe and attempted to murder a decent man who was babysitting your children only hours before the hearing of the proceeding to dissolve your marriage. You attacked him with horrendous and frightening violence... Our community has established processes and support systems for people who suffer emotional trauma by reason of relationship breakdown. No matter how traumatic and upsetting the relationship breakdown is, the fact is that civilised members of the community use such resources as are provided by the community to enable them to cope. The community cannot tolerate people such as you deciding to exact vengeance and/or retribution by way of violence upon others in consequence of a relationship breakdown. Those persons who contemplate such a course must expect that there will be serious consequences should they engage in violence to attempt to resolve the issues arising from relationship breakdown...[Y]our conduct is such that it requires a stern sentence of imprisonment in order to manifest the community's denunciation of your conduct and, as I have said, to deter those who breach the safety of family homes and commit acts of violence. In all the circumstances there is no alternative but to sentence you to a term of imprisonment."

In *R v Markham* [2004] VSC 443 Kellam J imposed a sentence of 11 years imprisonment with a non-parole period of 8 years on a man who had pleaded guilty to a count of attempted murder. The attack was pre-meditated and carefully planned and at least partly motivated by payment of money. At [22]-[26] Kellam J said:

"[22] [A]s well as matters personal to you such as the chances of your rehabilitation and special deterrence I must also take into account the question of general deterrence and the protection of the community from you. Regrettably, conduct such as yours has proved to be far from uncommon in this State in recent years. Those who seek to use violence for the settlement of grievances, whether for their own purpose or those of other persons, must know that if they are apprehended severe consequences will follow. I am also required by the *Sentencing Act* 1991 to manifest the community's denunciation of your conduct and to impose a just punishment.

[23] The crime of attempted murder is a most serious offence and this court must do what it can to underline the importance of the sanctity of life. The circumstances of your offence are a serious example of a serious offence. There is clearly no alternative, as indeed is properly recognised by your counsel, other than to impose a term of imprisonment upon you.

[24] However, [counsel] submits, that by reason of your plea of guilty and the remorse which he submits that plea demonstrates, your personal circumstances and the principles of parsimony, your sentence should be a moderate sentence. He submits specifically that your sentence should be less than that imposed in *R v Guthrie* [2002] VSC 323; *R v Keshtiar* [2004] VSC 140; *R v Alipak* [2004] VSC 206 and *R v Goldman* [2004] VSC 245. As he correctly notes, each of those cases involved a finding of guilt of attempted murder after trial and thus no discount was allowed for a plea of guilty.

[25] The head sentence imposed in those cases ranged from 7 years in *Keshtiar* to 14 years in *Goldman*. In fixing the appropriate sentence I have had regard to the views expressed by the Court of Appeal in *R v Boaza* [1999] VSCA 126, *DPP v Adajain* [1999] VSCA 105 and *R v Kelly* [2000] VSCA 59. I note the comments of Chernov JA at para 18 in *R v Boaza* and the comments of Callaway JA at para 28 of *Adajain* to the effect that each case depends on its own circumstances and that other sentences are not "precedents to be applied unless they can be distinguished". There are obvious differences in circumstances, both in relation to the criminal conduct and the personal circumstances of those convicted in the cases relied upon by [counsel].

[26] In my view, a closer analogy than the cases relied upon by Mr Grant in the case before me might be found with *R v Jaafer* [2003] VSC 157 where Teague J imposed a sentence of 11 years as a head sentence upon a prisoner who had pleaded guilty to the

attempted murder of a shop keeper by use of a hammer. However, even there, clear differences in circumstances can be established in that Jaafer was a heroin addict and had expressed some remorse for his conduct beyond that of his plea of guilty.

In *R v Joan Mary Walsh* [2005] VSC 233 the defendant had entered an early plea of guilty to attempted murder, arising from her inexplicable and unprovoked stabbing attack on a helpful security guard. In imposing a sentence of 11 years' imprisonment with a non-parole period of 8 years, Teague J said at [8]-[9]:

[8] The seriousness of the injuries suffered by [the victim] at your hands is a significant factor warranting stern punishment. The community expects that this kind of vicious and unprovoked attack on an innocent, even kindly victim, leaving the victim with permanent serious injuries, is to be denounced strongly. An element of attempted murder being an intention to kill, general deterrence is also a factor of considerable significance.

[9] On the other hand, there are many mitigating factors. They contribute to making more difficult the choice of the number of years of imprisonment for both the head sentence and the non-parole period. I have studied most, if not all, of the recent sentences for attempted murder imposed in this court. Some have been reviewed in the Court of Appeal. While one must allow for many variables, the broad picture is that many sentences imposed recently for attempted murder have not been very substantially below those fixed for murder itself."

In *R v Hudson; DPP v Hudson* [2010] VSCA 332 having pleaded guilty the accused was sentenced to IMP 5y for using an unregistered firearm, to IMP8y for intentionally causing serious injury, to IMP for life for murder and to IMP12y on each of two counts of attempted murder. A non-parole period of 35y was fixed. Coghlan J declared that had the accused not pleaded guilty, he would have imposed a sentence if IMP for life and would not have fixed a non-parole period. Allowing a DPP appeal on the sentences imposed for attempted murder and increasing the sentences to IMP14y6m & IMP16y respectively but leaving the non-parole period unchanged, Ashley, Redlich & Harper JJA said at [71]:

"[W]e do observe that cases involving attempted murder have attracted sentences of 12y imprisonment {*R v Alipek* [2006] VSCA 66 (Unreported, Warren CJ, Buchanan and Vincent JJA, 6 April 2006); *R v Kumar* (2006) 165 A Crim R 48}, 14y imprisonment {*R v Boaza* [1999] VSCA 126 (Unreported, Winneke P, Phillips and Chernov JJA, 5 August 1999); *R v Goldman* [2007] VSCA 25 (Unreported, Maxwell P, Vincent JA and Bongiorno AJA, 1 March 2007)} and 16y imprisonment {*R v McIntosh* [2005] VSCA 106 (Unreported, Batt, Chernov and Vincent JJA, 15 April 2005)}. Relevantly, the latter two sentences were imposed in cases in which the accused pleaded guilty: In *R v McIntosh* [2005] VSCA 106, Batt JA rejected the suggestion that

'there is a specific practical ceiling on the period of imprisonment that may be ordered for this crime. As [President Winneke] said in *R v Boaza* 'There are no "benchmarks" setting binding limits for the crime of attempted murder ...' This is unsurprising given that, as I have said, each case must be decided on its own facts and given the serious nature of the offence, in respect of "' which the maximum custodial sentence has been raised from 20 to 25 years.

The Court of Appeal also noted at [72] that the victim of the count on which the sentence was increased to IMP16y "was a good Samaritan who...was coming to the aid of a stranger who was in desperate need of assistance. He was shot by the [accused] because he was trying to help another human being when he was under no obligation to do so. This was an aggravating circumstance. One objective of punishment in this case must be to deter those who would injure persons who come to the aid of persons who are in desperate need of assistance."

In *R v Hermogenes* [2011] VSC 299, categorized by Coghlan J as "a most serious example of attempted murder – one would have difficulty in conceiving a worse case", the accused – who was a youth group leader from the victim's church – had attempted to burn the unconscious body of his young rape victim. He was sentenced to 16 years' imprisonment on the attempted murder charge and 8 years imprisonment on the rape charge, 3 years of which was cumulative.

Other cases involving sentencing for attempted murder include *R v Nguyen* [2011] VSC 632 [stabbing of lover – adjustment disorder with depressed mood – 8y/5y]; *R v Tedford* [2018] VSC 476 [76YO offender stabbed estranged wife and then deliberately drove in front of train – TES 9y/6y (leave to appeal refused [2020] VSCA 71); see especially the cases on attempted murder detailed in footnote 5:

R v Kelly [2000] VSCA 59; *R v Alipek* [2006] VSCA 66; *R v Soteriou* [2011] VSC 623; *R v Quail* [2013] VSC 190; *DPP v Saltmarsh* [2013] VSCA 290; *R v Nguyen* [2013] VSC 674; *R v Rapovski* [2015] VSC 359; *R v Darrington* [2016] VSC 60; *DPP v Boodhoo* [2016] VSC 458; *R v Sanghu* [2016] VSC 516; *R v Byrne* [2016] VSC 580; *DPP v Black* [2016] VSC 564; *R v Hannarong* [2017] VSC 264; *DPP v Nichol* [2017] VSC 809; *R v Guode* [2018] VSCA 205; *DPP v Jensen* [2019] VSC 327; *DPP v Sugar* [2020] VSC 338 [88 year old no longer able to care for his elderly wife who suffered from severe Alzheimer's and attempted to kill himself and wife with overdoses of insulin – 2y adjourned undertaking with conviction]; *R v Mikhail* [2020] VSC 681.

11.2.22.4 Sentencing for murder

In *R v Athuai* [2007] VSCA 2 the appellant, who was 17 years old at the time of the offence, had been found guilty of murder in circumstances where he had stabbed the deceased at least 3 times in the chest. He was sentenced to 22 years imprisonment with a non-parole period of 17 years. In allowing the appeal and reducing the sentence to 18 years imprisonment with a non-parole period of 14 years, Buchanan JA (with whom Vincent & Nettle JJA agreed) said at [12]-[13]:

“While the crime itself was serious indeed, attended by circumstances which were disturbing, the appellant was a teenager and the product of a culture of violence and deprivation. The appellant's youth should have rendered his rehabilitation a consideration of the first importance: see *R v Mills* [1998] 4 VR 235 at 241 per Batt JA. In fact, the sentencing judge did not find that the appellant was irredeemable. He said that he had been a diligent student, well thought of by those who conducted the learning programme upon which he was engaged before the offence, and had undertaken courses while on remand; so that his Honour was able to say that there were ‘some grounds for confidence for your rehabilitation’, although his Honour also expressed some reservations as to the appellant's prospects of rehabilitation.

In my opinion the sentence imposed upon the appellant failed to reflect the appellant's youth and its consequences. Those matters seem to have been swamped by the circumstances of the offence, and in my view that constituted error.”

In *R v Baker* [2008] VSC 390 the 20 year old accused, who was 18 years old at the time of the offence, was found guilty of murder in circumstances where he had violently attacked the deceased at a party and the deceased had subsequently fallen to his death through a window. In sentencing the accused to 17 years imprisonment with a non-parole period of 12 years, Whelan J said at [32]-[35]:

“Although you have committed a very grave crime indeed, I agree with the submission that it is not a murder at the apex of moral culpability. In finding you guilty of murder, the jury must have accepted the prosecution case that you intended to cause really serious injury to Mr Snowball. You did not intend to kill Mr Snowball. You did not intend for him to go through the window and you were not reckless as to him doing so. There was no pre-meditation involved. No weapon was used.

In *R v AB (No 2)* [2008] VSCA 39 at [15]-[16], the Court of Appeal agreed with the trial judge that the offence in that case was ‘a manslaughter of the gravest kind’ reaching to ‘the very confines of murder’. Conversely, although the offence in this case is one of murder, in my view it is one where the moral culpability involved approaches the confines of manslaughter.

Having said that, you have, by your violent acts, taken the life of an innocent young man who went to a party and became unwittingly involved in a violent confrontation which was not of his making. The tragedy of your personal situation must not obscure the tragedy of this young man's life, brutally taken from him by you, and the awful sorrow and suffering visited upon his family by your violence.

Given your history, specific deterrence is a sentencing consideration I regard as significant. General deterrence is also important. Violence of this type amongst young men in social situations is disturbingly common. Denunciation and punishment are also important factors.”

In *DPP v AK (Sentence)* [2019] VSC 852 the 18 year old accused, who was 17 years old at the time of the offence, had entered a plea of guilty to manslaughter of a 19 year old female whom he had stabbed in the chest. However the jury returned a verdict of guilty to murder on the basis of the prosecution case that he had intended to cause the victim really serious injury. The offence occurred in the context of a dispute between the victim and the accused and his friends, the victim being

outnumbered and defenceless. The accused had a disadvantaged and dysfunctional upbringing and at the time of the offence was addicted to cannabis and Xanax. He had numerous prior convictions and previous periods of detention with long sessions of lockdown and isolation. In sentencing the accused to 20 years imprisonment with a non-parole period of 15 years, Kaye JA said:

[24] “[Your] previous convictions are relevant, for a number of purposes in the determination of your sentence. It is clear that your resort to violence, in the present case, was not an isolated incident out of character for you. Rather, it was an escalation of a pattern of offending, in which you had been involved, during the period of two years that preceded the offence. That consideration is relevant to an assessment of your subjective culpability. In addition, your previous convictions are also relevant to an assessment of your prospects of rehabilitation, and of the weight which needs to be placed on specific deterrence, that is, the need to impose a sentence which is of sufficient length to deter you from engaging in any further such acts of violence against another person.”

[49-50] “...there are a number of mitigating factors that are required to be taken into account in the determination of your sentence. First and foremost, are the circumstances of your childhood and early adolescence. Your difficult experiences during that important stage of your life, none of which were of your making, all played a relevant role in shaping your personality and your responses. As a result, your culpability — that is, the level of your moral guilt — for the offending, in which you engaged, could not be equated with that of a person who had had the advantage of a normal, stable and regular home environment and upbringing. As the High Court, and the Court of Appeal of this State, have recognised, such a consideration is a relevant mitigating circumstance in the assessment of the degree of your culpability for the offending in which you engaged. An additional mitigating factor is your young age.”

[51]-[52] “Ordinarily, and in particular in cases involving less serious offending, the law considers that the youth of an offender is an important, and at times pre-eminent, mitigating factor. An offender’s youth may have had an effect on his or her offending, by reason of the offender’s immaturity. In addition, the law regards the rehabilitation of young offenders to be in the best interests of society, so that priority is to be given to a sentencing disposition that places greater emphasis on rehabilitation. However, in your case, such considerations are given significantly less weight. The kind of violent offence, in which you engaged, is regrettably all too commonly committed by offenders of a young age. It is well established that as the level of seriousness of the offending increases, there will be a corresponding reduction in the weight which is to be given to an offender’s youth by way of mitigation. In the present case, in light of the serious crime that you committed, and the circumstances in which you committed it, the weight to be given to your young age must be substantially moderated. Nevertheless, your youth, at the time of the commission of the offence, and at the time of sentence, is a relevant mitigating factor.”

In *Jaymes Todd v The Queen* [2020] VSCA 46 the 19 year old offender, having pleaded guilty before Kaye JA, was sentenced to life imprisonment on a charge of murder, 11 years on rape, 7 years on attempted rape 7 years and 2 years on sexual assault. A non-parole period of 35 years was set. See [2019] VSC 585. The primary cause of the offending was the offender’s sexual sadism disorder for which the underlying paraphilic interest was not able to be treated at present. Leave to appeal was refused, the Court of Appeal holding that the sentence was not manifestly excessive and was proportionate notwithstanding multiple mitigating factors including youth, plea of guilty, no prior convictions and the dysfunctional circumstances of his home life. Youth was of diminished mitigating effect given the seriousness of the offending. Kaye JA had appropriately weighed the mitigating factors and other sentencing considerations, including the importance of general deterrence, denunciation, just punishment and community protection. The sentence was within range of available sentencing options. Community protection was not the only consideration in fixing a sentence of life imprisonment. The principle of parsimony was not infringed and the sentence was proportionate. *Veen v The Queen (No 2)* (1988) 164 CLR 465, *Azzopardi v The Queen* (2011) 35 VR 43 & *DPP v Lawrence* (2004) 10 VR 125 were applied and *Bugmy v The Queen* (1990) 169 CLR 525 & *R v Rylie* (1993) 64 A Crim R 332 were distinguished.

In *DPP v Dunne* [2010] VSC 220 in the course of sentencing a 22 year old man with several relevant prior convictions to 17y imprisonment with a 13½ year non-parole period on a count of murder, Lasry J said: “This is yet another tragic case where the impetuous use of a knife has created tragic circumstances for several families.”

In *R v Jie Zhu* [2013] VSCA 102 the Court of Appeal dismissed an appeal against a sentence of IMP19y/15y imposed on the 25 year old appellant [aged 21 at the time of the offence] who had been found guilty of the murder of a 17 year old boy. At [71] Redlich JA & Kaye AJA said:

“This was a crime of wanton and unprovoked viciousness by a youthful offender who resorted to the use of a knife to inflict lethal injuries. The victim was an innocent bystander. Violence of this nature by youthful offenders in public places is so prevalent that general deterrence and denunciation of the conduct must be emphasised: See for example *Azzopardi v The Queen*; *Baltatzis v The Queen*; *Gabriel v The Queen* [2011] VSCA 372, [39]–[41] and the cases therein referred to. The sentencing judge was obliged to impose a sentence which gave due recognition to not only the sanctity of human life, but which also served to demonstrate that such violence was intolerable in a civilised society and gave emphasis to these sentencing principles.”

Other cases involving sentencing of young offenders for **murder** include *R v Strain* [2008] VSC 411 [20YO: 17y/13y6m “A bit of pretty silly name-calling has caused a man to lose his life”]; *DPP v Zaim* [2008] VSC 543 [20YO: 17y/14y6m Taxi driver crushed between taxi door and tree]; *R v Acuna* [2008] VSC 351 [23YO: 22y/17y Drug addicted deft stabbed stranger on train]; *R v McKenzie* [2008] VSC 394 [20YO: 20y/15y Senseless murder of close friend]; *R v McIntosh* [21YO: 23y/19y]; *R v Hargreaves* [21YO: 20y/16y] [2009] VSC 629 [unprovoked attack on developmentally delayed youth]; *R v Canham* [20YO: 14y/9y] [2011] VSC 296 [Crown concession that offender did not intend to kill victim or cause really serious injury when he struck him with a tyre level in the course of a robbery]; *R v JLE* [2011] VSC 669 [15½ YO offender pleaded guilty to constructive murder in the course of an attempted armed robbery: 13y/8y]; *R v Sengoz* [2011] VSC 652 [20YO: 18y6m/15y Pleaded guilty after stabbing 62YO gay friend 123 times]; *R v ZN* [2012] VSC 616 [17YO: 14y/10y Youthful offender with a psychological & psychiatric history and a history of alcohol abuse stabbed a friend a number of times to the upper body with a broken glass bottle]; *Smith v The Queen* [2012] VSCA 5 [18YO: 18y/17y; Offender was armed with 2 knives and was a willing participant in a carefully planned, orchestrated and extremely violent attack by a gang of youths]; *R v Grant* [2013] VSC 53 [22YO: 20y/16y; Offender who was alcoholic attacked 54 year old friend after sex with “unremitting ferocity and savagery”]; *R v West* [2013] VSC 737 [20YO: 20y/16y; Victim unknown to offender was friends with offender’s exgirlfriend and received a single stab wound to the back with a knife; offender had longstanding history of mental health issues and substance abuse]; *R v Giles* [2014] VSC 210 [24YO: 26y/21y; motiveless murder of 50y old friend – murder plan found on computer – desecration of body – lacing in empathy and exceedingly limited remorse]; *R v Hemming* [2014] VSC 521 [21YO: 32y/27y; offender with Asperger’s Syndrome entered early plea to inexplicable ‘thrill killing’ of 2 neighbours – limited remorse – lack of empathy]; *R v Lowe* [2014] VSC 543 [22YO: 21y8m/16y; accused, an ‘ICE’ addict and a member of a drug syndicate, was found guilty of murder committed in a joint criminal enterprise but was not necessarily present at killing – also pleaded to trafficking in large commercial quantity of methylamphetamine and ephedrine at numerous locations]; *R v Hague* [2018] VSC 323 [21YO at time of offence, 44YO at time of sentencing; 26y/20y – 16 year old deceased stabbed to death in shopping centre – motive of retribution – prior & subsequent offending – delay – accused found guilty at trial where the issue was identity]; *R v Hayden Wentworth (pseudonym)* [2020] VSC 435 [16YO: 16y/11y; accused stabbed his grandfather 24 times].

In *Felicite v The Queen* [2011] VSCA 274 at [15]–[20] Redlich JA (with whom Harper JA & Robson AJA agreed) held that “a domestic murder is not to be treated as comprising a less heinous category of the offence merely because such a relationship is present”. Their Honours referred to and concurred with the following observations of King J in *R v Azizi* [2010] VSC 112 at [24]:

“Every woman and man in this country is entitled to the protection of the law. Marriage does not sanction or give permission to any husband to treat his wife in a manner that is inconsistent with her rights as a fellow human being. No man has the right to order or direct a woman to behave in a certain way, merely because he is her husband. And of course the same applies in reverse. Both women and men, have a right to be protected within a marriage. Matters such as this used to be referred to many years ago as a domestic murders. It makes it no less significant or painful in terms of consequences, than any other type of murder. The punishment for a so-called domestic murder is not one that is reduced because of that fact. In the pantheon of murders, a domestic murder does not occupy a lowly position because of its nature. The protection of persons within a marriage is, and should be, a high and proper priority of the criminal justice system. Accordingly, it must be recognised that the courts take a most serious view of the protection of persons in an abusive and/or violent domestic situation.”

In *R v Penglase* [2011] VSC 356 the accused pleaded guilty to the murder of his wife. He had initially kicked her repeatedly in the head while she was lying on the ground and then repeatedly hit her with a hammer about the head and face. Their children aged 11 & 9 were witnesses to the latter part of the attack. The older child rang her maternal grandmother and said: "Dad's hurting mum and I think she is dead now. Come quick." In sentencing the accused to 22y/18y, Coghlan J said at [54]-[56]:

"The single most important matter of aggravation, and indeed of the whole case, is the fact that you murdered the mother of your children whilst in their presence and when they were at a most impressionable age.

Their mother was their principal carer and your actions were sustained and brutal. Your blows were direct almost entirely to the head and face. That factor, or these factors, makes this one of the most serious examples of the crime of murder. I have not been able to find any examples of cases where the children of the marriage of this age have been actually present while their mother was murdered. There are cases of children present in the house but they did not witness the murder: see *R v Baxter* [2009] VSC 180; *R v Karageorges* [2006] VSCA 49.

The most similar cases although by no means identical is *R v Nguyen* [2010] VSCA 31 and *R v Hettiarachchi* [2009] VSCA 270."

In *R v Meade* [2013] VSC 682 the accused pleaded not guilty to the murder of his ex-wife. He was found guilty after a trial in which the evidence against him was largely circumstantial. His ex-wife had been struck to the head at least twice with a blunt object. The motive was said to be to prevent his children from being relocated overseas. In sentencing him to IMP 23y/19y, Weinberg JA said at [74]: "[I]t is impossible to overstate the gravity of what you did. You deliberately, with premeditation, and without a shadow of justification, took the life of your former wife, the mother of your children, and a woman who, by all accounts, was greatly loved and admired. Your conduct was brutal, callous, and cowardly."

In *DPP v Borg* [2013] VSCA 181 the Court of Appeal allowed a Director's appeal against a sentence of 23y/19y on a count of murder and increased the sentence to 28y/24y9m. The 29 year old respondent had established marijuana crops in a house in Craigieburn and at other locations for the purpose of trafficking in the harvest. Police learned of the Craigieburn crop. The respondent believed that the victim, who had known the respondent for a number of years, had informed the police. Buchanan JA (with whom Nettle & Osborn JJA agreed) said at [22]:

"Unfortunately, it seems to me that the sentence itself fails to reflect the seriousness of the crime and its attendant circumstances. A planned execution carried out for the sole purpose of protecting a criminal enterprise at least approached the worst case of an offence for which the maximum penalty is life imprisonment."

In *Xypolitos v The Queen* [2014] VSCA 339 the accused pleaded not guilty to murder of his defacto stepson. The victim was killed with a hammer. Post-offence conduct involved dismemberment and concealment of the victim's body and continued denial over a very protracted period of any knowledge of the circumstances surrounding the victim's disappearance. No remorse. Substantial sentence [IMP 27y/24y] justified by lack of guilty plea and by post-offence conduct.

In *DPP v Browning* [2016] VSCA 152 the 54-year old accused pleaded not guilty to murder of his wife who had suffered multiple stab wounds to her upper body while she was asleep in her own home. The accused had consumed sleeping tablets containing doxylamine that could have had adverse side effects but a very experienced forensic psychiatrist gave evidence that he had never seen a doxylamine-induced psychosis. The accused was found guilty and sentenced to IMP18y/14y. Allowing a DPP appeal, the Court of Appeal characterized this as "a serious example of the offence of murder" and re-sentenced the accused to IMP21y/16y.

In *R v Kelson* [2018] VSC 442 the 25 year old accused had pleaded guilty to the murder of a 17 year old friend by striking the deceased to the head with knuckledusters and disposing of the body in a disused mineshaft. There were various factual matters in dispute and a co-offender gave evidence in a contested plea. Categorized as a serious instance of murder. IMP24y/19y.

In *DPP v Freeburn* [2018] VSC 616 the 29 year old accused had been found guilty after a lengthy trial of the murder of his girlfriend after "a sustained and violent assault on a vulnerable woman, who was in a drug-affected state, restrained at the wrists, and unable to defend herself". IMP25y/20y. At [25] Hollingworth J said:

“Courts have repeatedly spoken of the primary importance of general deterrence, denunciation and just punishment in cases of domestic violence. The taking of a domestic partner’s life undermines the foundations of personal relationships and family trust upon which our society rests. Although your relationship with Elizabeth had not been a long one, she was (as you well knew) in a more vulnerable position than many partners might have been; by reason of her intellectual disability, she was less able to protect herself from exploitation and abuse.”

In *R v Davsanoglu* [2019] VSC 332 the 44 year old accused had initially claimed that the victim – with whom he had had a very long-standing relationship – had died as a result of a suicide pact. The accused subsequently pleaded guilty following a confession made during cross-examination. IMP23y/18y. At [5] Lasry J said:

“This is yet another case of a man inflicting his will on a woman by the use of fatal violence in her home. Whilst the circumstances of this case are unusual to a degree, in other respects, they are all too familiar. Violence by men against women remains of epidemic proportions, and it simply must be stemmed.”

See also *R v Goodall* [2000] VSCA 106 at [21] per Batt JA (with whom Winneke P & Buchanan JA agreed); *DPP v Jones* [2018] VSC 329; *DPP v Kamalasanan & Sam* [2018] VSC 340; *R v Pavlis* [2018] VSC 440; *R v Tang* [2018] VSC 460; *DPP v Lyons & Lyons* [2018] VSC 488; *R v Smith* [2018] VSC 656; *R v Missen* [2019] VSC 32; *DPP v Gargasoulas* [2019] VSC 87; *DPP v Clover* [2019] VSC 123; *R v Robertson* [2019] VSC 145; *DPP v Noori* [2019] VSC 172; *R v Eustace* [2019] VSC 189; *R v Pylotis* [2019] VSC 231; *DPP v Stone* [2019] VSC 322; *R v Considine and anor* [2019] VSC 386 at [106]; *R v Stone* [2019] VSC 452; *R v Solmaz* [2019] VSC 530; *R v Pozzebon* [2019] VSC 631; *DPP v Mean* [2019] VSC 675. See also the list of cases in footnote 7 of *Felicite v The Queen* [2011] VSCA 274 at [17]; *R v Eckersley* [2020] VSC 22 esp. at [110]-[114]; *R v Wardlaw* [2020] VSC 83.

11.2.22.5 Sentencing for statutory murder

In *DPP v Gavin Perry; Gavin Perry v The Queen* (2016) 50 VR 686; [2016] VSCA 152 the Court of Appeal dismissed both appeals against a sentence of 20 years imprisonment imposed on the offender on a charge of statutory murder committed when he was on parole. The offender had stabbed and killed the victim in the course of an armed robbery. He had initially been charged with murder but the DPP agreed to accept a plea to statutory murder under s.3A of the Crimes Act 1958 given difficulties in proving “murderous intent”. At [24]-[41] Maxwell ACJ and Redlich & Whelan JJA discussed the history of the former common law ‘felony murder’ rule and its relationship with statutory murder, an offence which the Court described as “a statutory fiction..[t]hat is, a person who *unintentionally* causes the death of another person in the course of a crime of violence is liable to be convicted of murder *as though* he/she had killed the victim *intentionally*”. What constitutes “an act of violence for this purpose was explained by the Full Court in *R v Butcher* [1986] VR 43 as including acts of intimidation and menaces as well as physical force. At [50]-[80] the Court discussed and illustrated the divergent approaches to statutory murder in Victoria and New South Wales and concluded at [81] that the position enunciated in the NSW authorities was correct, namely that “Murder under s.3A is not inherently less serious than common law murder: *Mills* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Cole JA and Sperling J, 3 April 1995) 3–4; *JB* [1999] NSWCCA 93 [33]; *R v Teck Lee Lew* [2004] NSWCCA 320 [19]; *Jacobs* (2004) 151 A Crim R 452, 512 [332]. See also *R v Garve* (1995) 65 SASR 483, 486.” The Full Court went on to say at [84]-[85]:

“The persistence of the incorrect view — that statutory murder is an inherently less serious form of murder — has resulted in sentences being unduly confined in length. Markedly lower sentences have been imposed than would ordinarily be imposed for common law murder in the same category of seriousness. Sentencing practice for this offence should be altered to reflect the objective gravity of statutory murder.

R v Kelly appears to be the only Victorian case where a finding might have been made that the act causing death was accompanied by an intention to cause — at least — really serious injury. The offending in the present case was more serious, however. The CCTV evidence showed very clearly the forceful manner in which Perry stabbed Mr O’Toole, twice, in the upper chest region. On the view of the law set out in these reasons, the question of Perry’s intent was a matter which could, and should, have been investigated, as going to the gravity of the offence and Perry’s moral culpability. As explained below, however, the sentencing judge proceeded on the understandable assumption that she was precluded from raising that issue.”

In *R v Duca* [2019] VSC 371 the accused was convicted after trial of statutory murder. The deceased had been killed in furtherance of an armed robbery and it was the accused who fired the fatal shots. In imposing a sentence of IMP20y/16y Taylor J said at [42]:

“Statutory murder is not inherently less serious than murder: *DPP v Perry* (2016) 50 VR 686. Nonetheless, in assessing the objective gravity of the offence and your moral culpability for it, I must assess your state of mind with respect to the act causing death. That calls for an assessment of whether, in being party to the act of violence that caused the death of Mr Vuong in furtherance of the foundational offence of armed robbery, you intended to cause him harm.”

See also *R v Considine and anor* [2019] VSC 386; *R v Ramos* [2019] VSC 79.

11.2.22.6 Sentencing for being accessory to murder

In *R v MRN* [2010] VSC 671 the offender, aged 15y8m at the time of the offence and 16y at the time of sentence, pleaded guilty to being an accessory to murder. Coghlan J described his involvement as a “reasonably serious example of the offence”. The offender provided substantial assistance to police with their investigations and provided an undertaking to give evidence against the principal offender. Having regard to the matters in ss.360, 361 & 362 of the CYFA – which s.586 of that Act authorises – his Honour convicted the offender and placed him on probation for a period of 18 months.

11.2.23 Sentencing for culpable driving / dangerous driving causing death

In *R v Wooden* [2006] VSCA 97 at [1] Callaway JA, with whom Chernov & Vincent JJA agreed, said of **culpable driving**:

“There are few crimes that cause such suffering as culpable driving causing death. In the majority of cases young people are involved. The deceased is cut off in the prime of life. The victims are not limited to the deceased but include family and close friends. The offender is often a person of otherwise blameless character who behaves irresponsibly on one occasion with terrible consequences. In most cases factors personal to the offender have to be moderated in the sentencing process in the interests of general deterrence, even where specific deterrence is of little moment. Parliament has increased the maximum penalty on several occasions, the community is increasingly intolerant of drunken and dangerous driving and the courts have rightly responded to those concerns. Ten years ago a penalty of six or seven years’ imprisonment would have been regarded as very severe, if not excessive, but that was before Parliament increased the maximum penalty again, from 15 years’ to 20 years’ imprisonment, and the courts began to liken the offence to manslaughter.”

In *DPP v Clarke* [2005] VSCA 2 the Court of Appeal allowed a Director’s appeal against a sentence of 5 years imprisonment with a non-parole period of 2¾ years on a 22 year old man who had pleaded guilty to a count of culpable driving (causing the death of his girl-friend) and 2 counts of negligently causing serious injury (to his cousin and a friend). The respective sentences were 4½ years, 12 months & 6 months and 6 months of the 2nd sentence was ordered to be cumulative on the first. The offences arose from a single-vehicle collision shortly prior to which the offender had a blood alcohol concentration of at least 0.15% and was driving at a speed of 158kph in a 60kph zone. In holding that the sentence was manifestly inadequate, Nettle JA (with whom Vincent JA & Cummins AJA agreed) said at [12]-[14]:

“[12] First, the starting point in this case, as in every case of culpable driving, is that the offence is a species of involuntary manslaughter, and it must be treated as such: *R v O’Connor* [1999] VSCA 55 at [19] per Winneke P. The community will not tolerate the taking of human life by acts of gross negligence of the sort that occurred in this case and it expects that those who commit such offences will be sternly punished.

Secondly, and whatever be the reasons for the respondent’s conduct, his culpability was high. To drive while intoxicated would have been bad enough, but to drive at more than three times the legal blood alcohol concentration limit and at a speed of almost 160 kph (which is to say at a speed of almost 100 miles per hour) in a 60 kph zone was to make death and serious injury odds on probabilities.

Thirdly, despite that culpable driving is a tragedy for all concerned, including the parents and loved ones of victims and offenders alike, and despite that no amount of imprisonment or other punishment can turn the clock back to the way things might have been, the frightful consequences of culpable driving and the propensity of young people - particularly young men of otherwise good character - to commit the offence, demand that denunciation

and general deterrence be at the forefront of the sentencing synthesis: *R v Cody* (1997) 25 MVR 325, BC9703006 at 10; *R v McGrath* [1999] VSCA 197 at [18]; *DPP v Calderera* [2003] VSCA 140 at [9] – [13]; *DPP v Scott* (2003) 6 VR 217 at 223; cf. *R v Scholes* [1999] 1 VR 337 at 346[18].

Fourthly, and for those reasons, it must be recognised that youth, an absence of prior offences, general good character and other mitigating considerations, cannot play the same role in sentencing for culpable driving as they may in other cases.

Judged according to those principles, a sentence of only four and a half years' imprisonment, for the sort culpable driving that was committed by the respondent, presents as grossly inadequate.

[13] In this case there is then the further consideration that the offence of culpable driving and the offences of causing serious injury were separate offences, albeit arising out of the same substratum of facts, and thus that the sentences imposed on the counts of causing serious injury should have reflected the seriousness of those offences, standing alone...

[14] There is as well the question of cumulation. While a judge is not bound in every case of culpable driving to order cumulation of the sentences imposed in respect of multiple counts – as has been said, in the long run the question will often be whether the total effective sentence is manifestly inadequate to the circumstances of the case (*DPP v Whittaker* (2002) 5 VR 508 at 515 [31]) – in this case the total effective sentence of only five years is indicative of a need for a greater degree of cumulation."

The Court of Appeal increased the sentences to 6 years, 2 years and 1 year and ordered that 9 months of the 2nd sentence and 3 months of the 3rd sentence be cumulative on the 1st, giving a total effective sentence of 7 years. A non-parole period of 4 years was fixed.

In allowing a Director's appeal in *DPP v Church* [2005] VSCA 8, Vincent JA (with whom Nettle JA & Cummins AJA agreed) said at [26]-[28]:

"[26] Culpable driving causing death is now viewed by the courts as a species of involuntary manslaughter and carries the same maximum penalty as the offence of manslaughter. It did not always do so, but the maximum applicable penalty has been raised on several occasions, as the terrible and irreversible consequences of its commission have become the subject of increasing concern and public awareness in this society.

[27] There have been continuing endeavours made through highly publicised campaigns to ensure that motorists remain conscious of the need to exercise proper care on the roads, and to pay due regard to the safety of others. The risks involved in driving at excessive speeds or whilst affected by alcohol or drugs have been emphasised time and time again. Few, if any, I believe could claim to be unaware of these constantly repeated messages. The assumption can be safely made that the respondent was not one of that tiny group. As Tadgell JA pointed out in *R v Scholes* [1999] 2 VR 337 at 346, the offence of culpable driving created by s.318 of the *Crimes Act* 1958 is essentially one against public safety and its purpose is to deter, by criminal sanction, the unnecessary and avoidable killing by motor vehicle drivers.

[28] Deterrence being its principal objective, it follows that general deterrence and, where appropriate, specific deterrence must assume great significance as sentencing considerations in such cases, even to the extent of substantially reducing the weight that can be given to factors that would otherwise operate powerfully in mitigation."

In *R v Campbell* [2005] VSCA 225 at [18] per Eames JA said:

"The seriousness of the offence of culpable driving causing death has been emphasised in many decisions of this Court. See for example, *R v O'Connor* [1999] VSCA 55; *DPP v Solomon* [2002] VSCA 106; *DPP v Walden* [2003] VSCA 139. Nonetheless, in *R v Leesley* [2001] VSCA 90 at [14], Winneke P observed that in culpable driving cases involving allegations of speed and inadvertence, sentences not exceeding five years had not infrequently been imposed by courts in this State [the maximum penalty increased to 20 years imprisonment in September 1997]. In more recent years, too, there are instances of sentences of five years or less, in some of which there were additional features of aggravation apart from speed and inadvertence. See for example *R v Menzies* [2001] VSCA 22; *DPP v Miller* [2005] VSCA 7; *R v Satalich* [2004] VSCA 132; *R v McLachlan* [2004] VSCA 87; *DPP v Calderera* [2003] VSCA 140; *DPP v Scott* (2003) 6 VR 217; (2002) 4 VR 457; *DPP v Whittaker* (2002) 5 V.R. 508. Statistics published recently by the Sentencing Advisory Council [*Sentencing Trends for Culpable Driving*

Causing Death in Victoria", September 2005, No.6] indicate that in the period from 1998-1999 to 2003-2004 the average length of sentences of imprisonment for this offence was 4.9 years, but the Council also noted that there had been a steady increase in the average length of sentences in that time. Thus, in 1999-2000 sentences were on average 4.1 years but by 2002-2003 the average length was 5.7 years. Of course, those statistics include all cases of culpable driving causing death, embracing the whole range of criminal conduct which might constitute the offence."

And at [38] Nettle JA said in reference to *R v Scott* [2003] 141 A. Crim. R. 323:

"[T]he relevance of *Scott* for present purposes, like the earlier authorities upon which it was based, is that it makes plain that a sentencing judge is to proceed in any case of culpable driving upon the basis that the community will not tolerate the taking of human life by acts of gross negligence and that it expects that those who commit such offences will be sternly punished: *R v O'Connor* [1999] VSCA 55 at [19] per Winneke P. In the circumstances of this case, the judge was plainly right to conclude that the requirements of general deterrence dictated a substantial gaol sentence."

See also *R v Rees* [2005] VSCA 25 at [13]; *R v Kennedy* [2006] VSCA 77 at [11]; *R v Smith* [2006] VSCA 92 at [37]-[38]; *R v Clark* [2010] VSCA 64; *DPP v Chaplin* [2010] VSCA 145; *McGrath v R* [2018] VSCA 134.

In *R v Audino* [2007] VSCA 318 at [43] Maxwell ACJ, with whom Ashley & Neave JJA agreed, said:

"General deterrence is a very powerful consideration in sentencing for culpable driving. See eg *The Queen v Stockdale* [2002] VSCA 202 [37], [42] (Charles JA); *DPP v Di Nunzio* [2004] VSCA 78, [23] (Batt JA), [32] (Vincent JA). In relation to the count of culpable driving causing death, I would impose a sentence of six years' imprisonment. Sentences for this offence vary widely, according to the circumstances. See *DPP v Johnstone* (2006) 16 VR 75, 86-88 [35] (Warren CJ). I treat as of particular relevance the instances (set out in the recent judgment of this Court in *The Queen v Martin* [2007] VSCA 291, [55]-[56]) of sentencing for culpable driving where the driver had a high blood alcohol reading and one or more prior convictions for driving with excess alcohol in the blood. I refer also to *DPP v Wareham* (2002) 5 VR 439, where the driver had a blood alcohol concentration of 0.161 and two prior convictions (10 and 14 years earlier, respectively) for driving with a blood alcohol concentration exceeding 0.05%, each reading being more than double the statutory minimum. The driver was convicted of one count of culpable driving and sentenced to five years' imprisonment with a minimum of two years and six months. On the Crown's appeal, and with a discount for double jeopardy, the sentence was increased to six years with a minimum of four."

However, in *Erik Fuller (a pseudonym) v The Queen* [2013] VSCA 186 [2013] VSCA 186 the Court of Appeal (Ashley & Hansen JJA) said at [35] & [82]:

[35] "By reason of the appellant's age at time of offending, his level of intellectual and psychological disability at that time, and the injuries which he sustained, general deterrence cannot be regarded as a factor of any significance in the sentencing synthesis."

[82] "[L]ack of restraint in consequence of the combination of the appellant's premorbid state and the effects of his head injury provide an explanation, though not an excuse, for his offending before, at the time of, and subsequent to the instant offending. Specific deterrence can have only a limited role to play in the sentencing synthesis."

The unusual circumstances which gave rise to the above comments involved a young boy who had received a sentence of IMP 5y10m/3y on one charge of culpable driving causing death, one charge of negligently causing serious injury, one charge of theft of a motor vehicle and 2 charges of theft of petrol on a boy aged 14 years 10 months at the time of the offending. He had low level intellectual functioning and psychological problems and had sustained a severe head injury in the accident giving rise to a permanently increased intellectual deficit. After the appellant had engaged in 'fishtailing', he lost control of the vehicle and it rolled over a number of times. Two occupants were thrown out. A 16 year old boy was killed and a 16 year old girl suffered injuries including fractures of the pelvis and spine. Ashley JA (with whom Hansen JA agreed) said at [24]:

"The appellant's driving which brought about the death and injury was evidently negligent to the requisite degree; and as well alcohol played some part in the happening of the accident. The appellant's manner of driving exhibited the hallmarks of an immature, irresponsible and thrill seeking young man, somewhat alcohol-affected, showing off to a

group of his peers. Although the vehicle was not overloaded – it was a seven seater vehicle – the two passengers who were ejected were not wearing seat restraints. The entirety of the circumstances were a recipe for the disaster which in fact occurred. By that time there were seven young people in the vehicle. They ranged in age from 14, which was the applicant's age, to 17.”

The Court of Appeal allowed the appeal and imposed sentences of IMP3y on the charge of culpable driving, IMP18m on the charge of negligently causing serious injury and IMP6m on the charge of theft of motor vehicle. 8m of the sentence of negligently causing serious injury and 1m of the sentence of theft of motor vehicle was cumulated on the 3y sentence for culpable driving. The total effective sentence was 3y9m/1y9m. The Court recommended that the Adult Parole Board make an order under s.471(1) of the CYFA directing that the applicant be transferred to serve all or part of his sentence in a Youth Justice Centre.

In *DPP v Miller* [2005] VSCA 7 the Court of Appeal dismissed a Director's appeal against a sentence of 3 years & 3 months imprisonment with a non-parole period of 1 year 7 months imposed on a 41 year old U.S. citizen who had been on a short visit to Australia. Driving on the Great Ocean Road at 87kph in a 100kph zone and with a blood alcohol concentration of 0.10%, he had proceeded across double lines on to the wrong side of the road and had hit and killed a motorcyclist. The factors which had affected the offender's driving were alcohol {*Cowan* (1997) 25 MVR 12; *Toombs* [2001] VSCA 144; *Wareham* (2002) 5 VR 439 and *Calwell* [2004] VSCA 40}, fatigue {*Rudebeck* [1999] VSCA 155; *Scott* (2003) 6 VR 217 and *Satalich* [2004] VSCA 132} and counter-intuitive driving requirements {*Guariglia* [2001] VSCA 27; *Toombs* [2001] VSCA 144 and *Stockdale* [2002] VSCA 202}. Vincent & Nettle JJA considered that the sentence was manifestly inadequate but declined to interfere in the exercise of their residual discretion, Nettle JA basing this on the “very exceptional circumstances of the case”. Cummins AJA disagreed, saying at [34]: “The sentence imposed, and the minimum term, are at the bottom of the range; but in my view in all the circumstances are justifiably so.”

In *R v Tran* (2002) 4 VR 457 [2002] VSCA 52 the offender, while driving a stolen car at speed under the influence of heroin, caused a collision with another car, killing two of its occupants, seriously injuring the other three and seriously injuring the passenger in her car. The passenger had encouraged the offender to drive faster to elude a police car that was chasing them. Following *R v Wright* [1999] 3 VR 355 & *R v McGrath* [1999] VSCA 17 and commenting on *R v Howarth* (2000) 1 VR 593, the Court of Appeal said at [34]:

“[T]he complicity of a victim constitutes the absence of a circumstance of aggravation, albeit a circumstance of aggravation that is commonly present...It is a matter for the judge, within the limits of a sound discretion, to decide what weight (if any) to attribute to the victim's complicity...Similarly, not too much should be read into the labelling of innocence as a circumstance of aggravation. Conceptually it is so, but its significance depends on the facts of the particular case. For example, a young mother who had killed her ‘innocent’ child would not ordinarily attract the same denunciation as a drunken driver who had killed a pedestrian.”

In *Guseli v The Queen* [2019] VSCA 29 at [5] Kyrou & Weinberg JJA and Taylor AJA said:

“The elements of the offence of culpable driving causing death are: first, the accused was driving a motor vehicle; secondly, the driving was culpable; and thirdly, the culpable driving caused the death of another person. The second element can be established either by proving that the accused drove the vehicle recklessly or negligently. Negligence means a failure unjustifiably and to a gross degree to observe the standard of care which a reasonable person would have observed in all the circumstances of the case. The third element requires that the accused's driving must have been ‘a substantial and operative cause’ of the victim's death: *R v Rudebeck* [1999] VSCA 155 [2], [47], [66], [87]. The accused's acts do not need to be the sole cause of the death; a person can be criminally liable for a death that has multiple causes even if he or she is not responsible for all of them: *Royall v The Queen* (1991) 172 CLR 378, 398; *R v Lee* (2005) 12 VR 249, 252 [14].

A primary issue in this case was the weight to be attached to the deceased's failure to wear a seat belt. At [40]-[41] & [44] their Honours said:

“The parties made extensive submissions on the applicability in this case of the principles set out in *Spanjol v The Queen* (2016) 55 VR 350 concerning the relevance of a victim's conduct to the exercise of the sentencing discretion...Prior to *Spanjol*, there were two inconsistent lines of authority on the relevance of a victim's conduct to the sentencing synthesis in relation to motor vehicle offences. The leading cases for each of the lines of authority were *Howarth v The Queen* (2000) 1 VR 593 and *Tran v The Queen* (2002) 4 VR

457... *Spanjol* involved a charge of negligently causing serious injury. The victim, who was a passenger in the offender's vehicle, was not wearing a seatbelt. The offender was significantly intoxicated and drove at between 79 and 85 kilometres per hour in a 70-kilometre zone. The Court stated that the unresolved conflict between *Howarth* and *Tran* enabled the Court to decide the question whether a victim's conduct is relevant to sentencing for 'offences such as these ... afresh, starting from first principles': (2016) 55 VR 350, 360 [37]. The Court summarised its conclusions as follows:

- (1) In a case of negligently causing serious injury by driving, the finding of guilt (or plea of guilty) establishes that the offender's driving was criminally negligent and that the negligent driving caused the victim's serious injury.
- (2) The sentencing court will treat as its starting point that the offender was solely responsible for the manner of his driving and that the manner of his driving was the sole cause of the serious injury. But the evidence may support a qualification of one or both of these propositions.
- (3) As to responsibility for the negligent driving, the offender may be able to establish that some other person (whether or not the victim) and/or some external circumstance was partly responsible for the manner of the driving.
- (4) As to the causal link with the serious injury, the offender may be able to establish that there was an additional factor, outside the offender's control, which was also a material cause of the serious injury.
- (5) The language of 'complicity' should be avoided in this context. 'Complicity' is a technical term, with a well-defined meaning. It connotes the attribution of criminal responsibility to a co-offender. No such question arises in either of the circumstances under consideration.
- (6) Instead, the language of 'reduced responsibility' should be used to describe the first kind of qualification and the language of 'other contributing causes' to describe the second kind of qualification: (2016) 55 VR 350, 352–3 [5]."

Ultimately the Court of Appeal reduced the appellant's sentence for culpable driving from IMP11y/7y to IMP9y/6y, holding at [76] that the weight to be given to the deceased's "failure to wear a seatbelt must be relatively modest".

See also *R v Cowden* [2006] VSCA 220 at [18]-[32]; *Shields v The Queen* [2011] VSCA 386 at [14]-[18] & Annexure; *George v The Queen* (2017) 80 MVR 436.

In *Paszynk v The Queen* [2014] VSCA 87 at [43]-[59] Priest JA (with whom Redlich JA expressly agreed), after an extensive review of the authorities, held that culpable driving by driving recklessly is not necessarily a more serious form of the offence than the other three forms.

In *DPP v Ciantar* [2006] VSCA 263 the respondent driver was said to have had a blood alcohol concentration of between 0.128% & 0.166 at the time he hit and killed a pedestrian. A Full Bench of the Court of Appeal, while holding that a sentence of 4 years imprisonment with a non-parole period of 19 months was "very light", declined to interfere bearing in mind the principle of double jeopardy. At [168] the Full Bench (Warren CJ, Chernov, Nettle, Neave & Redlich JJA) approved and applied the sentencing principles for culpable driving which Redlich JA had shortly before restated in *DPP v Gany* [2006] VSCA 148 at [35]:

"Serious driving offences frequently involve offenders who are of generally good character and who have excellent prospects for reformation. No-one likes sending such people to gaol but there has been much publicity about the consequences for those who choose to drive their motor vehicles in a criminally negligent or reckless manner causing serious injury or endangering other members of the public. This Court has said on numerous occasions, frequently when dealing with offences of culpable driving and negligently causing injury, that those who put lives at risk through grossly negligent driving can expect to receive heavy penalties influenced by the sentencing principle of general deterrence. In such circumstances, sound prospects of rehabilitation will not lead to any significant amelioration of the prominence of general deterrence in the sentencing process. Denunciation and general deterrence must be at the forefront of the sentencing synthesis."

In *DPP v Hill* [2012] VSCA 144 the respondent had been convicted of two charges of culpable driving causing death, one charge of reckless conduct endangering life and two charges of reckless conduct placing persons in danger of serious injury and had been sentenced to three years detention in a youth justice centre. He was 18 years old when the offences were committed and 19 years old when he was sentenced. In a 50kph zone he had been driving at 97-102kph and had failed to give way at an intersection, causing the deaths of two persons in the other car as well as injuries to three others.

The respondent had also admitted that he had been driving fast, “cutting laps” and “sort of showing off” prior to the collision. A DPP appeal against sentence was allowed and the respondent was re-sentenced to IMP 6y/3y6m with a recommendation that the respondent be transferred to serve part or all of his sentence in a youth justice centre. At [44]-[45] Neave & Osborne JJA & King AJA said:

“Numerous appellate decisions have considered sentences imposed on young offenders with a good family background, unblemished work records and no prior convictions, who have been convicted of culpable driving: see, eg, *DPP v Rongonui* (2007) 17 VR 571; *R v Cody* (1997) 25 MVR 325; *R v Williamson* (2009) 21 VR 330. Such cases have emphasised that mitigatory factors of this kind do not ordinarily outweigh the important emphasis which must be placed on deterrence and denunciation in sentences for offending of this nature.

As this Court recognised in *DPP v Neethling* (2009) 22 VR 466, 475 [43] (Maxwell P, Vincent JA and Hargrave AJA), driving is an ‘adult responsibility’. That responsibility involves the necessity to make adult decisions and choices, and an awareness that a failure to do so will result in the same consequences that apply to mature adults. Those who have the privilege of holding a drivers licence must ensure that they make decisions carefully and responsibly, because the failure to do so may have catastrophic consequences, including the death of others.”

In *Dale Cairns (a Pseudonym) v The Queen* [2018] VSCA 333 the Court of Appeal (Priest, Beach & Weinberg JJA) allowed an appeal against a sentence of IMP8y/5y imposed on the appellant on charges of culpable driving causing death and 9 associated offences in circumstances where the appellant was driving at high speed to evade police and was drug affected. The appellant was aged 17 at the time of the offences and 18 at the time of sentence. He had a mild intellectual disability evidenced by an IQ of 63 and what the Court described as an “unfortunate upbringing”. He had, “since the age of 11 years, been regularly before the Children’s Court and his record demonstrates that his conduct has, over a number of years, been remarkably anti-social”. At [38] the Court of Appeal concluded that the sentencing discretion had miscarried in this case:

“[T]he judge purported to sentence on all of the charges apart from [the culpable driving] charge 5 as if — because of the operation of s 362 — general deterrence was not a relevant sentencing consideration, yet a number of the individual sentences are at odds with that expressed intention. As we have noted, imprisonment is not an option available to the Children’s Court. And we acknowledge that detention in a youth justice centre cannot readily be compared to confinement in an adult prison. But we consider the conclusion inescapable that, had the applicant been sentenced in the Children’s Court on those charges otherwise within that Court’s jurisdiction, he would not have attracted sentences of detention of anything like the same length as the sentences of imprisonment imposed on him by the sentencing judge. In particular, we consider it to be unlikely that the three charges of theft (charges 1, 2 and 7), and the charge of failing to stop and render assistance (charge 6) would have attracted sentences of detention as long as the periods of imprisonment imposed. We also note that the judge imposed the maximum sentence of imprisonment available on the summary charge of unlicensed driving, in circumstances where there appears to be no justification for having done so.”

The sentencing discretion having miscarried, it fell to the Court of Appeal to re-sentence the appellant. At [42]-[43] the Court of Appeal said:

“In resentencing the applicant, the fact that this was a very bad case of culpable driving cannot be ignored. The victim impact statements speak eloquently of the effect that the applicant’s outrageous conduct has had. Further, we acknowledge that for the purposes of sentencing a youthful offender, generally speaking, the greater the seriousness of the crime, the more the mitigating influence of youth is diminished (although not completely eliminated). In imposing sentence on the applicant, we principally take into account in mitigation that he was a child when he offended; his cognitive disability; his unfortunate upbringing; and his early pleas of guilty.”

A total effective sentence of IMP6y/4y was imposed in lieu, including a sentence of IMP6y on the culpable driving charge, the sentences on all other charges being concurrent.

In *DPP v Huby* [2019] VSCA 106, in dismissing the Director’s appeal against a sentence of IMP5y/1y on a charge of culpable driving in which the victim was the respondent’s 4 year old daughter, the Court of Appeal said at [67]-[68]:

“It would be hard to imagine an offence of culpable driving which could be viewed as being very much lower on the scale of objective gravity than this case. On the findings made by

the sentencing judge, the respondent dozed off while driving within the speed limit, unaffected by alcohol or drugs, and with no prior warnings of his excessive fatigue alerting him to the need to pull over to the side of the road. In truth, this was a case of little more than 'momentary inattention' brought about by sleep deprivation.

The mitigating factors that were present made this a wholly extraordinary case. It called for a significant measure of leniency, even putting to one side the relevance of mercy in the exercise of this sentencing discretion. It would be hard to imagine a more powerful case for mercy than presented itself here."

See also *DPP v King* [2008] VSCA 151 at [34]-[36]; *R v Harris* [2009] VSCA 287 at [12]; *DPP v Reid* [2020] VSCA 247; *Victorsen v The Queen* [2020] VSCA 248.

In *DPP v Oates* [2007] VSCA 59 the Court of Appeal upheld a sentence of a community based order imposed on a truck driver who had pleaded guilty to one count of **dangerous driving causing death** and 3 counts of dangerous driving causing serious injury. At [22]-[23] Neave JA, with whom Warren CJ & Nettle JA agreed, said:

"In this case her Honour was faced with a difficult sentencing task. I accept [the prosecution] submission that general deterrence must be given considerable weight in *sentencing an offender for dangerous driving causing death or serious injury*. Members of the public must recognise that a person who kills or injures another while driving dangerously is likely to receive a significant term of imprisonment. As the New South Wales Court of Criminal Appeal said in *R v Whyte* (2002) 55 NSWLR 252 at 286 at [214] per Spigelman CJ, a custodial sentence will usually be appropriate for an offence of this kind, except in cases where the offender's level of moral culpability is low.

However, as her Honour recognised in her reasons, there is no suggestion here that the respondent deliberately engaged in conduct which endangered others. Nor was there any suggestion that he was grossly negligent or reckless or that he decided to go on driving having become aware of that he might kill or injure others. He was not affected by alcohol or drugs and he was driving within the speed limit. [The prosecutor below] acknowledged that the cause of the accident was 'in all probability...a momentary sleep, or perhaps a moment of inattention. And that's the dangerousness, rather than a fatigue that justifies a higher charge'."

In *Bradley Nicholson v The Queen* [2018] VSCA 146 the Court of Appeal upheld a sentence of IMP2y9m on a charge of dangerous driving causing death and IMP1y9m on two charges of dangerous driving causing serious injury – resulting in a TES of IMP 3y9m/1y9m – imposed on a 22 year old driver who had a mild intellectual disability with severe receptive and expressive language impairment as well as auditory processing deficiencies who had proved – as predicted by a psychologist – to be extremely vulnerable to exploitation and manipulation within the prison system. At [30]-[32] Whelan & McLeish JJA – referring to the cases of *DPP v Whittaker* (2002) 5 VR 508 & *DPP v Neethling* (2009) 11 VR 466 – said:

[30] "As the judge observed, these cases indicate that a youthful driver is subject to the same obligations as a driver as an adult. But neither of those decisions supports a conclusion that youth is not a mitigating factor in respect of driving offences. In *Whittaker*, as the judge set out, O'Bryan AJA stated at 514 that a young person must accept adult responsibility for their actions behind the wheel of a motor vehicle, but he then repeated with approval the following observation of Callaway JA in *R v Sherpa* (2001) 34 MVR 345, 348 regarding youth and culpable driving:

'General deterrence must usually be emphasised in the punishment of this offence and there is correspondingly less scope than in the case of some other crimes for leniency on account of an offender's youth. That does not mean that there is no scope for youth and concomitant prospects of rehabilitation to influence the disposition.'

[31] In *Neethling*, the Court stated at 475 that driving was an adult responsibility which must be discharged accordingly. The offender, who was in year 12 and had held his licence for 12 days, had abandoned that responsibility and so his culpability was to be viewed as high. However, the Court went on to consider the relevance of the offender's youth at greater length, concluding as follows at 477:

'It is precisely because of the tendency of young drivers to drive dangerously that general deterrence must be regarded as of great importance, and youth must be given relatively less weight. In the present case, the victims were themselves young

people. The importance of general deterrence is to try and prevent the very kind of damage which occurred here.’

[32] This passage illustrates two things. First, youth remains relevant to an assessment of moral culpability in driving cases but is given relatively less weight. Secondly, the reason why that is so is that there is a well-known tendency for young drivers to drive dangerously, such that general deterrence is of great importance. In other words, the rationale for the different treatment of youth is referable to the need to discourage young people from driving dangerously. Both points indicate that, if the sentencing judge regarded youth as being irrelevant to moral culpability, and applied that reasoning to the applicant’s intellectual disability, he fell into error.”

In *Woldesilassie v The Queen* [2018] VSCA 285 the Court of Appeal upheld – though categorizing it as “stern” – a sentence of IMP3y6m on a charge of dangerous driving causing death and IMP2y on a charge of dangerous driving causing serious injury – resulting in a TES of IMP 4y6m/3y – imposed on a 40 year old driver whose moral culpability was assessed as “higher end of low range” and who ran down two pedestrians after a prolonged period of 13½ seconds of inattention to his driving.

See also *DPP v Martinez* [2008] VSCA 165; *DPP (Vic) v Pesa* [2012] VSCA 109; *DPP v Gangur* [2012] VSCA 139; *DPP v Janson* (2011) 31 VR 222; *Board v The Queen* [2013] VSCA 91; *Rowe v The Queen* [2013] VSCA 140; *DPP v Weybury* [2018] VSCA 120; *Pan v The Queen* [2020] VSCA 42.

11.2.24 Sentencing for intentionally / recklessly / negligently causing serious injury, intentionally / recklessly causing injury, affray/riot & reckless endangerment

In *R v Marino* [2011] VSCA 133 at [53] the Court of Appeal held – distinguishing *Towle v The Queen* (2009) 54 MVR 543 – that there is no principle that where offending results in any injury to more than one victim, a sentencing judge must provide for some cumulation in respect of the offences relating to each victim.

In the following paragraphs a number of cases are discussed or cited which illustrate various aspects of sentencing for causing serious injury or injury, affray/riot and reckless endangerment.

11.2.24.1 Sentencing for intentionally causing serious injury / intentionally causing serious injury in circumstances of gross violence

In *R v El-Haouli* [2014] VSCA 5 Priest JA said at [25] that “the offence of intentionally causing serious injury varies in seriousness and does not automatically result in a term of imprisonment”. However, it is fair to say that in the superior courts it usually does.

In two decisions handed down on 19/08/2004, the Court of Appeal emphasised the seriousness of the offence of **intentionally causing serious injury** and the significance of the substantial maximum term of imprisonment – 20 years – which Parliament has provided in s.16 of the Crimes Act 1958 (Vic).

In *DPP v Lawrence* [2004] VSCA 154 at [23] Batt JA (with whom Winneke P & Nettle JA agreed) said:

“In *Thompson* [Court of Appeal, unreported, 21/04/1998] at pp.7-8 Tadjell JA said, ‘The courts must do what they can to send to the community a message of crystal clarity that conduct of this kind is intolerable in a civilised society.’ The two decisions being given today by this Court on appeals by the Director of Public Prosecutions in relation to the offence of intentionally causing serious injury should, it is to be hoped, make clear to sentencing judges and would-be offenders how seriously this offence is to be regarded.”

At [21] the Court said:

“The maximum penalty fixed by Parliament shows how intrinsically serious the offence is considered to be on behalf of the community. Although it is to state the obvious, it should not be overlooked that in this most serious of the non-homicidal injury offences there is the concurrence of *serious* injury with the *intention* to cause it. To move from the general to the particular, the offending here was grave indeed and the results of it life-threatening for the victim. The offending was aggravated by the fact that it was committed under the influence of alcohol and drugs. Moreover, the respondent’s antecedent history showed that the instant offence was not an uncharacteristic aberration but rather that in its commission he manifested a continuing attitude of disobedience of the law, so that, whilst the antecedent criminal history could not be given such weight as to lead to the imposition of a penalty disproportionate to the gravity of the instant offence, retribution, deterrence and protection of society indicated that a more severe penalty was warranted

than would otherwise be the case. Moreover, that antecedent criminal history showed the respondent's dangerous propensity and a need to impose condign punishment to deter him and other offenders from committing further offences of a like kind: *Veen v. The Queen* [No.2] (1988) 164 CLR 465 at 477.

After referring to the cases of *R v Thompson* (unreported, Court of Appeal, 21/04/1998) at pp.7-8; *R v Wright* [1998] VSCA 84 at [1], [5] & [6]; *R v Teichelman* [2000] VSCA 224 at [20]; *R v Howarth* (2000) 112 A Crim R 244 at [51]; and *R v Hennen* [2004] VSCA 42 at [24] and cautioning that regard must be had to the maximum penalty available at their respective relevant dates and to the fact that they were appeals by offenders, the Court said at [22]:

“Further, as the cases make clear, with an offence as serious as intentionally causing serious injury and particularly with an instance of it as grave as this one, the offender's youthfulness and rehabilitation, achieved and prospective, whilst not irrelevant in the instinctive synthesis which the sentencing judge must make, were of much less significance than they would have been with a less serious offence. As has been said, youth and rehabilitation must be subjugated to other considerations. They must, as the President said in *Wright* at [6], take a ‘back seat’ to specific and general deterrence where crimes of wanton and unprovoked viciousness (of which the present is an example) are involved, particularly where (again as here) the perpetrator has been given previous chances to control his aggressive habits. This is because the offending is of such a nature and so prevalent that general deterrence, specific deterrence and denunciation of the conduct must be emphasised. There is a particular reason why, with this offence, youthfulness of an offender cannot be of much significance. This is that, as this very case exemplifies, the persons who commit the offence and wreak appalling injuries, very often by kicking and stomping upon their prone or supine victims, are predominantly youths and young men acting under the influence of alcohol or drugs or both. Here, the respondent was in any event only on the borderline of youthfulness and moreover was not by any means a first offender. For these reasons I agree with [the DPP's] submission that her Honour did err in her statement that the respondent's rehabilitation was required to be foremost in the mind of a sentencing court.”

In *DPP v Zullo* [2004] VSCA 153 the Court of Appeal did not accept that a sentence for causing serious injury intentionally could never exceed the sorts of sentences that are imposed for less serious forms of manslaughter. At [10]-[13] Nettle JA (with whom Winneke P & Batt JA agreed) said:

[10] The maximum sentence for causing serious injury intentionally is 20 years' imprisonment. A sentence of only 3½ years, with a non-parole period of 2½ years, implies that this offence was at or towards the lower end of the scale. But this offence was anything but towards the lower end of the scale. It was a cowardly, unprovoked and vicious attack on a member of the public who was minding his own business and who was doing nothing to warrant any interference with him at all - let alone being beaten senseless - and it has left the man with lasting injuries. It was therefore a serious case of causing serious injury intentionally, with serious aggravating circumstances.

[11] This Court has said repeatedly that those who when disinhibited by alcohol engage in unbridled violence in public places must expect condign punishment in which the principles of general and, on many occasions, specific deterrence will play major roles: *R v Stevenson* [2000] VSCA 161 at [27]. Given the age and antecedents of the respondent, there can be no doubt that it should be so in this case. This offence calls for a substantial sentence in order to mark the Court's denunciation of the offence and to provide the sort of specific and general deterrence that is needed. A sentence of only 3½ years' imprisonment with a non-parole period of only 2½ years is for those purposes so inadequate as to reflect an error of principle: *DPP v. Scott* (2003) 6 VR 217 at 222.

[12] It is said that the longest sentence ever imposed in this State for an offence of causing serious injury intentionally is 10 years' imprisonment, and it has been said that it is only the most serious cases of the offence that have attracted a sentence within what is described as ‘the very top of the range’ of between 6 and 10 years: Fox & Freiberg, *Sentencing, State and Federal Law in Victoria*, 2nd Ed. at [12.303], but see *R v Mallinder* (1986) 23 A Crim R 179. In the past that may have been so. When it was the case, a sentence for this offence of 3½ years' imprisonment with a non-parole period of 2½ years might have been within the range. But it is no longer the case. The so-called ‘very top of the range’ of 6 to 10 years was established when the maximum penalty for causing serious injury intentionally was only 12½ years' imprisonment. The maximum penalty is now almost double that amount. Now the ‘very top of the range’ is upwards of 15 years.

[13] It has also been said that the sentence to be imposed for an offence of causing

serious injury intentionally should be considered in the context of what might be appropriate for a case of manslaughter: *R v Meizys* 01/10/1990; *R v Pratt* 28/04/1995; *R v Lee* 19/08/1997, BC 9703974 at p.7; Fox & Freiberg, *supra* at [12.303]. With respect, I would agree with that sort of approach, provided all that is meant is that a particular case of causing serious injury intentionally may be so grave and productive of consequences so serious as to warrant a penalty similar to the penalty for manslaughter. But I do not accept that a sentence for causing serious injury intentionally may not ever exceed the sorts of sentences that are imposed for less serious forms of manslaughter. A head sentence of 6 or so years may be imposed for some forms of manslaughter at the lower end of the range, although of course much will depend upon the age and antecedents of the offender and the prospects of rehabilitation. But where a sentence of that order is given for manslaughter, the offence is more often than not a case of accidental homicide. It does not often involve an intention to inflict serious injury. Contrastingly, an intention to cause serious injury is of the essence of the offence of causing serious injury intentionally and in that respect the latter is a graver offence than unintentional homicide. Depending upon the circumstances...a sentence for a serious case of causing serious injury intentionally may well exceed a sentence for manslaughter at the lower end of the scale.”

In *R v Staples* [2005] VSCA 130 the Court of Appeal affirmed a sentence of 6½ years imprisonment, with 4½ years non-parole period, for an offence of intentionally causing serious injury – described by the Court as “shocking” and “horrific” - to his daughter aged 3.

In *R v Xe Van Pham* [2005] VSCA 57 the Court of Appeal affirmed a sentence of 10 years’ imprisonment with a non-parole period of 7 years on two counts of intentionally causing serious injury. The victims were the appellant’s former de facto and her 6 year old son who saw the attack on his mother and bravely ran to protect her, raising his arm to shield her. The appellant struck the boy on the arm with the knife, inflicting 3 cuts and almost severing the child’s hand, leaving him with a severe disability that he will carry for the rest of his life. Vincent JA, with whom Nettle JA & Cummins AJA agreed, referred at [21] to the aggravating circumstance that the appellant’s offences were in breach of an intervention order:

“[A]lthough his Honour specifically adverted to this feature when considering the seriousness of the appellant’s conduct and the degree of criminality involved, it is particularly significant that the appellant acted in the flagrant breach of an intervention order that Thu Tran had obtained in order to protect herself and her children against the very kind of behaviour in which the appellant engaged on this occasion. She had availed herself of a process designed by parliament to provide the protection of the law to vulnerable individuals, usually, as in this case, women and children, who legitimately fear for their safety. **Offenders who disregard such orders and occasion injury to persons whose personal security is intended to be guaranteed through this means must anticipate that an extremely stern view will be adopted by the courts of their conduct and, save in the most unusual circumstances, will be subject to condign punishment.**”

In *R v Marshall* [2012] VSC 587 King J imposed a total sentence of 10y6m/8y on a 34 year old man who had pleaded guilty to offences including intentionally causing serious injury, aggravated burglary and criminal damage. The victim, the accused’s ex-partner, had sustained a very high level of injury when assaulted with a sledgehammer. The offences had occurred in front of the victim’s young son. King J said:

[21] “Our community has expressed through the Parliament and the legislation enacted that it will not tolerate behaviour of this nature. The fact that you were in a domestic relationship with Ms Gagliardi at one stage does not, in any way, reduce your culpability for the infliction of such terrible physical and psychological injuries upon her, not to mention her son. A strong message must be sent that the courts will not accept behaviour of this kind and that people in domestic situations are entitled to feel safe from the rage of their ex-partners, because clearly this is rage. Your comments as you punched and hit this woman with a sledgehammer, that she had ruined your life can only be expressions of rage fury and anger.”

[31] “The court condemns your action on both occasions. Your wanton disregard of the intervention orders, your deception of your family and those caring for you and your enraged attacks upon Ms Gagliardi are all serious matters that require severe condemnation. **The fact that the child was present on both occasions is an aggravating feature of the offending.**”

In *DPP v Caine Michael Snell* [2005] VSCA 131 the 22 year old respondent had been sentenced to 7 months' imprisonment, of which months was suspended, on charges of aggravated burglary and intentionally causing serious injury. The aggravated burglary was characterized as a "home invasion" and the offences were committed while the respondent was on parole. The respondent had a significant history of both offending and dependence. However, there was evidence before the trial judge and the Court of Appeal that he had genuine prospects of rehabilitation. A Director's appeal was allowed, the Court of Appeal holding that 5 months for aggravated burglary and 4 months for intentionally causing serious injury was manifestly inadequate and re-sentenced the respondent to 3 years' imprisonment. However, in light of "the steps taken by the respondent on the path of rehabilitation and reform", this sentence was wholly suspended for a period of 2 years.

In *DPP v Nagi* [2005] VSCA 14 the Court of Appeal declined to interfere with a sentence of 12 months' imprisonment to be served by way of an ICO on a 27 year old man who had pleaded guilty to one count of intentionally causing serious injury to a man whom he had "king hit" at a hotel. Winneke P (with whom Charles & Buchanan JJA agreed) said at [10]:

"The Director does not submit, and no doubt for the reasons advanced by the trial judge, that a non-custodial sentence was beyond the range available to her in the circumstances of this case. Rather, it was submitted that she had adopted the wrong option to achieve that end. I agree with the Director's submission that the sentence of one year's imprisonment in the circumstances of this offending was too low; and, indeed, such a sentence should rarely be imposed for an offence of this magnitude. Nevertheless, I would not be prepared to interfere with it on a Director's appeal for the purpose simply of substituting some other form of non-custodial sentence."

In *R v Speedie* [2005] VSC 194 an 18 year old offender had pleaded guilty to two counts of intentionally inflicting serious injury, one count of common assault and two counts of intentionally damaging property, the offences arising out of a dispute at a private party. In sentencing him to 4½ years' imprisonment with a 2 year non-parole period, Coldrey J said at [20]:

"The use of knives to inflict physical harm is abhorrent to this community. The courts, by the sanctions they impose, must seek to deter persons from carrying and using such weapons."

In *DPP v Gebremeskel* [2005] VSCA 171 the Court of Appeal dismissed a Director's appeal against a wholly suspended sentence of 12 months imprisonment imposed on a 30 year old man of Eritrean background who had pleaded guilty shortly before trial to one count of intentionally causing serious injury - by throwing a cup of steaming liquid over the victim – in circumstances of significant mitigation.

In *DPP v Taylor* [2005] VSCA 222 the Court of Appeal dismissed a Director's appeal against a sentence of 2 years imprisonment with a non-parole period of 6 months imposed on an Aboriginal man who, 9 years prior to his sentencing hearing, had caused serious injury to the young child of his then partner by shaking her. Nettle JA, with whom Eames JA & Hollingworth AJA agreed, said at [17]:

"I agree that assaults by males on children of their de facto partners are all too frequent, and that the phenomenon of shaking babies needs to be denounced and condemned by means of stern punishment. Men who engage in the intentional infliction of serious injury on children should expect that there will be no leniency. They will be sternly punished. But I am not persuaded of the need for general deterrence in the particular circumstances of this case."

In *R v Considine* [2007] VSCA 253 Curtain AJA (Vincent & Neave JJA concurring) said at [14]:

"The intentional infliction of injury is understandably regarded very gravely by the courts. I need refer only to the sentencing remarks made by Vincent J (as he then was) in the matter of *R v Cansino* [unreported, Supreme Court of Victoria, 11/04/1994] at pp.42-43 where his Honour stated:

'The too too frequent resort to violence by persons who have encountered problems in their personal relationships has produced strong senses of apprehension and outrage in a society which is not prepared to accept that women and children, in particular, are to be subject to such behaviour.

Through the sentences that they impose, the courts must reflect their recognition of the seriousness of such conduct. The law must be heard to say with crystal clarity that it will not be tolerated. Consistent with the application of other sentencing principles, judges must endeavour through the sentences

which they hand down to deter those who would be like minded or may be prepared to release their feelings of frustration and aggression in this manner from engaging in acts of violence of the type which you perpetrated.’

See also the judgments of this Court in *R v Lacey* [2006] VSCA 4, [18], [19] (Vincent JA) and *DPP v Ross* [2006] VSCA 223, [23] (Maxwell P).

Whatever may be the intended extent of the injury to be sustained by the victim of an unlawful assault, the potential for even more serious consequences, including permanent incapacity or the possible death of the victim is very commonly present. More broadly, with respect to violence generally, no properly functioning community can accept the employment of physical force as a tolerable method of the expression of frustration or anger, whether justified or not, as a means of resolving personal disputes. Insofar as they are able to do so and consistent with the application of other sentencing principles, the courts must vindicate the rights of the victim and endeavour to protect the community through sentences designed to deter both generally and specifically.”

In *DPP v RSP* [2010] VSC 128 Curtain J imposed sentences totalling 5y3m with a non-parole period of 3y on one count of intentionally causing serious injury and 3 counts of intentionally causing injury. The accused was an 18 year old male who, with a friend, had “gatecrashed” a party and while dancing had been bumped. His “aggressive and excessive” response was to arm himself with a screwdriver and stab three people, one seriously, and also to strike another person with a bottle to the head. One of the victims was left “permanently and significantly visually impaired”. In answer to a submission that the accused should be given a sentence of detention in a YJC, her Honour said at [27]:

“I am not satisfied that a sentence of three years’ detention would adequately address the nature and gravity of the offences here committed and the weight to be given to specific and general deterrence, although I accept that the principles of *Mills*’ case are here relevant and applicable.”

In *DPP v Richard Ross* [2006] VSCA 223 the respondent had pleaded guilty to intentionally causing serious injury to the new partner of his estranged partner and recklessly causing injury to her. The Court of Appeal upheld a Director’s appeal against a sentence of 12m/6m and ordered in lieu a sentence of 2½y/1½y. In his judgment (with which Warren CJ & Buchanan JA substantially agreed), Maxwell P discussed at [27] & [29]-[30] a number of recent decisions of the Court of Appeal on sentencing for intentionally causing serious injury. At [20] & [28] his Honour said:

[20] “As the daily business of the Family Court demonstrates, these are absolutely fundamental relationships, with a partner and with a child. I would readily accept that any threat to either of those relationships can have the most profound impact on the person concerned. A father threatened with the loss of contact with his son is likely to be extraordinarily upset at the prospect. That is of the very nature of these important relationships. In my opinion, the inevitable pain occasioned by a threat to those relationships can never – repeat, never – justify violence against any other person. The existence of that recognisable and understandable emotional upset and anguish is not, and can never be, an excuse for violence.”

[28] “In my opinion this Court needs to make very clear to sentencing judges, and through them to the community, that resorting to violence of this kind to resolve emotional disputes or personal antipathies will be treated very, very seriously by the courts.”

In *DPP v Kosmidis* [2008] VSCA 66 the Court of Appeal upheld a Director’s appeal against a sentence of 6 months imprisonment suspended for 1 year imposed on a 20 year old offender on a charge of intentionally causing serious injury and ordered in lieu a sentence of 2 years’ imprisonment suspended for 2 years. Forrest AJA, with whom Buchanan & Ashley JJA agreed, said at [26]:

“In my view, the sentence passed by the sentencing judge on the count of intentionally causing serious injury was patently inadequate and would, if not varied, undermine public confidence in the courts in dealing with serious criminal offences. Whilst her Honour was entitled to take into account a number of the favourable matters pointing towards a somewhat lenient sentence she failed to have adequate regard to the circumstances surrounding the offence. As I have endeavoured to set out, it was a violent and unprovoked attack upon a defenceless individual, accompanied by racist taunts which left the victim with significant injuries.”

However, in *DPP v Fevaleaki* (2006) 165 A Crim R 524; [2006] VSCA 212 the Court of Appeal dismissed a Director’s appeal against a 12m intensive corrections order imposed in a case in which an assault had produced serious unintended consequences and there were strong mitigating

circumstances. And in *DPP v Mitchell* [2006] VSCA 108 the Court of Appeal dismissed a Director's appeal against a sentence of 4m youth training centre imposed on a 19 year old offender on charges of intentionally causing serious injury, affray and handling stolen goods in circumstances where there was evidence of rehabilitation after conviction.

In *R v Kane* [2010] VSCA 213 the accused had pleaded guilty to charges of intentionally causing serious injury, intentionally causing injury, assault, criminal damage and breach of intervention order, all of which were committed on his ex-partner after she had told him that she was ending their relationship. He received a total effective sentence 10y/7y, including 8y on the charge of intentionally causing serious injury. In allowing his appeal, Nettle JA (with whom Harper & Hansen JJA agreed) said:

- At [17]: “In her sentencing remarks, the sentencing judge observed, correctly, that it is incumbent on a sentencing judge to impose condign punishment in a case like this in order to send a clear message to likeminded people that a civilised society does not condone people using physical violence to take the law in their own hands to settle disputes and deal with domestic partners in a violent way. Her Honour also observed, correctly, that inasmuch as these attacks were cowardly, unprovoked and unexpected attacks, there was a particular need for specific deterrence.”
- At [23]: “Although a sentence of eight years' imprisonment imposed is high for a count of intentionally causing serious injury not involving the use of weapons [cf. *R v Heary* (2002) 22 VR 164, 202 [150] (9y imprisonment)] or resulting in the total and permanent incapacity of the victim [cf. *DPP v Terrick, Marks and Stewart* (2009) VSCA 220, [17] (8y imprisonment); *Ashe v R* [2010] VSCA 119 (recklessly causing serious injury, 10y imprisonment)], the nature and gravity of this offence was formidable and the effects on the victim were painful and lasting. It called for a sentence which reflected that.
- At [24]: “The Crown, however, concedes that the sentence is excessive. It draws attention to the decision of this Court in *R v Harvey* [2007] VSCA 127 where the majority held that a sentence of nine years' imprisonment imposed on a serious violent offender on a count of intentionally causing serious injury was manifestly excessive, and varied the sentence to six years. Although I dissented in that case, I am bound to heed it. The Crown also makes mention of *R v Pennell and Rankin* [2007] VSCA 225 in which I joined, where the nature and gravity of the offending was more serious than here, albeit that the offenders were younger, and the sentence imposed was only six years' imprisonment.”
- At [25]: “Sentencing cases are without precedential value. Each case is unique and dependent on its own circumstances. The most that can be derived from previous decisions is their exposition of sentencing principles. But in view of the Crown's concession, and given the similarities and dissimilarities between this case and the cases to which the Crown has drawn attention, I am persuaded that a sentence of eight years' imprisonment was, in this case, beyond the sentencing range. It may be that there is a need to revisit current sentencing practices in relation to offences of intentionally causing injury. But this is not the case in which to do that; if only because of the sentencing range of five to seven years' imprisonment which was put by the Crown to the sentencing judge on the plea.”

The accused was re-sentenced to 6y imp on intentionally causing serious injury. The other sentences and cumulation were confirmed, resulting in 8y/6y.

The cases of *DPP v Bogtstra, Kontoklotsis & Karazisis* [2010] VSCA 350 involved Crown appeals against sentences imposed on joint offenders who were off-duty security officers who had pleaded guilty to charges of affray, recklessly cause serious injury and intentionally cause serious injury related to an unprovoked attack on restaurant patrons. In the County Court B & Ko had been sentenced to terms of imprisonment of 9m & 12m respectively to be served by way of Intensive Correction Order. Ka was sentenced to IMP 2y4m/12m. Appeals against sentence in the cases of Bogtstra & Kontoklotsis were dismissed. Appeal against sentence in the case of Karazisis was allowed and he was re-sentenced to IMP 3y8m/1y10m. At [192] Ashley, Redlich & Weinberg JJA (with whom Warren CJ & Maxwell P agreed on this point) said:

“It can readily be accepted that Karazisis did not foresee the full extent of the serious injuries suffered by Adams. Of course, those consequences should not be permitted to swamp other sentencing considerations: *DPP v Fevaleaki* (2006) 165 A Crim R 524, 527-8. In a case such as this, the Court's assessment of the gravity of the offending will involve a consideration of both the degree of probability that serious injury would result, and the seriousness of the injury thus foreseen: *Ashe v The Queen* [2010] VSCA 119, [23]–[27]. Karazisis' plea of guilty to the offence of recklessly causing serious injury amounted to an acknowledgement on his part that he was aware, when he applied the choke hold to Adams, and thereby rendered him unconscious, that his conduct would

probably cause serious injury: *Ignatova v The Queen* [2010] VSCA 263. Prior to the decision in *Ignatova*, there was a body of case law suggesting that it was an element of recklessly causing serious injury that the offender be 'indifferent' to that foreseen consequence. *Ignatova* held that 'indifference' was not an element of this offence. Accordingly, Karazisis' plea of guilty did not, of itself, amount to an acknowledgement that he was 'indifferent' to the likelihood that Adams would sustain serious injury. Nonetheless, on the facts of this case, it would have been well open to the sentencing judge to reach that conclusion. The fact that the injury turned out to be more serious than that originally foreseen is, to some degree, mitigatory, but does not absolve him from responsibility for his actions."

For other examples of sentencing for **intentionally causing serious injury**, see:

- *R v Chand* [2005] VSC 448 per Warren CJ [throwing live hair dryer into victim's bath];
- *R v Bookham* [2005] VSC 483 per Williams J [stabbing of former girl friend's sister in presence of her 6 year old son; attempted murder of former girl friend];
- *DPP v Galea* [2005] VSC 508 per Cummins J [road rage];
- *R v Davis* [2006] VSCA 8 [applicant's spouse in relationship with victim];
- *R v Brock & Green* [2006] VSC 13 per Hollingworth J [drunken attack involving kicking and hitting with wooden hammer handle];
- *R v Catania* [2006] VSC 189 per Bell J [victim set on fire – 9y/6y];
- *DPP v Hooker* [2006] VSCA 95 per Buchanan, Vincent & Nettle JJA [fight in street – 8m suspended increased to 2½y suspended];
- *DPP v Douglas* [2006] VSCA 160 per Maxwell P, Buchanan & Vincent JJA [home invasion – 12m suspended did not reflect gravity of offending but not increased in exercise of discretion];
- *R v Watson* [2006] VSC 375 per Kellam J [21 year old defendant involved in alcohol fuelled violence against partner – 6y/4y];
- *R v Britt* [2006] VSC 378 per Kellam J [shooting – 8y/5y];
- *DPP v Lothian* [2006] VSCA 217 per Warren CJ, Maxwell P & Buchanan JA [road rage – 18m/6m increased to 3y/18m];
- *R v Dooley* [2006] VSCA 269 per Callaway & Redlich JJA & Coldrey AJA [stabbing – 4½y/2½y];
- *DPP v Pantazopoulos* [2006] VSC 331 per Teague J [3y YTC];
- *R v Sita* [2006] VSC 323 per Bongiorno J [knifing - young offender mental deficiency – 4y/1y8m];
- *DPP v Evans; DPP v Hickinbotham* [2007] VSCA 15 per Buchanan & Eames JJA & Kellam AJA [assault with spanner and jack hammer – sentences manifestly inadequate – Evans re-sentenced to 4y/1y9m – Hickinbotham re-sentenced to 3y7m/1y4m].
- *DPP v TT* [2007] VSC 23 per Bell J [3y YTC for 15 year old offender who had entered a neighbour's house at night and stabbed her multiple times without any explanation for his actions but said to have excellent prospects of rehabilitation – 2y on injury count, 2y/1y cumulative on aggravated burglary count];
- *DPP v Bulert & Terzi* [2007] VSCA 69 per Vincent JA (with whom Buchanan & Eames JJA agreed) [each respondent cowardly and viciously kicked the head of a person who was in a defenceless and vulnerable position on the floor – 2½y imprisonment suspended for 2½y];
- *DPP v Joyce* [2007] VSCA 215 [6y/4y for unprovoked alcohol fuelled attack in victim's home];
- *R v Pennell; R v Rankin* [2007] VSCA 225 per Curtain AJA (with whom Buchanan & Nettle JJA agreed) [6y];
- *R v Clark* [2007] VSCA 254 per Neave JA (with whom Vincent JA & Curtain AJA agreed) [3½y for punching & kicking victim in victim's room];
- *R v Ali Ali* [2007] VSC 350 per Curtain J [15y/12y for causing serious injury to cellmate];
- *DPP v McAllister* [2007] VSC 536 per Teague J [shooting where defendant's moral culpability was said to be high and described as meriting the strongest denunciation];
- *R v Tresize* [2008] VSCA 8 [stabbing of male acquaintance by 55 year old female where there were various mitigating factors including a history of serious mental illness];
- *R v Eastham* [2008] VSCA 67 [prison officer kicked a prostrate prisoner being held by others causing injuries requiring removal of spleen];
- *R v McRae* [2008] VSCA 74 [closed head injury, facial bone fractures, lumbar spine fractures and five laceration wounds suffered by trans-sexual – 5y/2y9m];
- *R v Castles* [2008] VSC 93 per Bongiorno J [attack on defacto];
- *DPP v Dalley* [2008] VSCA 173 [fractured skull after multiple blows inflicted by young offender with shopping trolley handle after an exchange of words – 18m/12m suspended – dicta in *R v Mills* [1998] 4 VR 224 approved];
- *DPP v Eli* [2008] VSCA 203 [attack on train; sentence increased from 2y to 4y6m];

- *R v Aggelidis* [2008] VSC 445 per Kaye J [stabbing causing very serious permanent injury to victim – prisoner’s impaired mental state and substantially mitigating circumstances – 4y6m/2y3m];
- *R v Cossu* [2008] VSC 458 per Kaye J [premeditated stabbing of prisoner in gaol – 7y6m/5y].
- *R v Zander* [2009] VSCA 10 [care worker causing serious injury to 4 intellectually disabled high needs patients – 3y/2y];
- *R v Papworth* [2010] VSC 422 per Osborn J [stab wound to forearm – plea of guilty by 24 year old offender who was orphaned at 13 and then under the custody of DOHS – offender under influence of drugs and alcohol – prospects of rehabilitation – 4y/2y];
- *R v Emery* [2010] VSC 478 per Lasry J [victim who had been accused’s partner was doused in diesel and set on fire – early plea of guilty – long history of drug abuse – rehabilitation well advanced – 5y/3y6m];
- *R v Rossi* [2010] VSC 602 per Lasry J [victim doused in diesel and set alight with blow torch – impact of medical and psychological conditions on time in custody – 7y/4y];
- *R v Dimitrakis* [2010] VSC 614 per Coghlan J [stabbing of 44 year old man at the apparent instigation of his wife – undertaking to give evidence against coaccused – 7y/5y];
- *R v Stone* [2010] VSC 616 per Coghlan J [brutal attack with knife for no reason – history of drug and alcohol abuse – limited prospects of rehabilitation – 9y/7y].
- *R v Ludeman, Thomas & French* [2010] VSCA 333.
- *R v Mann* [2011] VSCA 189 [multiple stabbing including lacerations to throat & abdomen] – 8y.
- *R v Kavanagh* [2011] VSCA 234 [“Plunging a knife upwards into the abdomen of a guest in an attack provoked by nothing more than the victim’s desire to escape an argument is a crime heinous enough to warrant consideration of a stern penalty for all but the insane.” – 4y/2y – sentence moderated by Verdins’ principles].
- *R v Ian Robbins* [2012] VSCA 34 [appellant hit wife on head three times with claw hammer; guilty plea; no prior convictions; profound remorse; very good prospects of rehabilitation – 11y/7y].
- *R v Hale* [2012] VSC 386 per Lasry J [“severe and unprovoked domestic violence” inflicted on victim by 40 year old defacto; good prospects of rehabilitation – 8y/5y].
- *R v Nash* [2012] VSC 507 per Robson J [“kicking and punching a mature-aged woman”; guilty plea; offender suffering from impaired mental functioning and major depressive disorder causally related to offending conduct; disinhibiting effect of alcohol and drugs – 7y/5y3m].
- *R v O’Brien & Hudson* [2012] VSC 592 per King J [20 year old offenders conducted unprovoked, prolonged, vicious attack on an Asian student motivated partially by racial hatred – 10y6m/8y for offender with extensive prior criminal record; 4y6m/2y6m for offender with no prior record].
- *R v Wallis* [2013] VSC 721 per Curtain J [son stabbed mother with knife four times to chest, abdomen & forearm – judgment impaired due to intoxication, mixed personality disorder and PTSD – genuine remorse and insight – horrific, dysfunctional childhood and early life – 5y/3y].
- *R v Freeman* [2013] VSC 454 per King J [an attack in company with a co-accused which was described as “despicable, inhuman, degrading and sadistic” – 9y {+2y for other offences}/8y6m].
- *DPP v Hamdache* [2014] VSC 158 per Macaulay J [29 year old offender with IQ of 48 shot both father and mother of his partner after an argument – 1st & 5th limbs of *Verdins* enlivened – 7y6m/5y].
- *DPP v Tran* [2014] VSC 223 per Hollingworth J [38 year old offender attended house with friend disguised and intending to confront an occupant – when confronted stabbed unarmed unknown victim 3 times with knife – guilty plea with some remorse – 6y/4y].
- *R v Savage* [2019] VSC 111 per Lasry J [28 year old offender struck the victim with hammer in an unprovoked revenge attack – prior good character – immediate remorse – late plea guilty 5y/3y].
- *R v Pham* [2019] VSC 245 per Coghlan JA [36 year old offender shot victim multiple times with a sawn off .22 calibre rifle – late but utilitarian guilty plea – PTSD and major depressive disorder – 7y6m/5y].
- *DPP v Dalton* [2019] VSC 468 per Beale J [38 year old offender on CCO intentionally encouraged two other offenders to seriously injure the victim at a time and place when he was vulnerable; victim subsequently died; offender assisted in disposal of body – 30m/20m].
- *Anne Marie Hart v The Queen* [2020] VSCA 194 per Maxwell P & Weinberg JJA at [24]-[28].

In *R v AH* [2016] VChC 1 the 16 year old accused pleaded guilty to **intentionally causing serious injury in circumstances of gross violence** after a charge of attempted murder was withdrawn at committal. She had stabbed an acquaintance in the neck. She was sentenced to YJC22m.

In *R v Gencev & Newman* [2019] VSC 502 both accused pleaded guilty to **intentionally causing serious injury in circumstances of gross violence**. D1 & D2 doused the victim in petrol and set him on fire, striking him with metal bars when he tried to escape. The victim suffered devastating injuries and would have died but for medical intervention. D1 & D2 intended to cause really serious

injury. D2, whose childhood was blighted by profound deprivation [cf. *Bugmy v The Queen* (2013) 249 CLR 571], played an active but lesser role than D1. At [8] Beale J held that the “offence was an upper range example of the offence of causing serious injury in circumstances of gross violence”: see *R v Kilic* (2016) 259 CLR 256; *Nash v The Queen* (2013) 40 VR 134 at [10]. D1 was sentenced to IMP14y/10y, D2 to IMP 13y/9y.

11.2.24.2 Sentencing for recklessly causing serious injury

In *DPP v Lovett* [2006] VSCA 5 at [54] Ormiston JA, with whom Buchanan & Ashley JJA agreed, drew a sharp distinction between sentencing for **intentionally causing serious injury** and for **recklessly causing serious injury**:

“Doubtless this was a very serious example of the commission of a serious offence, but it must be emphasised that the applicant was not found guilty of intentionally causing the particular injury or indeed of intentionally causing serious injury. The jury were prepared to be satisfied only that it was inflicted recklessly, so that much of the argument based on the devastating nature of the blow and its consequences must be looked at in that context. Of course, to satisfy the test of recklessness, the applicant must have had some comprehension that what he was doing was likely to cause serious injury to the victim, but the verdict also means that he did not directly have it in mind to cause the appalling injuries or the consequences from which David Herbert is now suffering.”

In *R v Winch* [2010] VSCA 141; (2010) 27 VR 658 a very drunk 26 year old Aboriginal offender had been sentenced to 5y imprisonment with a non-parole period of 3y on a plea of guilty to one count of recklessly causing serious injury as a result of “glassing” the victim in a hotel. On appeal the sentence was reduced to 2y9m with a non-parole period of 15m. On a direction by Maxwell P. the Crown collated and reviewed sentences imposed by the County Court in 276 cases of recklessly causing serious injury, 16 of which – summarized in an appendix – involved cases of ‘glassing’. Under the heading “GLASSING CASES – A SERIOUS EXAMPLE OF RCSI”, Maxwell P & Redlich JA said at [31]-[36]:

[31] “The work undertaken on current sentencing pursuant to Maxwell P’s direction led the Crown to submit on this appeal that current sentencing for glassing (as an instance of RCSI) should be incrementally uplifted. For reasons which follow, we agree with the Crown’s submission that the general run of sentences imposed for glassing as an instance of RCSI does not sufficiently reflect the fact that such conduct is inherently dangerous, and should not be treated as a less serious form of the offence of RCSI.

[32] ‘Glassing’ cases have a number of recurrent features. The typical glassing – of which the present appeal is an illustration – occurs in or near licensed premises. It is usually an act of alcohol-fuelled aggression, in disproportionate response to an actual or perceived slight. The typical offender is young and of generally good character, and is full of remorse after the event.

[33] The consequences of glassing are, almost invariably, very serious. Striking to the face or head with a bottle or glass carries a high – and obvious – risk of serious injury. The victim of a glassing almost always suffers severe lacerations; often has permanent facial scarring; and suffers physical and psychological damage which is typically long-term and often permanent.

[34] It is important to recall that RCSI is a very serious offence. It carries a maximum penalty of 15 years. An examination of the elements of the offence reveals why this is so. First, the offence involves the causing of serious injury to the victim. Secondly, the mental element of the offence – recklessness – means that the offender has consciously disregarded a known risk: *R v Towle* [2009] VSCA 280, [31] and the decisions there cited.

[35] The offence of RCSI is only committed if the offender foresaw the probability that his/her action would cause serious injury to the victim, and went ahead regardless of that probability: *DPP v Castro* [2006] VSCA 197, [13] (Coldrey AJA, with whom Callaway AP and Redlich JA agreed); *DPP v Fevaleaki* (2006) 165 A Crim R 524, [12] (Redlich JA); *R v Pota* [2007] VSCA 198, [19]. This is not mere carelessness, where the offender fails to appreciate the risk of injury. This is conscious disregard of a risk of serious injury which the offender knows to exist.

[36] As this Court pointed out in *Ashe v The Queen* [2010] VSCA 119, [27], the court's assessment of the seriousness of a particular instance of RCSI will involve considering both the degree of probability that serious injury will result, and the degree of seriousness of the injury thus foreseen. What makes glassing a serious instance of RCSI – almost by definition – is the obvious dangerousness of a glass or bottle (whether broken or not) when used to strike a blow to the face or head. Hence, the offender who is convicted of this offence of recklessness is to be taken to have foreseen a high probability of serious injury."

In *R v Ashdown* [2011] VSCA 408 the applicant (who was on a suspended sentence for a previous assault) had pleaded guilty to one count of recklessly causing serious injury to a former girlfriend. He had punched the victim to the face causing multiple facial fractures. A sentence of 5 years imprisonment was held on appeal to be outside the range of current sentencing practices for the offence of RCSI. The applicant was re-sentenced to 3y6m imprisonment. On the appeal, the Director of Public Prosecutions had mounted an extensive argument that current sentencing practices for RCSI were "inadequate across the board". A very experienced Court of Appeal comprising Maxwell P, Ashley & Redlich JJA held that this was not an appropriate case for the expression of an opinion about the adequacy of sentencing for RCSI generally. This appeal was heard at the same time as that in *Winch's Case*. At [46]-[47] Maxwell P said:

"What made it both possible and necessary to express a view about current sentencing practices in *Winch* was that glassing could be identified as a distinct sub-category of RCSI, characterised by the recurrent features to which the majority judgment referred. That made it possible both to identify the state of current sentencing, based on the cases which the Crown had identified, and to express a view about its adequacy. A similar exercise might well be possible with another sub-category, such as RCSI involving the use of a weapon."

There are four very detailed appendices to this judgment. Appendix A contains a selection of 27 RCSI cases from Crown compilation 2007-2009. Appendix B contains a list of RCSI sentence appeals from 2005-2010. Appendix C contains a lengthy list of RCSI knife case sentences. Appendix D contains a lengthy list of RCSI non-weapon case sentences.

In *DPP v Aslan* [2010] VSC 518 Whelan J applied *Winch's Case* in sentencing a 28 year old offender who had pleaded guilty to one charge of recklessly causing serious injury – a "glassing" in a restaurant – to 2y6m imprisonment with non-parole period 12m.

In *R v Gerrard* [2011] VSCA 200 the Court of Appeal applied *Winch's Case* in sentencing a 37 year old offender who had entered an early guilty plea to one charge of intentionally causing serious injury arising from a "glassing" in a hotel to 3y imprisonment wholly suspended for 3y. The suspension of the sentence arose from "a very exceptional combination of circumstances", including that the offence was provoked by a prior violent assault and family hardship constituted by the offender's defacto partner being profoundly deaf and dependent on him and his young son suffering from autism.

In *R v Anyang (Sentence)* [2011] VSC 263 the accused pleaded guilty to one count of recklessly causing serious injury. He had stabbed a man walking with the accused's wife on a busy public road in the daytime. The accused was 23 years old at the time and his motivation was jealousy. Accepting submissions of both counsel that the "glassing" cases were relevant, Whelan J sentenced the accused to IMP 3y/2y.

In *DPP v Batich* [2012] VSC 524, the accused – who was a first offender aged 18 at the time of the offence – had pleaded guilty in the County Court to one count of recklessly causing serious injury by "glassing" the complainant in the face during an altercation at a nightclub. Describing the offence as involving "some aspect of what would have been excessive self-defence", Judge Chettle exercised a discretion to transfer the proceeding for summary hearing and determination in the Magistrates' Court pursuant to ss.29 & 168 of the Criminal Procedure Act, saying *inter alia* at [41]: "The court below has adequate power to impose a gaol term if it seeks to do so...As a matter of fairness and justice I think it is artificial that he should be dealt with in this court [where a suspended sentence of imprisonment was barred by law] and denied the opportunity of a sentencing disposition that would be open to him in the Magistrates' Court". His Honour had had the accused assessed for suitability for detention in an adult YJC. The report had been positive but had included the observation that the accused "would benefit from being diverted away from the penal system in its entirety and [that his] rehabilitation would be better served in a community setting. Mr Batich presents as a young man who is naïve about the criminal justice system, which would make him susceptible to undesirable influences in an adult custodial environment and at risk of becoming impressionable to older more sophisticated offenders." The DPP made an application to the Supreme Court for certiorari or mandamus to quash the transfer

decision of Judge Chettle. After reviewing at [51]-[57] applicable sentencing principles – including current sentencing practices – for ‘glassing’ offences, Bell J dismissed the application for judicial review, holding at [69]:

“Taking into account that the Magistrates’ Court could not impose a sentence of imprisonment of greater than two years, it was open to his Honour to decide that that court could impose an appropriate sentence in the circumstances. In reaching that conclusion, it was relevant for his Honour to take into account that the Magistrates’ Court could suspend a sentence of imprisonment, even though the County Court could not do so. He did not err in law on the face of the record by misinterpreting the transfer provision, exercise the transfer discretion for the improper purpose of circumventing the prohibition on the County Court suspending a sentence of imprisonment, take into account irrelevant considerations or fail to exercise the jurisdiction of that court.”

In *Ejupi v The Queen* [2014] VSCA 2 at [37] Priest JA, with whom Coghlan JA agreed, said:

“Axiomatically, every case must depend on its own particular facts, and every sentence must be the product of the features (both aggravating and mitigating) peculiar to that case. When regard is had to current sentencing practises for the offence of recklessly causing serious injury perpetrated by the use of a knife and resulting in life-threatening injuries, in my opinion the sentence of four and a half years’ imprisonment here fixed for the offence cannot be said to be outside the range of those properly open, notwithstanding the appellant’s plea of guilty (and other mitigating features): see *Winch v The Queen* (2010) 27 VR 658; *Ashdown v R* (2011) 219 A Crim R 454.

In *DPP v Russell* (2014) 44 VR 471; [2014] VSCA 308 the respondent, a trained martial arts fighter, had been sentenced to a total effective sentence of IMP15m/8m having pleaded guilty to charges of recklessly causing serious injury, recklessly causing injury and affray. On appeal by DPP the sentence was increased to IMP3y/1y9m. At [1]-[4] Maxwell P and Weinberg & Santamaria JJA said:

“Random street violence is a scourge on our society. Typically, the violence is brief and unpremeditated but it has profound and enduring consequences. Innocent people are killed or seriously injured; their families are devastated; their communities disrupted. And the outburst of violence is ruinous for the offender, too. Imprisonment with all its destructive consequences is virtually inevitable, as is the shame and embarrassment felt by the offender’s family.

The present case had all of these characteristics. The respondent (‘Russell’) was a participant in random street violence on New Year’s Eve 2012. The consequences were devastating for all concerned. One young man died; another was seriously injured; bystanders were terrified; the victims’ families engulfed by sorrow. The person who delivered the fatal punch pleaded guilty to manslaughter and was sentenced to nine years and three months’ imprisonment, with a minimum of six years: *DPP v Closter* [2014] VSC 484. Russell, who seriously injured one young man and injured another, was sentenced to 15 months’ imprisonment, with a minimum of eight months.

The Director of Public Prosecutions has appealed against Russell’s sentence on the ground of manifest inadequacy. For reasons which follow, we would allow the appeal. In our view, a substantially higher sentence was called for, given the gravity of the offending and the importance of both general and specific deterrence. As to specific deterrence, Russell had a prior conviction for recklessly causing injury. The sentence imposed for that offence evidently did not deter him from engaging in this similar, but more serious, offending.

Given the prevalence of street violence, general deterrence was a particularly important consideration in a case such as this.”

In *DPP v McKay* [2018] VSCA 292 on charges of recklessly cause serious injury [IMP18m], assault with a weapon [IMP 9m, 2m CUM] and possessing a controlled weapon without excuse [IMP 3m] the trial judge had imposed a TES of IMP20m/10m. Allowing the DPP appeal, the Court of Appeal increased the sentence on recklessly cause serious injury to IMP4y6m and fixed a TES of IMP4y8m/2y9m. Beach, Hargrave JJA and Almond AJA said at [13] & [24]:

[13] “During the plea hearing the sentencing judge characterised the gravity of the offence as ‘objectively very high’. This is undoubtedly so. Recklessly causing serious injury using a knife is an inherently grave offence. In combination with alcohol the consequences can be life-threatening,² as was the case here.”

[24] “The appellant submits that the sentence imposed represents precisely 10 per cent of the maximum penalty, which reflects a clear incongruity between the sentencing judge’s characterisation of the offending and the sentence imposed. We agree. Moreover, we note that this Court has recently upheld sentences imposed in several recklessly cause serious injury cases: *Pang v The Queen* [2018] VSCA 5 (IMP4y/2y); *Al Wahame v The Queen* [2018] VSCA 4 (IMP6y/4y6m); *Jojic v The Queen* [2017] VSCA 77 (IMP4y/2y9m). Whilst accepting that every case depends on its own facts and sentences are to be individually tailored, the very substantial difference between the sentences imposed in these cases and the sentence imposed on the respondent is plain.”

In *Hamid v The Queen* [2019] VSCA 5 the 28 year old applicant had ambushed the victim and struck him repeatedly to the head and neck with a bladed knuckleduster causing life-threatening injuries and permanent scarring. There was an element of vigilantism in the applicant’s offending, his text messages indicating that he attacked the victim because he perceived that the victim had dishonoured his sister and he wanted to punish the victim by permanently scarring him. He had prior convictions for intentionally causing serious injury using a knife and for affray. The Court of Appeal granted leave to appeal but dismissed his appeal against a sentence of IMP10y/7y (the 2nd highest ever imposed in Victoria for the offence), holding that it was not manifestly excessive.

In *DPP v Betrayhani* [2019] VSCA 150 B had been found guilty of recklessly causing serious injury and sentenced to IMP4y/3y. The victim had been “king hit” with a single punch to the head causing him to fall backwards and hit his head on the footpath which caused catastrophic injuries including a permanent brain injury. Dismissing B’s appeal against conviction the Court of Appeal held that it was well open to the jury to infer from the circumstances that at the time he struck the victim B realized that serious injury would be the probable result. However the Court allowed a Crown appeal against sentence, holding at [6] that the attack was “a very serious instance of the offence of recklessly causing serious injury” and that the sentence was manifestly inadequate. The attack was without provocation, B had no remorse and had a criminal record of similar offences. After referring to the cases of *Winch v The Queen* (2010) 27 VR 658, *DPP v Russell* (2014) 44 VR 471, 473; [2014] VSCA 308 & *Al Wahame v The Queen* [2018] VSCA 4, the Court resented B to IMP7y/5y.

In *Atem v The Queen* [2020] VSCA 35 the 19 year old offender – 18 years old at the time of the offending – had received an aggregate sentence of IMP5y/3y on a charge of recklessly causing serious injury, a charge of reckless conduct endangering life and 2 charges of recklessly causing injury: see *DPP v Atem* [2019] VCC 1177. All the charges arose from an incident that took place in and around the Gasometer Hotel in Collingwood in the early hours of 02/09/2018 and principally relate to the offender’s erratic and dangerous use of a car in a manner that caused injuries to pedestrian onlookers. In refusing leave to appeal, the Court of Appeal noted the seriousness of the offences, that they were committed while he was subject to a youth supervision order and that he had prior violent offending. They agreed with the sentencing judge that the offender’s prospects of rehabilitation were guarded and said at [67] that “the cautious nature of the assessment must mean that supporting his prospects of rehabilitation cannot be the overriding goal of any sentence imposed.” Finally, applying *DPP v Neethling* (2009) 22 VR 466, *Azzopardi v The Queen* (2011) 35 VR 43 and *Harrison v The Queen* (2015) 49 VR 619, the Court of Appeal said at [61] & [63]:

“With respect to Atem’s youth, it has been accepted in the authorities that in sentencing a young offender, the offender’s youth is an important, and a principal, consideration, with the consequence that rehabilitation is usually a more important consideration than general deterrence: *Eade v The Queen* (2012) 35 VR 526, 534–5 [40]–[44]. Nevertheless, there will be cases in which the need for deterrence and denunciation will require greater emphasis...In our view, the very serious nature of Atem’s offending has the consequence that his youth will not provide the strong mitigating effect he seeks. His youth and immaturity must, to some degree, be subordinate to the other sentencing considerations the judge identified, including denunciation, general deterrence and protection of the community.”

Some general considerations relevant to sentencing for the offence of **recklessly causing serious injury** are to be found in the cases of:

- R v Paul Jedson* [2004] VSC 345 {this was a case in which a 25 year old man was given a 3 year suspended sentence of imprisonment for recklessly causing serious injury to his parents when, at age 16, he struck them in the head with an iron bar when they were in bed; one relevant factor was the parents' complete forgiveness of their son}. Teague J said at [12]:

"I must take account of the great seriousness of your crimes and of the consequences of those crimes. There was a prolonged attack on vulnerable people in their beds. Added to that is the aggravation of the situation by your fleeing from Victoria. Before I embarked on the hearing of the plea I carefully studied the cases that have been referred to by [counsel] during the plea. I refer to cases including *Shaw, Nutter, MFP, Cameron, Cunliffe, Scurrah* and *White*. Some matters can only have a significant bearing on the ultimate sentence in exceptional cases. One such matter is the views of the victims. On the one hand, this is not a private prosecution. The State is prosecuting in the interests of the whole community. On the other hand, it is rare that victims who have been so badly and so humiliatingly injured are prepared to be as forgiving as are your parents. It is a powerful factor encouraging relative leniency."
- R v Close* [2004] VSCA 188 {this was a case where the appellant had been grossly provoked by the victim and had retaliated causing serious brain damage to the victim}. The appellant's counsel had placed reliance on *Economedes* (1990) 58 A Crim R 466 at 469 and on the observations of Crockett & Hampel JJ in *R v Boxtel* [1994] 2 VR 98 at 103 to the effect that it is of great importance not to allow the effects of an unintended catastrophe to 'swamp' all other considerations. Charles JA, with whom Winneke P agreed, said at [12]:

"I would accept at once that the appellant was not to be sentenced as someone who intended the degree and nature of the injuries suffered by the victim. But there can be no doubt that the consequences to a victim are relevant sentencing considerations. *Mallinder* (1986) 23 A Crim R 179 at 180; *Economedes* at 468."
- R v Phuoc Van Bui* [2005] VSC 83 at [39]-[45] {this was a case where a 25 year old offender went to the aid of friend under serious attack; he fired three shots, two of which caused serious injury; he was on parole at the time; he pleaded guilty and was sentenced to 4½ years' imprisonment}.
- DPP v Coley* [2007] VSCA 91 – approved and applied by Maxwell P (with whom Ashley JA & Lasry AJA agreed) in *R v Hendy* [2008] VSCA 231 at [29]-[30] – where Kellam AJA said at [48]:

"The use of knives, whether in circumstances of recklessness or otherwise, as a means of resolving disputes is a matter of great concern to the community and to the courts and must be deterred."
- DPP v Nikolic* [2008] VSCA 226 was a case in which the learned sentencing judge had noted a number of aggravating features of the offence: (1) it was a very serious offence involving a frenzied attack; (2) it occurred in a public place; (3) there was no provocation; (4) the victim suffered and continues to suffer very serious injury. In allowing a Director's appeal and replacing a 12 months intensive corrections order with a sentence of 12 months imprisonment with a non-parole period of 6 months Warren CJ (with whom Dodds-Streeton JJA agreed) said at [28]:

"It must be said that unprovoked assaults in public places by young men affected by alcohol plague the community. They result in dreadful injuries and, tragically on occasion, death. In this case the respondent may well have faced a far graver charge if the injuries to the victim had played out only ever so slightly differently."
- R v Vandenberg* [2009] VSCA 9 where the Court of Appeal dismissed an appeal against a sentence of 3y6m on a charge of recklessly causing serious injury. At [26]-[27] Nettle JA (with whom Dodds-Streeton JJA agreed) doubted the utility of sentencing statistics:

"Counsel for the appellant argued that the sentence of three years and six months' imprisonment imposed on the count of recklessly causing serious injury undervalued the reckless nature of the offending and the background to it. In a carefully crafted submission, he argued that in view of the Sentencing Snapshot [Sentencing Advisory Council, Snapshot No. 40: Sentencing trends for causing serious injury recklessly in the higher courts of Victoria, 2002-03 to 2006-07] which indicates that the most common length of actual imprisonment imposed for the offence of recklessly causing serious injury is one year imprisonment, a sentence of three years and six months in the circumstances of this case was plainly beyond the range.

I reject that submission. Statistical reference to the most common length of actual sentence imposed is seldom much of assistance, and in this case I think largely irrelevant. To state the obvious, each case depends upon its own facts and circumstances and, critically in a case of this kind, upon the effects on the victim of

the offence. The facts and circumstances of this case and the effect of the offence on the victim in my view mark this out as a serious instance of recklessly causing serious injury requiring condign punishment. The recent decisions of this Court in *Director of Public Prosecutions v Massey* [2008] VSCA 254, in which an individual sentence of three years and six months' imprisonment was imposed on a count of recklessly causing serious injury, and *R v Davidson and Konestabo* [2008] VSCA 188, in which an individual sentence of six years' imprisonment was imposed, are arguably more relevant comparators."

- *R v Vance* [2008] VSC 468 {a case where a female accused, who had stabbed her partner once in the back while intoxicated and taking Zoloft, had called an ambulance and had showed immediate remorse was sentenced to 2½ imprisonment wholly suspended for 2½ years}.
- *R v Marino* [2011] VSCA 133 {a case where a 24 year old respondent who had "king-hit" a victim outside his home in a dispute about a drug debt had pleaded guilty – amongst other charges from other incidents – to one count of recklessly causing serious injury; the respondent had punched the victim to the face with his fist whereupon the victim fell back and struck his head on a concrete driveway causing a severe head injury resulting in a severe acquired brain injury and epilepsy; a DPP appeal against a sentence of IMP 5y was dismissed.}
- *McKeon-Muller v The Queen* [2018] VSCA 199 {a case where the 25 year old appellant had struck the victim in the face with a rock or brick – IMP6m with 24m CCO not manifestly excessive.}
- *Moresco v The Queen* [2018] VSCA 336 {a case where the offender aged 19 at the time of the offence had been party to the assault and partial blinding of the 27 year old victim after a dispute at a night club – nil priors – YJC3y.}
- *R v Ziday* [2006] VSCA 163; *R v Kumar* [2006] VSCA 182 at [66]; *R v Asim Selcuk* [2006] VSC 465; *R v Stuttard* [2006] VSCA 112; *DPP v Castro* [2006] VSCA 197; *R v Campbell Ross* [2007] VSCA 213 at [23] & [26]; *R v Pota* [2007] VSCA 198; *DPP v Toumngoun* [2008] VSCA 91 and especially the list of cases and sentencing statistics cited at [20]-[21]; *R v Earl* [2008] VSCA 162; *R v Wills* [2010] VSCA 235; *DPP v Giannoukas* [2011] VSCA 296; *R v Sindoni* [2012] VSC 238; *DPP v Leys & Leys* [2012] VSCA 304; *R v Kovacs* [2012] VSC 647; *R v El Ali* [2013] VSC 172; *Mogoai & Another v The Queen* [2014] VSCA 219 at [13]; *DPP v McKinnin* [2019] VSCA 114; *DPP v Gilmour* [2019] VSC 766.

11.2.24.3 Sentencing for negligently causing serious injury

In *R v Roach* [2005] VSCA 162 at [11], in the course of dismissing an appeal by a 46 year old woman, *inter alia* against sentences of 3 years imprisonment & 12 months imprisonment on two counts of **negligently causing serious injury**, Callaway JA, with whom Ormiston & Charles JJA agreed, said:

"Unfortunately, as has often been observed, the maximum penalty for negligently causing serious injury is out of kilter with the maximum penalties for related offences. The only response open to the courts, in cases of such gravity as the present, is to impose a term of imprisonment as close to the maximum as other principles of sentencing will allow."

See also *R v Brown* [2003] VSCA 153 at [9]; *R v Fackovec* [2007] VSCA 93 at [37]; *DPP v Albert* [2010] VSCA 75; *Jakob Sutic v The Queen* [2018] VSCA 246.

In *R v Shi Mok* [2011] VSCA 247 the appellant (who was 18 at the time of the offence) had been found guilty of negligently causing serious injury to his infant son by placing him in a hot bath and had been sentenced to IMP 3y/20m. The Court of Appeal allowed an appeal against sentence and re-sentenced him to 2y of which all but 9m was suspended. At [4]-[5] Nettle JA said:

"First, despite the very serious consequences of the offence, I place the objective gravity of the offending down in the low to medium range. By definition, it involved a degree of negligence worthy of criminal punishment. But according to the jury's verdict, and my assessment of the facts, it was negligence constituted of momentary inattention, as opposed to the kind of sustained, near to recklessness negligence often associated with offences of negligently causing serious injury in motor accidents. It was with a view to the latter, not the former, that the maximum penalty for negligently causing serious injury was increased from five to 10 years' imprisonment.

Secondly, I place the appellant's moral culpability towards the lower end of the scale. Certainly, he is responsible for what occurred and he should not have allowed it to happen. But according to the jury's verdict, and my assessment of the facts, his negligence was the result of nothing more egregious than immaturity, inexperience and inattention. That he did not own up to the error as quickly as he should have does not

alter that fact. Given his age and immaturity, one can readily understand that he might have hoped and perhaps even believed that the problem would go away without medical intervention. More importantly, there was no thought here of hurting the child or disregarding its welfare. The appellant's intention was to care for the child by bathing it. The only problem was that he went about it negligently. His degree of moral culpability thus stands in contrast to the higher degree of moral culpability involved in the so-called baby shaking cases of negligently causing injury."

In *Fox v The Queen* [2020] VSCA 3 the applicant had pleaded guilty to negligently causing serious injury and was sentenced to IMP3y9m. The circumstances were unusual. The applicant had reversed while the victim was leaning into the car and then drove the vehicle forward over the victim's leg. The victim sustained a fractured femur and ankle. Leave to appeal was refused. On the issue of 'serious injury' Maxwell P & Beach JA said at [25]:

"[T]he applicant, by his plea of guilty accepted that the injuries were 'substantial and protracted', within the definition of 'serious injury' in s 15 of the *Crimes Act 1958*. In our view, a fractured femur — which required the insertion of a rod and pins to secure it — is properly described as a 'very serious' injury. The judge was also right to have regard to what was said in *Harrison* (2015) 49 VR 619, 635 [68]; [2015] VSCA 349, as follows:

'We would wish, in passing, to advise against the common practice of drawing detailed distinctions between the precise injuries suffered in different cases. Sentencing judges are often asked to compare injuries which are plainly extremely serious and enduring with other very serious and enduring injuries, and place them in some hierarchy of severity.'"

See also *R v Gorlachencharau* [2011] VSCA 432; *DPP v Miller* [2012] VSCA 265 at [31]-[48]; *DPP v Walsh* [2018] VSCA 334.

11.2.24.4 Sentencing for intentionally / recklessly causing injury

In *R v Saltalamacchia* [2010] VSCA 83 the appellant, who had no prior convictions, pleaded guilty to offences involving the invasion of his ex girlfriend's home and was sentenced as follows: Aggravated burglary-2 years; threat to kill-2 years; recklessly cause injury-12 months; criminal damage-8 months. With a measure of cumulation, a total effective sentence of 3 years was produced. A non-parole period of 18 months was imposed. On appeal the individual sentences were approved and the same cumulation applied but all but a little over 1 year of the sentence was suspended for a period of 3 years. At [24] Maxwell P said:

"I respectfully agree with what her Honour said in sentencing the appellant, about the need for a person to be free to bring a relationship to an end without the other party to the relationship reacting violently:

'People in Ms Hogan's position must be allowed to freely exercise their right to terminate a relationship, to have their wishes respected even if they do not accord with the wishes of the other party to the relationship, even if the other party feels hard done by. People in Ms Hogan's circumstances must be able and feel free to terminate a relationship without fear of violence, actual or threatened, without violation of their sense of safety in their homes and without fear of suffering damage to or destruction of their property. Where a person, even if they feel they are a jilted lover, and even if they feel they have a justifiable sense of grievance over the circumstances in which the relationship came to an end, resorts to violence, threats and wanton destruction of property directed towards the person they were in a relationship with, they must understand that if they do so, they are committing serious criminal acts and will suffer punishment at the hands of the criminal justice system. They must also accept that it is their behaviour, not that of the other party, which has put them in a position where they face criminal charges and that they must not consider that they can pressure or threaten their victims into withdrawing the charges. If they do what you have done, they must understand that such conduct too is criminal and they will be punished for it. A failed relationship, or a prospect of facing criminal sanctions for the manner in which you conducted yourself with your former girlfriend and her friends is no justification for using threats, violence and causing wanton damage to property to attempt to deter her from proceeding or in retaliation for her proceeding with being a witness in criminal proceedings. They were of course, not her proceedings but proceedings taken by the police as a result of the complaints made by her and others.'"

In *Rivera v The Queen* [2020] VSCA 5 the Court of Appeal approved a sentence of IMP5y11m/4y imposed on the applicant – who had a substantial criminal history – on a charge of intentionally causing injury to an expartner. At [34]-[40] Beach & Weinberg JJA said:

[34] “Ultimately, the issue is whether the judge sentenced the applicant for an offence other than the one for which he fell to be sentenced or relied upon, as an aggravating matter, a circumstance which could have formed the basis of a distinct (and in this case more serious) charge: Cf *De Simoni* (1981) 147 CLR 383, 389. In our view, the judge made no such error. Four points may be made.

[35] First, we observe that no objection was taken on the plea hearing to the admission of Dr Schreiber’s opinion concerning the complainant’s need for a blood transfusion to avoid a potentially fatal outcome. Nor was any issue taken on the plea by the applicant’s plea counsel to the prosecutor’s use of the word ‘life-threatening’.

[36] Secondly, evidence suggestive of a serious injury in a case involving an offence involving injury simpliciter is not necessarily inadmissible. Such evidence may be admissible in order to properly delimit the nature and extent of the injury which is the subject of the relevant offence of causing injury.

[37] Thirdly, the offence to which the applicant pleaded guilty was one of intentionally causing injury. While the injury actually caused may have satisfied the definition of ‘serious injury’ in the *Crimes Act*, there is no suggestion that the judge sentenced the applicant on the basis that he *intentionally* caused a serious injury. The extent of the injury actually caused by an offender may be discrete from the extent of the injury that the offender intended to cause. In the present case, while it might be thought that the applicant caused the complainant to suffer a serious injury and that he undoubtedly caused an injury, there was no suggestion he intended to cause a serious injury...

[40] Fourthly, having noted at the commencement of her reasons that the applicant had pleaded guilty to a charge of intentionally causing injury, the judge was at pains later to say that she was now required to sentence him for ‘a most serious example of intentionally causing injury’. Contrary to the applicant’s submissions, the judge made no error of the kind identified by the High Court in *De Simoni*.

See also *Didier Lam Kee Chau v The Queen* [2020] VSCA 252; *R v Ball* [2020] VSC 623.

11.2.24.5 Sentencing for affray/riot

In the particular circumstances of *R v King*; *R v Ngyouen* [2007] VSCA 263 the Court of Appeal concluded that the count of **affray** for each appellant had included the same factual matters as those that constituted the count of intentionally causing serious injury. However, the Court noted at [28]-[29]:

“[A]n additional and distinguishing element of the count of affray is that the unlawful fighting was such that a bystander of reasonable firmness and courage (whether or not present or likely to be present) might reasonably be expected to be terrified.

Notionally, therefore, cumulation was permissible in both cases without breaching any principles prohibiting double punishment. However, in the circumstances of this case any additional element of criminality may be regarded as minor.”

See also *R v Akin Sari* [2008] VSCA 137 at [18] per Ashley JA and at [62]-[65] per Lasry AJA; *R v Musa & Wubneh* [2014] VSC 15 per Dixon J; *DPP v McCloskey-Sharp* [2014] VSC 634.

11.2.24.6 Sentencing for reckless endangerment

In *R v Hennessy* [2010] VSCA 297 the applicant had been sentenced to IMP5y/3y after pleading guilty to one count of reckless conduct endangering life. The impugned conduct consisted of repeated acts of unprotected sexual intercourse between the applicant and his future wife for 4 months in 1996, the applicant being aware at all relevant times that he was HIV positive. Drawing a distinction between reckless endangerment on the one hand and intentional endangerment and intentionally causing serious injury on the other – and giving significant weight to the 12-13 year delay between offence and sentencing – the Court of Appeal allowed the appeal and re-sentenced the applicant to IMP4y/2y6m. See also *The Queen v Neal* [2011] VSCA 172 at [109]-[111]; *R v Oakley* [2012] VSC 392.

In *DPP v SI (a child)* [2018] VChC 3 the 15 year old offender – who suffered from a profound hearing loss and an autism spectrum disorder at level 3 severity requiring very substantial support – had pleaded guilty to two charges of reckless conduct endangering life, two charges of reckless conduct endangering serious injury, one charge of assaulting an emergency worker and one charge of unlicensed driving. All of the charges arose out of SI's conduct when – dressed in dark military style clothing – he drove erratically and recklessly in the Melbourne CBD in his father's car. The consequences of SI's driving could have been catastrophic but fortunately they were not. At [47]-[48] Judge Chambers held that notwithstanding SI's absence of priors and the significance of his disability, the serious nature of his offending warranted a conviction; she placed SI on a 12 month youth supervision order with special conditions that he does not drive a motor vehicle and only has access to a computer or other internet connected device for activities approved by his disability support worker or his school.

In *Butler v The Queen* [2019] VSCA 132 the applicant had pleaded guilty to attempted arson, reckless conduct endangering serious injury and related summary offences. Describing the sentence of IMP 14m on the reckless endangerment charge as “extremely lenient, if not inadequate”, Priest JA said at [42]:

“The applicant's was appalling driving, by a man with a bad record, for the express purpose of evading police. Driving such as the applicant's, putting the public in danger so as to avoid facing the consequences of other criminal activity, is to be strongly condemned and severely punished. Furthermore, general deterrence is of prime importance in a case such as this. People tempted to drive recklessly and endanger the public in order to evade police must know that when caught they will receive stern punishment.”

In *DPP v Graoroski* [2018] VSCA 332 the 37 year old respondent was the victim of a violent home invasion by 3 men acting in concert with his then girlfriend. As the offenders retreated, the respondent fired a shotgun from close quarters. One of the offenders sustained life-threatening injuries. The respondent was sentenced to IMP7m plus a 2y CCO. The Crown appeal was allowed, the Court of Appeal holding, “after anxious consideration”, that the sentence was manifestly inadequate notwithstanding that the respondent had been “confronted with an extremely difficult set of circumstances” – including his home having been invaded and he having been attacked with a baseball bat and a machete by 3 violent criminals, he having sustained injuries to various parts of his body and his father having also been placed in danger. At [32]-[33] the Court said:

“By the time the respondent chased Anagnostou from his house, the danger had passed. And, as a prohibited person, he shot Anagnostou with his loaded shotgun in the upper back from a distance of one to two metres. Whilst the respondent could not be punished for intentionally injuring Anagnostou, his action in discharging the shotgun so close to Anagnostou was extraordinarily reckless and caused life-threatening injuries. We have concluded that his Honour, in imposing the sentence on this charge, gave insufficient attention to these factors and, as a consequence, insufficient attention to general deterrence. We are unable to discern any ‘primacy’ given to general deterrence in either of the impugned sentences.”

A total effective sentence of IMP2y/1y was substituted.

In *R v Natale* [2019] VSC 30 the 87 year old offender – who had fired two shots from a distance of about 7 metres at a sex worker of whom he had been a long-term client – pleaded guilty to reckless conduct endangering life. His offending was motivated by anger and a sense of entitlement. Holding that general deterrence and denunciation were of primary importance he was sentenced to IMP4y and in conjunction with offences of using an unregistered longarm, stalking and threat to kill a total effective sentence of IMP4y6m/18m was imposed.

In *Nicos Kiril (a pseudonym) v The Queen* [2019] VSCA 133 the applicant had provided inadequate care for his elderly mother putting her in danger of death. At the time of her death the victim was living in squalid conditions, weighing 34 kilograms and covered in sores. After a late guilty plea, the applicant was sentenced to IMP18m/12m notwithstanding the prosecution concession that a CCO was an appropriate sentence, a concession strongly criticised by T Forrest JA at [53].

In *Cooper v The Queen* [2020] VSCA 288 the Court of Appeal described a sentence of IMP3y imposed on a 27 year offender as “stern” but refused leave to appeal, holding at [74]:

“The fact that the applicant's offending involved the discharge of a firearm in retaliation for Mr Lee's previous assault heightened the importance of general deterrence. In *Kelly v*

The Queen [2020] VSCA 171, [46] — which involved the discharge of a firearm in the direction of a car from which two shots had been fired at the offender's home — this Court stated the following about offending that was retaliatory in nature:

'The courts have repeatedly emphasised that the sentences for individuals who take the law into their own hands and commit crimes in order to resolve real or perceived grievances must be sufficiently high to deter others from adopting that course. For example, in *Zogheib v The Queen* (2015) 257 A Crim R 454, 475 [89], 477 [98]; [2015] VSCA 334., this Court said the following:

Rather than contacting police, the appellant took the law into his own hands...The appellant's conduct, and such conduct by like-minded individuals, simply cannot be countenanced in a civilised society. In such a case, considerations of denunciation and general deterrence must be given substantial weight."

11.2.25 Sentencing for drug trafficking / cultivation / importation

In *R v Carl Williams & Walter Foletti* [2004] VSC 424 at [39] Kellam J stressed the importance of general deterrence in sentencing for drug trafficking, stating: "For that reason the courts have repeatedly stated that those who take the risk of trafficking in drugs for profit, should expect to receive severe punishment if they are apprehended. Furthermore, those like you who play for high stakes and are detected conducting the business of trafficking in drugs of addition for profit can expect condign punishment for their conduct."

In *R v Xin Liang* [2011] VSCA 148 at [24] Harper JA (with whom Ashley JA & Lasry AJA agreed on this point) made a strong statement about drug trafficking:

"Had the Crown properly established that the quantity of heroin trafficked by the appellant was at the high end of the marketable scale, a sentence of eight years' imprisonment would not in my opinion have been manifestly excessive. Drugs are a scourge on society. Those who trade in the misery of others for the selfish benefit of themselves, as the appellant has done, must be sentenced having regard, amongst other things, to the fact that the maximum penalty for this offence is 25 years' imprisonment. Eight years' incarceration for marketing a quantity of heroin towards the upper limit of the range of a 'marketable quantity' should, other things being equal, be regarded as merciful, even given a plea of guilty."

So did Kaye AJA (with whom Redlich & Whelan JJA agreed) in *Dawid v DPP (Vic)* [2013] VSCA 64 at [35] in upholding a sentence of IMP 9y/6y2m on charges of trafficking in a large commercial quantity of methylamphetamine and trafficking in cocaine:

"The nature and pervasive extent of drug trafficking of the type engaged in by the applicant is such that, on sentencing, the principles of general deterrence and denunciation assume substantial prominence. It is the large profits, which can be gained from trafficking in drugs, that attracts people, such as the applicant, to engage in the type of offending for which the applicant was sentenced. It is important that persons, like the applicant, who contemplate embarking on such an enterprise, do so in the clear knowledge that, if detected, they will be sentenced to lengthy terms of imprisonment. In other words, it is necessary that the sentences imposed for such drug trafficking be sufficiently severe to offset the lure of large and relatively easy profits, which can be derived from the trafficking of illicit drugs.

This dicta was referred to with approval in the joint judgment of Maxwell P and Weinberg & Santamaria JJA in *Samuel Bass (A pseudonym) v The Queen* [2014] VSCA 350 at [180] in imposing a sentence of IMP 10y6m/6ym on charges of trafficking a commercial quantity of methylamphetamine and trafficking methylamphetamine.

In *Kim v The Queen* [2019] VSCA 149 the Court of Appeal (Kaye & T Forrest JJA), in dismissing the appellant's appeal against a sentence of IMP9y9m/7y on charges including trafficking in a large commercial quantity of MDMA, trafficking in methylamphetamine and trafficking in heroin, said at [31]:

"We wish to make it clear once more that long prison sentences await those who participate in this pernicious trade. Those lengthy sentences are the occupational risk of the drug dealer and with modern policing techniques, that risk becomes greater by the day. Should that risk become reality, the principles of general deterrence and denunciation will normally be accorded particular prominence in the sentencing mix. Those who choose to embark on the business of drug trafficking must understand that they will lose their liberty for an extended period. It is only in this way that the courts can discourage those lured by greed into an enterprise that is so harmful to our community."

In *R v Mahmoud Kheir* [2003] VSCA 209 the Court of Appeal upheld an appeal by a 25 year old man with 5 previous unrelated offences against a sentence of 200 days imprisonment on one count of trafficking in a very small quantity of amphetamine and reduced the sentence to 14 days imprisonment. However, the Court of Appeal rejected counsel's submissions that the sentence should be an unconditional discharge or a fine without conviction. At [7] Callaway JA drew a graphic distinction between the appellant and a drug-addicted 15 year old street trafficker:

"I am quite satisfied that a conviction was properly recorded and that that conviction should not be disturbed. The appellant pleaded guilty to an offence that is rife in our community. It carries a maximum custodial penalty of 15 years' imprisonment and is one in relation to which general deterrence is of great importance. The appellant was not a drug addicted 15 year old succumbing to a spur of the moment temptation on the street. He went with his brother to a prearranged rendezvous to engage in a pestilential activity. Although his priors are not related to drug trafficking, he does not have an unblemished record to be prayed in aid. For similar reasons, notwithstanding that he took no active part in the transaction, I would not impose a fine. I think a sterner mark of the Court's denunciation of the trafficking is warranted."

Sometimes the fact that a drug trafficker is also a drug user may be a mitigating factor. Sometimes it may be an aggravating factor. Sometimes it may be neither. In *Beckerton v The Queen* [2011] VSCA 107 the Court of Appeal explained why. Although dismissing an appeal against a sentence of IMP 3.5y/2.5y on counts of trafficking of 7.65 pounds of cannabis and 238 grams of methylamphetamine, Ashley & Weinberg JJA were critical of the sentencing judge's observation that the applicant's offending was "so much the worse" because of her past experience with drugs and her knowledge of the harm they did to those who used them. At [42] & [44]-[45] Weinberg JA said:

[42] "This Court was highly critical of that same expression when used by his Honour in an unrelated case that came before it earlier this year: *Nguyen v The Queen*; *Phommalyack v The Queen* [2011] VSCA 32. On that occasion Maxwell P had this to say about that expression when applied by this judge in a Commonwealth matter involving the importation of a large quantity of drugs:

'There is, however, more substance to the complaint about the judge's comment that [the appellant's] offending was 'so much the worse' because he had personal experience of the 'disabilities' affecting drug-addicted people. His Honour's statement conveys the clear impression that he regarded [the appellant] as more morally culpable, and hence deserving of more severe punishment, because of his personal experience of drug addiction. As the prosecutor readily conceded on the appeal, this was not a contention advanced by the prosecution on the plea, and the judge was therefore bound to invite submissions from the defence before he could have decided to treat it as an aggravating factor. This is particularly so given the novelty of the proposition that a person's drug addiction should be treated as aggravating the seriousness of that person's participation in an offence involving the manufacture or distribution of drugs.

At the same time, for a sentencing judge to treat a matter as aggravating the seriousness of an offence is, in the absence of agreement between the parties, a significant step to take. This experienced sentencing judge gave lengthy and careful reasons for sentence, dealing in turn with all the relevant sentencing considerations. He did not, in terms, characterise this as an aggravating feature.'

[44] *Nguyen* needs to be understood in context. There are, in my opinion, some circumstances in which it can fairly be said that a past history of drug addiction not only does not mitigate an offence such as trafficking, but may be viewed as a factor that worsens the applicant's level of culpability. I have in mind the admittedly unusual case of an offender who, having been an addict for much of his or her adult life, and therefore fully appreciates the devastating consequences that addiction can have, then overcomes his or her habit, and subsequently decides to sell drugs purely for profit, and out of a sense of greed. In such a case, comments such as 'so much the worse is your offending' may be entirely apt.

[45] The present case does not quite fall into that description. The applicant was still addicted to drugs throughout the period that she engaged in trafficking. Nonetheless, it is fair to say that her primary motivation seems not to have been to obtain money or drugs

to maintain her habit, but rather to generate profit which she spent on various personal items, as previously discussed."

See also *R v Scott* [2011] VSCA 108 at [35]; *R v Scott Wilson*; *DPP v Sassine*; *DPP v Kalakias*; *R v Vicki Wilson* [2012] VSCA 141.

In *R v Shane Moran* [2004] VSCA 6 the Court of Appeal dismissed an appeal against a sentence of 3 years imprisonment with a non-parole period of 1 year imposed on a 19 year old man of previously good character who had pleaded guilty to during the committal proceedings to attempted trafficking of amphetamine. At [10] Smith AJA, with whom Vincent JA & O'Bryan AJA agreed, said:

"In my view, it cannot be shown that the mitigatory circumstances were not given adequate weight or that the sentence is manifestly excessive. The applicant was closely engaged for five months in the enterprise, an enterprise intended to result in the production of amphetamines and related drugs. This was planned anti-social behaviour of a very serious kind. The sentence imposed was a lenient one."

In *R v Paul Harold Walker* [2004] VSC 412 Teague J, in sentencing a 70 year old man for 6 offences, including the supplying of cannabis to a 15 year old girl, said at [14]:

"I accept in your favour that you did not inveigle your victim into starting up the illegal activity of smoking marijuana, but merely encouraged its continuation. You have been described before me as an aged hippie. It seems that too many aged hippies choose to wear rose-coloured glasses. They choose not to see the wreckage caused by marijuana which is so often the subject of evidence before sentencing judges."

In *R v Pablo Foletti* [2004] VSC 277 Kellam J agreed that a partly suspended sentence resulting in the defendant's immediate release should be imposed on a 23 year old man who assisted on one occasion in the transport of a commercial quantity of ecstasy. At [7]-[8] His Honour said:

Nevertheless, the trafficking of drugs causes great harm to the youth of our community. Indeed, you have your own experience of this. For this reason such offences must be regarded seriously by the courts. Whilst you did play a minor part in the trafficking in question, it must be remembered that major drug traffickers rely upon those such as you to be the couriers and to move drugs around the community. Trafficking of the type in which you engaged would almost invariably justify the imposition of a substantial prison sentence, particularly in the case of a person who has prior convictions for trafficking drugs. However, there are a number of mitigating factors which have been pointed out by your counsel".

In *R v Chinh Quang Do* [2004] VSCA 203 the Court of Appeal held that a trial judge did not err in failing to treat trafficking in a commercial quantity of cannabis more leniently than trafficking in commercial quantities of other drugs of dependence. At [10]-[12] Buchanan JA, with whom Winneke P & Vincent J agreed, said:

"[10] A number of courts have sought to draw distinctions between different drugs of dependence for the purpose of sentencing. In *R v Ryan, Salinas and Lizza* [unreported, 24/02/1988] Southwell J expressed the view that trafficking in cocaine did not represent as great a threat to society and its victims as did the heroin trade. In *R v Stavropoulos and Zamouzaris* (1990) 50 A Crim R 315, McGarvie J, with whom Murphy and Brooking JJ agreed, said at 324:

'The sentences of the courts under the *Drugs, Poisons and Controlled Substances Act* show that offences committed with respect to drugs such as heroin have been treated for sentencing purposes as inherently more heinous and serious than offences involving cannabis.'

In *R. v. Bimahendali* [1999] NSWCCA 409 Wood CJ at CL referred to the New South Wales Court of Criminal Appeal's consistent treatment of ecstasy as a mid-range drug and to authority for treating amphetamine as a mid-range drug, and said at [16]:

'However, I am quite unpersuaded that it is appropriate, let alone helpful, to attempt any greater gradation of seriousness between drugs falling into the broad categories of soft drugs (e.g. cannabis), middle range drugs (amphetamines in their various forms) and high range drugs (heroin and cocaine).

See also *R v Vivian* (1979) 23 SASR 45 at 50 per White J.

[11] More recently, faced with an increasingly complex and rapidly changing drug industry, the courts have treated trafficking in commercial quantities of different drugs of dependence as equally serious, relying upon the common maximum penalty. In *R v Casey* [2002] VSCA 117, Winneke P, with whom Phillips JA and O'Bryan AJA agreed, said that it was:

'non-productive in sentencing offenders to speak of graduations of seriousness depending upon the substance involved. Courts should always take their cue from the legislature and the penalties prescribed by statute rather than import into the sentencing discretion individual views as to the perniciousness of the substance.'

See also *R v Carey* [1998] 4 VR 13 at 18 per Winneke P; *R v Kevenaer* [2004] NSWCCA 210 at [112] per Hulme J; *R v Amran Efendi* [2001] NSWCCA 391 at [14]-[15] per Heydon JA. In *Pereira v. The Queen* (1992) 66 ALJR 791 Mason CJ, Deane and McHugh JJ, refusing special leave to appeal, said that a Court of Criminal Appeal was not shown to have erred in regarding drug offences involving cocaine as no less serious than those involving heroin. They noted what was said by the Court of Criminal Appeal in the Supreme Court of Victoria in *R. v. Thomas* [unreported, 26/10/1990]:

'The offences of trafficking in the drugs of dependence of heroin and cocaine are very serious offences and both deserve severe punishment. It is not appropriate for this Court in the absence of expert testimony to seek to categorise such offences further.'

[12] Accordingly, I think that, in the absence of expert testimony as to the addictive qualities and the psychological and social effects of the various drugs of dependence, the trial judge did not err in failing to treat trafficking in a commercial quantity of cannabis more leniently than trafficking in commercial quantities of other drugs of dependence."

In *R v Pidoto; R v O'Dea* (2006) 14 VR 169; [2006] VSCA 185 a Court of Appeal constituted by 5 judges, after tracing the legislative history of the *Drugs, Poisons and Controlled Substances Act 1981* through its various amendments, making comparison with related UK & New Zealand legislation and analysing a large number of related cases, held that when a person is being sentenced for the offence of trafficking in a drug of dependence, it is not relevant for the Court to consider either:

- (i) the nature and extent of the harm which the particular drug causes, both directly to users of the drug and indirectly to the community as a whole; or
- (ii) whether the particular drug of dependence is, by those measures, more or less harmful than another drug of dependence.

Hence, the Court said at [3]: "As a matter of statutory construction, the harmfulness of the drug is irrelevant to the exercise of the sentencing discretion." At [7] the Court expressly shared the view expressed by Winneke P (with whom Phillips JA and O'Bryan AJA agreed) in *R v Casey* [2002] VSCA 117 at [27] that it was "non-productive in sentencing offenders to speak of graduations of seriousness depending upon the substances involved."

In *R v Power* [2010] VSCA 139 at [19] Hansen AJA (with whom Nettle & Harper JJA agreed) referred with approval to the statement in *R v Pidoto; R v O'Dea* (2006) 14 VR 269, 278 [41] that "the principal measure of seriousness of the offence is the quantity of drugs trafficked." Hansen AJA at [16]-[17] and Nettle JA at [26] drew a distinction with *DPP v Collins* (2004) 10 VR 1, 13 [29] where it was held that a sentencing judge had not erred in imposing a low penalty on the basis that any trafficking in the relatively small amount of drugs involved in that case had been 'nipped in the bud' before causing any damage.

In *R v Adams* [2007] VSCA 37 the Court of Appeal (Buchanan, Vincent & Nettle JJA) accepted a submission made on behalf of the Commonwealth DPP that the reasoning in *R v Pidoto; R v O'Dea* applied equally to quantity-based drug offences under the *Customs Act 1901* (Cth). An appeal to the High Court was dismissed: (2008) 244 ALR 270.

Allowing an appeal in *R v Bala* [2010] VSCA 78, Maxwell P (with whom Ashley JA & Coghlan AJA agreed) said at [12]:

"Importantly, the amount which Bala trafficked was less than five per cent of a commercial quantity of cannabis. The sentencing regime for drug trafficking offences is quantity-based [*R v Pidoto & O'Dea* (2006) 14 VR 269], which means that the quantity trafficked will ordinarily be a key indicator of the seriousness of the offence, though it is never determinative of penalty [*R v McCulloch* [2009] VSCA 34 at [46]]. Based on

quantity, Bala's offence was at the bottom end of the scale of seriousness for trafficking in a non-commercial quantity."

In *DPP v Fatho, Van & Huynh* [2019] VSCA 311 Maxwell P and Priest & Beach JJA said at [70]:

"As is now well understood, the sentencing regime for drug trafficking is quantity-based. The quantity trafficked can never be the determining factor but it will always be of importance. Other things being equal, the greater the quantity trafficked, the more serious the trafficking offence: see, eg, *DPP v KMD* [2015] VSCA 255.

Allowing an appeal in *Qui v The Queen; Ng v The Queen* [2019] VSCA 147, the Court of Appeal (Kaye & T Forrest JJA) said at [58]-[59]:

[58] "It is a well-established principle of sentencing, in cases involving the importation of a border controlled substance, that the amount of drug involved in the importation is a particularly relevant factor in determining the objective seriousness of the offence and the culpability of the offender. In *Phuong Bich Nguyen v The Queen* (2011) 31 VR 673 at 682, Maxwell P stated the relevant principles, in that respect, in the following terms:

"Although the weight of the drug imported is not the principal factor to be considered when fixing sentence, the size of the importation is a relevant factor and has increased significance when the offender is aware of the amount of drugs imported.

Ordinarily, the amount of the drug involved in an importation is a highly relevant factor in determining the relevant objective seriousness of the offence, even to the extent of assessing that a particular offence is in the worst category of its type. In many cases, the only factor that would lead to a determination that one importation is worse than another would be the amount of drug involved where otherwise the circumstances of the importation were the same or very similar.'

[59] The statutory proscription of the importation of border controlled substances, such as heroin, and the gradation of sentences for the offence according to the amount that was the subject of the importation, reflects the simple premise that the greater the amount of heroin or prohibited substances that are imported into this country, the greater the harm that is caused to its citizens. Conversely, the moral culpability of the offender must increase, ordinarily, as the amount that was the subject of the importation is larger, as a reflection of the degree of criminality involved in the offending, and the amount of financial gain that is expected to be derived from such an egregious activity."

In *R v Do* [2008] VSCA 199 the Court of Appeal (Vincent & Weinberg JJA & Robson AJA) held that a trial judge had not erred in declining to treat as a mitigating factor what was described by defence counsel – without supporting evidence – as "low level" purity of not less than a commercial quantity of MDA. The Court left open at [35]-[38] the question whether the case of *R v Mahasay* (2002) 135 A Crim R 232, 234 - which is authority for the proposition that low purity is a mitigating factor – has survived the rejection by the Court of Appeal in *R v Pidoto; R v O'Dea* of the concept of a harm-based system of classification of drug offences.

However, in *R v Trajkovski & Waters* [2011] VSCA 170 Weinberg JA (with whom Ashley JA & Hargrave AJA agreed) held that the judge's statement that the low purity of the drug in the mixture was not to be given significant weight when assessing the applicant's culpability was incorrect, stating at [124] & [127]:

"There is no reason, in principle, why the fact that the mixture contains what is plainly only the most minuscule quantity of a drug of dependence, and is therefore unlikely to produce the deleterious effects normally associated with a much larger amount of that particular drug, albeit in a mixture, should not be regarded as a significant factor to be taken into account in assessing the gravity of the offending..."

In my opinion, there is nothing in *Pidoto* which requires the low level of purity of a particular drug in a case such as the present to be given little or no weight. Whether one views such a matter as a mitigating circumstance, or rather as simply reducing the objective culpability of the offending, matters little in the ultimate result. There is obviously a difference between trafficking in 3.9 kilograms of pure methylamphetamine, and trafficking in 1.9 grams of methylamphetamine in a mixture of 3.9 kilograms. To treat these two offences as relevantly indistinguishable would be an affront to common sense."

On the issue of "purity" see also *R v Nguyen* [2011] VSCA 139 at [16].

In *Kapkidis v The Queen* [2013] VSCA 35 at [25] Maxwell P & Redlich JA said:

“In our view, nothing said in *Trajkovski* and *Nguyen* detracts from what this Court made clear in *Pidoto*. There is no place for considering the relative harmfulness of a drug in sentencing an offender for trafficking offences. Where the purity of the amount trafficked is ‘de minimis’ it may be taken into account, but save for such exceptional circumstances, the relative purity of a mixed quantity of a drug of addiction does not bear upon the objective gravity of the offence.”

For further discussion on the decision in *R v Pidoto*; *R v O’Dea*, see *R v Yacoub* [2006] VSCA 203; *R v Duncan* [2006] VSCA 239; *R v D’Aloia* [2006] VSCA 273; *R v Adams* [2007] VSCA 37; *R v Reed & Shortis* [2007] VSCA 67; *R v Karafilowski* [2007] VSCA 156; *R v Perrier, Pop & Tilley* [2008] VSCA 97.

In *R v Burgess* [2004] VSCA 187 the trial judge had not accepted the defendant’s explanation that the reason he was cultivating 221 cannabis plants was to provide seed to feed his racing pigeons. In dismissing the appeal Charles JA, with whom Winneke P & Nettle JA agreed, noted at [19]:

“During the plea, both counsel and the judge accepted, I think, that quite different sentencing considerations would apply, depending upon whether her Honour found that the marijuana was being cultivated to provide seed for the appellant’s pigeons, as against for purposes of trafficking. It was not in question that where the purpose of cultivation might be described as ‘innocent’ such as for the purpose of feeding pigeons, this would mitigate the criminal conduct and lead to the imposition of a lesser sentence, and that such a factor should be proven by the offender on the balance of probabilities.”

In *R v Weitering* [2006] VSCA 54 the Court of Appeal held that in relation to the offence of cultivation of cannabis, a commercial quantity could be established either by weight or by number of plants.

In *R v Ro Si Vo* [2005] VSCA 21 the appellant had pleaded guilty to one count of trafficking in heroin and was sentenced to 4 years’ imprisonment with a non-parole period of 2 years and 8 months. The appellant had been paid \$2,000 to transport a package of heroin from Melbourne to Port Kembla. The trial judge, after noting that “trafficking in drugs is regarded as a most serious offence and...that drug-related offending is attacking the very fabric of our community”, held that for the purpose of sentencing the appellant was a courier. His Honour continued: “It is beyond argument that the courier has a most pivotal role to play in any drug distribution operation. Without the courier the proscribed drugs could not find their way on to the streets and so into our community.” His Honour held that the appellant’s “level of culpability...lies marginally below that of any principal”. In dismissing the appellant’s appeal, the Court of Appeal accepted and applied the following statements of principle from the judgment of Phillips CJ, Ormiston & Chernov JJA in *R v Nicholas* (2000) 1 VR 356 at [158] which, in turn, applied the majority judgment of Gleeson CJ, Gaudron, Hayne & Callinan JJ in *R v Olbrich* (1999) 199 CLR 270:

- “1. The identification of the precise nature of an offender’s involvement in the act of importation of drugs is not an essential aspect of the sentencing process (See [13]).
2. For sentencing purposes, concentration should be on what it was that the offender actually did, in the setting of the offence for which he stood to be sentenced (See [19] & [21]).”

In *R v Fisher* [2005] VSCA 75, the Court of Appeal dismissed an appeal against a total effective sentence of 3 years’ imprisonment with a minimum term of 18 months imposed on the 32 year old female appellant who had pleaded guilty to one count of trafficking in speed and one count of attempted trafficking in cannabis, notwithstanding that she had shown a significant degree of rehabilitation. At [17] Chernov JA, with whom Warren CJ & Batt JA agreed, said:

“This Court has emphasised on a number of occasions the serious nature of the offence of trafficking in drugs of dependence given their devastating effect on the community, particularly on those who can least afford to be subjected to them. Consistently with its condemnation of such conduct, the Court has made it plain that those who traffick in such drugs should expect to receive condign punishment.”

In *R v White, Higgins & Dines* [2005] VSC 437 at [9]-[10], Teague J imposed community-based orders on three accused aged 27, 22 & 24 but reiterated the seriousness of drug trafficking:

[9] “The three of you were trafficking in speed at close to the lowest level. That was most clearly so in the case of you, Matthew White. Nevertheless, the expectations of the community are that courts will impose heavy penalties for trafficking in illegal drugs. Only

rarely will it be appropriate not to impose an immediate term of imprisonment. The personal use of marijuana is also to be condemned. But trafficking in speed is a great deal more serious. Immense harm is caused by both drugs.

[10] I am satisfied that, because of the combination of several factors, the situation of all three of you is that an immediate term of imprisonment is not the only appropriate option. The first is that the trafficking was at a relatively lower level. The second is that Z was not sentenced to an immediate term of imprisonment. Accordingly, parity factors apply, although his undertaking to give evidence against others makes his position more difficult to compare. The third is that you have all pleaded guilty. The fourth is that your personal circumstances in each case operate to your advantage. None of you has had any prior convictions. Each of you has a good work record. Each of you has family support. Each of you has placed before the court letters of commendation. Finally, I have been provided with pre-sentence reports that support the imposition of a community based order subject to certain conditions.”

In *R v Catanzariti* [2006] VSC 162 the defendant had pleaded guilty to two counts of cultivation and cannabis and theft of electricity. In sentencing him to a wholly suspended sentence of 2y4m – which was based in part on an early plea of guilty, an offer to give evidence against co-accused and the Crown submission that a lengthy suspended sentence was within range – Teague J said at [5]:

“The high maximum penalties prescribed by Parliament reflect the community attitude that the cultivation of cannabis is to be condemned. I do accept that the aim of your involvement in the provision of advice and other assistance as to the cultivation of these cannabis plants was not primarily financial. Your aim was to acquire a large quantity of cannabis for personal use.”

In *DPP(Cth) v Alon Inbar* [2005] VSCA 116 the respondent had been sentenced to 5½ years’ imprisonment with a minimum of 3¼ years on a count of aiding and abetting the importation of ecstasy contrary to s.233B of the Customs Act (Cth). His role had been to “clear drugs” through Customs. In the course of allowing a DPP appeal and increasing the respondent’s sentence to 7½ years with a minimum of 5 years, Winneke P – with whom Byrne & Osborn AJJA agreed – discussed principles relevant to the sentencing of persons involved as “couriers” in drug importation cases. At [23] his Honour said:

“True it is that the respondent is not a principal, but the role he played was a very significant one; and one which - like the courier - is vital to the aspirations harboured by his controllers. It has often been said that drug trafficking across international boundaries can only flourish if you have those who are prepared to carry them, even though for moderate reward. Experience in these courts shows us that couriers and others in similar capacities are people generally of good character and who take the risks which they do take for little reward. I refer, for example, to *R. v. Carey* [1998] 4 VR 13. Equally, experience tells us that these people frequently are kept in the dark by their principals about the nature and quantity of the drugs that they are carrying: see, for example, *Carey and Perrier and Richardson* (1990) 59 A Crim R 164. The same can be said in respect of the role played out by this respondent. It should not need to be said again by this Court that all those who play significant roles in bringing harmful drugs into this country can expect to receive condign punishment if caught; and particularly if - when caught - they do not co-operate with police. Although the respondent did not know the nature and quantity of the drugs the importation of which he was facilitating, he took the risk of aiding the importation of a huge amount which, if it had been circulated, would have inflicted real and lasting harm upon the community. It is my view that his conduct warranted a penalty in the order of nine to ten years; and similar penalties have been inflicted upon couriers for importing commercial quantities of this and other types of narcotics. I refer in particular to *Carey*, particularly at p.19; *R. v. Su* [1997] 1 VR 1 and *Perrier and Richardson*. The penalty which his Honour imposed, in my view, seriously under-estimated the part which the principles of general deterrence must play in inflicting penalties for this type of offence upon persons who play significant roles in the importation of large quantities of drugs and who do not co-operate when apprehended. I take the opportunity to remind judges who are dealing with couriers from other countries of what was said by Fullagar J in *Perrier and Richardson* at page 170. His Honour said:

‘Parliament has indicated the clear legislative intention that severe sentences be imposed for offences of this type. Bearing in mind that policy and the general level of sentence imposed for such offences, I consider that an appropriate level of sentence for this courier, if he had not co-operated

with the police, would be of the order of 15 years' imprisonment. In reaching that conclusion, I have regarded as extenuating circumstances the respondent's previous good character and his impecuniosity and the fact that the sentence will be served in a country not his own.'

It must be remembered that, when those comments were made, remissions applied, so that the 15 years which his Honour mentioned would translate in current terms to 10 years."

In *R v Gates* [2005] VSCA 61 the appellant had pleaded guilty to trafficking in a commercial quantity of pseudoephedrine (30kg of 80% purity). A sentence of 12 years' imprisonment, said by the trial judge to represent a significant to high discount, was held by the Court of Appeal to be manifestly excessive. The appellant was re-sentenced to 10 years' imprisonment. Nevertheless Eames JA, with whom Warren CJ & Batt JA agreed, noted at [27]: "The importance of general deterrence in cases of major drug trafficking has been repeatedly emphasised in the courts: see *R. v. Berisha* [1999] VSCA 112." And at [18] his Honour said:

"As an examination of recent sentencing decisions discloses, the manufacture and trafficking in methylamphetamine has reached very serious levels throughout Australia, particularly in New South Wales, where the pseudoephedrine was bound in this case. The incidence of offences of trafficking in pseudoephedrine reflects directly on the growth in the trade of the finished product. Without the trade in one, there is not the trade in the other. In my opinion, the fact that pseudoephedrine is merely a precursor to manufacture of methylamphetamine ought produce only a modest amelioration in sentence for those who traffick in it, rather than in the finished product, but modest as the difference may be there must be some reflection in penalty for the fact that traffickers in commercial quantities of methylamphetamine seek even greater profits than those trading in pseudoephedrine."

In *R v Cassar* [2005] VSCA 164 the appellant had been found guilty of one count of being knowingly concerned in the importation into Australia of not less than a traffickable quantity of cocaine. The appellant had no prior convictions. Being second in charge of an international freight company's warehouse and operating in effect as a customs agent, his role in the enterprise was to be the "man on the inside". In holding that a sentence of 6 years' imprisonment with a non-parole period of 4 years was not manifestly excessive, Nettle JA, with whom Chernov JA & Byrne AJA agreed, said at [27]:

"Recently in *DPP v Leach* (2003) 139 A Crim R 64 at [9], Vincent JA noted again the concern repeatedly expressed in this court over the destructive effects of illicit drugs in our society and the importance of general deterrence as the principal sentencing consideration in drug trafficking cases. *Leach* was to do with trafficking in a commercial quantity of methylamphetamine, but of course the same considerations apply as much if not more in cases involving the importation of prohibited narcotics: *R v Marcuson Marcus* [2004] VSCA 155 at [4], applying *R v Berisha & Ors.* [1999] VSCA 112 at [39] – [43]. In my opinion it cannot be stressed too much that those who are tempted to get involved in the importation of traffickable quantities of prohibited narcotics will be sternly punished."

In *R v Phenny Thai* [2005] VSCA 283 the appellant had been found guilty of one count of importing into Australia, by posting from Cambodia in a package addressed to his wife, 316.7g of heroin of approximately 70% purity. Although on appeal the non-parole period of his sentence of 5½ years imprisonment was reduced from 4 years to 3½ years, the Court of Appeal said at [29]:

"[T]he factors of both general and specific deterrence are of particular importance. This was a calculated offence conducted for no reason other than commercial gain by an entrepreneur seeking to shore up his other business activities by the injection of profit from the importing of heroin to Australia. Although it is said that the offence is not sophisticated, it did not require to be, but it was certainly calculated."

In *R v Kiam Fah Teng* [2005] VSC 33 Kellam J sentenced the offender, a Malaysian citizen, to 22 years imprisonment with a non-parole period of 15 years after he had pleaded guilty to one count of aiding and abetting the importation of a commercial quantity of heroin into Australia. At [63]-[65] His Honour said:

[63] "This is a serious example of a grave crime. To have been involved at the level that you were, in the largest importation of heroin ever detected in this State, and one of the largest ever detected in Australia, calls for severe punishment. The issue of general deterrence is of great significance in the determination of the appropriate sentence to be imposed upon you. Those who see fit to take the risk of playing a part in the importation

of heroin into this country must have no expectation other than that the consequences of engaging in such enterprises will be severe. As the Victorian Court of Appeal said in *R v Soo Su* [1997] 1 VR 1 at 73:

‘Again and again the Courts have said that importers and traffickers of heroin will receive heavy sentences.’

[64] I have no doubt that that comment applies to those who aid and abet the importation of substantial quantities of heroin.

[65] The importation of a large quantity of heroin in which you played a substantial facilitative role had the potential to cause grave harm to many members of our community. As Sully J said in *Cheung Wai Man* [unreported, Court of Criminal Appeal NSW, 22/03/1991]:

‘The importation or the attempted importation of, and the trafficking or attempted trafficking in, a quantity of heroin of the amount here in question is in a very real sense a declaration of war upon this community. It is a distinct challenge both to concepts of human dignity and to moral values otherwise which are fundamental to our way of life. It is no less a challenge to the rule of law which is in the end the ultimate guarantor of the personal freedoms and of the social stability which all of us Australians take for granted.

In the face of such challenges each of the institutional supports of our society has a role to play. That of the courts is to punish and deter according to law. Obviously, the courts alone cannot meet adequately, let alone defeat, the challenge of which I have been speaking. What the courts can do is to punish drug-related crime in a way which signals plainly to drug traffickers, especially foreign drug traffickers, that the courts are both able and willing to calibrate their sentences until a point is reached at which, to a significant extent even if never perfectly, fear of punishment risked will neutralise the greed which is the only possible motive of those who ... engage in drug related crime...’

[66] In my view the words of Sully J are applicable to the circumstances of this case. As I have said, the circumstances of your case are such that the issue of general deterrence is most important. This country has a vast and unprotected coastline which some foreign drug dealers may see as providing an opportunity for undetected crime. Those persons and those who assist them must know that when detected they will suffer a heavy penalty for their greed.”

See also the sentencing remarks of Kellam J in sentencing co-accused in *R v Yau Kim Lam* [2005] VSC 98; *R v Ta Song Wong* [2006] VSC 126.

In *R v Doan* [2010] VSCA 250, the Court of Appeal dismissed an appeal by a “young offender” aged 20 and of prior good character against a sentence of 2 years imprisonment with a non-parole period of 14 months on a charge of cultivating cannabis in a commercial quantity. At [18] Nettle JA said:

“In my view lest there be any doubt about it, there should be no doubt that in cases involving cultivation of a narcotic plant in not less than a commercial quantity, general deterrence is at the forefront of sentencing considerations.”

In *R v Chandler & Paksoy* [2010] VSCA 338, the accused had pleaded guilty to one count of trafficking in a large commercial quantity of methylamphetamine that they had manufactured. This was 13.2kg, no less than 18 times the minimum required to constitute a large commercial quantity. The Court of Appeal held at [25] that: “Other things being equal, manufacturing a large commercial quantity of a drug for distribution is no less culpable than the distribution of that quantity of drug. Nevertheless the Court of Appeal reduced their sentences from IMP14y/9y to IMP12y/7y. One of the additional factors that the Court of Appeal took into account was the question of the lengthy delay between charge and sentence and that the accused Chandler was suffering severe clinical depression that made imprisonment more burdensome on him.

In *R v Gonzalez* [2011] VSCA 175 the accused had pleaded guilty to one count of trafficking in a large commercial quantity of pseudoephedrine which he had taken without permission in the course of his employment with a company whose business was the authorised disposal of pharmaceutical waste. In allowing an appeal by the DPP and increasing a sentence of IMP 4y to IMP 6y6m, the Court of Appeal said at [32]:

“As to the relevance of the weight of the drugs in question, it is plain that weight is but one of many sentencing considerations and weight should not be permitted to swamp

other relevant sentencing considerations. Nevertheless, weight is a highly relevant factor. And in the present case, the enormous quantity of pseudoephedrine was highly relevant to denunciation, punishment and general deterrence.”

In *R v Son Anh Pham* and *R v Ken Tang* [2012] VSCA 101 each of the accused had been sentenced to IMP 19y/14y on counts of importation of large commercial quantities of drugs of dependence (71kg of cocaine, 9.7kg of ecstasy and 29kg of methamphetamine). In holding that the sentences were not manifestly excessive, the Court of Appeal said at [4]-[5]:

[4] “[I]t will be useful in some circumstances to distinguish the positions occupied by offenders within a hierarchical criminal organization as a means of determining the offender’s level of culpability. For example a courier will generally attract a more lenient sentence than a principal within a criminal drug hierarchy. The characterization of an offender’s position may not always illuminate and may sometimes obscure the actual level of criminality of the offender assessed by reference to his conduct {*The Queen v Olbrich* (1999) 199 CLR 270, 279 [19]–[20]; *De La Rosa* [2010] NSWCCA 194 [255]; *Nguyen and Pham* [2010] NSWCCA 238; *Phommalsack v The Queen* [2011] VSCA 32, [34]; *Paxton v R* [2011] NSWCCA 242}. Where the evidence establishes the acts performed by the offender and their position within the criminal organization, the offender’s criminality is to be assessed by a consideration of both the actions of the offender and the role he occupies within the organization {*The Queen v Olbrich* (supra); *Savass v R* (1995) 183 CLR 1; *R v Wong*; *R v Leung* [1999] NSWCCA 420; *Tyler v R* [2007] NSWCCA 247, [78]–[95]; *R v Riddell* [2009] NSWCCA 96 [37]–[41]}.

[5] It will often be difficult to categorise the role of the offender within the criminal enterprise or to determine his role relative to others. The focus must then be upon the degree of criminality of the acts performed and their importance in accomplishing the organisation’s criminal purpose. When dealing with a number of offenders whose positions within the enterprise are difficult to identify or are closely aligned, the need will arise to identify the features of each offender’s conduct that justify the imposition of the sentences, whether they are the same or different, which have been imposed on each co-offender.”

Attached to the judgment in *DPP v OPQ* [2012] VSCA 115 there are two tables detailing respectively:

- six sentences imposed for possession and attempted possession of a marketable quantity of a border controlled drug contrary to s.307.6(1) of the Cth Criminal Code; and
- 24 sentences imposed for importation and attempted importation of a marketable quantity of a border controlled drug contrary to s.307.2(1) of the Cth Criminal Code

Neave JA (with whom Maxwell ACJ specifically agreed) stated at [39] that the “provision of information of this kind is particularly helpful when it is claimed that a sentence falls outside the range of sentences which can be imposed for a particular offence.” In this case the appellant was not convicted of importation but of attempting to possess a marketable quantity of a border-controlled drug. At [42] Neave JA referred with approval to the following dicta of Johnson J (Macfarlan JA and RA Hulme J concurring) in *R v Nguyen* (2010) 205 A Crim R 106, 127-8 [72]:

“(l) where an offender...is to be sentenced for an attempted possession offence, it should be kept in mind that the act of attempted possession can be attended by a wide range of moral culpability, so that the circumstances in which a person so charged attempted to come into possession of the drug, and what it was that the person intended to do with that drug, is relevant to determining the degree of moral culpability attached to the act of attempted possession itself, so that a sentencing judge should have regard to the offender’s involvement in the overall transaction for the purpose of determining the offender’s degree of involvement in a drug-smuggling enterprise: *El-Ghourani v The Queen* (2009) 195 A Crim R 208, [33]–[37];

(m) offences of attempting to possess imported drugs are not, for that reason, in a less serious category than that of importing the drugs: *R v Ferrer-Esis* (1991) 55 A Crim R 231, 230.”

In *Frank Blango v The Queen* [2018] VSCA 210 the Court of Appeal dismissed an appeal against a TES of IMP16y6m/12y6m imposed on a 30-31YO on (1) a rolled-up charge of attempting to possess 33 consignments containing methylamphetamine with an aggregate quantity of 55.95kg and an estimated street value of \$31-\$61 million; (2) a charge of attempting to possess a marketable quantity of heroin, namely 4 consignments totalling 725g with a street value of \$217,500; (3) a charge of attempting to possess a marketable quantity of cocaine, namely 28.89g with a street value of \$8,600.

The appellant was a member of a criminal syndicate that imported and distributed border controlled drugs in Victoria. At [55] Whelan & Kyrou JJA said:

“The judge was correct to emphasise the importance of general deterrence in a case such as the present. As this Court said in *Brown* [2017] VSCA 162 [9], [68], there needs to be ‘a clear signal to would-be offenders, motivated by the potential financial rewards of drug importation, that detection will inevitably lead to very lengthy terms of imprisonment’.”

In *Sarah Ellis v The Queen* [2018] VSCA 221 the Court of Appeal refused leave to appeal against a TES of IMP4y6m/3y imposed on a 24YO on charges of (1) trafficking and (2) trafficking a commercial quantity of 1,4-butanediol. At [19]-[21] Whelan & Beach JJA said:

“The judge...stated that he regarded the applicant’s traumatic childhood as a mitigatory feature. He also referred to the psychologist’s report, including the discussion of the applicant’s drug use and mental health issues.

The sentencing judge said he had had careful regard to the decision of *DPP v Maxwell* [2013] VSCA 50 in which this Court considered the relationship between the financial reward anticipated by a drug offender and the objective gravity of the offence. The judge noted the Crown’s concession that 1,4-butanediol is less profitable than other drugs of dependence. The sentencing judge accepted the applicant’s counsel’s submission that the applicant’s offending ‘lies at the lower end of the range of offences of trafficking in a commercial quantity of a drug of dependence’.

The sentencing judge assessed the applicant’s prospects of rehabilitation as poor. He noted that despite her relative youth, the applicant had a significant prior criminal history, and that much would depend on her ability to remain drug free.”

In *Ban Joo Teoh v The Queen* [2018] VSCA 239 the Court of Appeal refused leave to appeal against a TES of IMP9y/7y imposed on charges of attempting to possess and of trafficking a marketable quantity of methylamphetamine. At [49]-[50] Kyrou & Kaye JJA said:

“During the past decade or more, the courts have become increasingly conscious of the proliferation of drugs in our society, and of the grave and pernicious harm caused to individuals who have succumbed to their temptation to use them, and to society as a whole. In the vast majority of cases, persons who engage in trafficking prohibited substances are driven by the lure of large profits. In short, their motivation is pure greed.

It is for that reason that general deterrence and denunciation assume an important, if not primary, role in the determination of sentences for the kind of offence that was the subject of Charge 2 [trafficking]. As the authorities have emphasised, sentences to be imposed for drug importation offences, and for drug trafficking offences, must be such as to impress on intending drug traffickers that by seeking to reap the potentially large financial rewards from drug trafficking, they run a significant risk, when detected, of severe punishment, consisting of sentences which deprive them of their liberty to live in society for long periods of time. For these reasons, it is recognised and accepted that personal mitigating circumstances, such as previous good character and lack of previous convictions, are generally given less weight as mitigating factors. See for example *R v Nguyen*; *R v Pham* (2010) 205 A Crim R 106, 127 [72].”

At [55]-[58] Kyrou & Kaye JJA went on to analyse and approve the following four cases to which reference had been made by the prosecutor to demonstrate current Commonwealth sentencing practices: *Nguyen v The Queen* [2010] NSWCCA 132; *DPP (Cth) v Merrill* [2015] VSCA 52; *OPQ v The Queen* (2012) 221 A Crim R 424; *Cappis v The Queen* [2015] NSWCCA 138.

In *Bembo v The Queen* [2019] VSCA 308 the Court of Appeal refused leave to appeal against a TES of IMP35y/25y imposed after separate trials, the first involving an attempt by the applicant to possess a commercial quantity (3.767 kilograms pure) of heroin, the other an attempt by the applicant to possess a commercial quantity (125.682 kilograms pure) of methamphetamine. At [167]-[168] Priest, Niall & Ashley JJA said:

“We need not add to the lament concerning the harm to society that drugs such as those that the applicant sought to possess cause. They are destructive of the mental and physical health of a great many members of the community, with incalculable harm to society. The applicant’s participation in drug-related activity was motivated by greed, not altruism.

His very considerable offending called for very considerable punishment. Not only was general deterrence an important feature that needed to be reflected in the sentence imposed, but his enthusiastic and cynical offending demonstrated that a healthy measure of

personal deterrence was also required. We would not be sanguine about his prospects of rehabilitation.”

Other cases of sentencing for drug trafficking / cultivation / importation include:

- *R v WMR* [2005] VSCA 59 – Trafficking of pseudoephedrine – Commercial quantity of approximately 3kg – Plea of guilty – Appellant transferred to Victoria for sentencing from interstate prison, where undergoing sentence for five years’ imprisonment for manufacturing methylamphetamine within same period as Victorian offence – Interstate offence deemed to have been imposed in Victoria – Commencement date of interstate offence deemed to have been imposed by a Victorian Court – Sentence by Victorian judge of four years’ imprisonment on trafficking count and sentences for other counts to be served concurrently – Victorian sentence ordered to be served cumulatively on interstate sentence, producing total effective sentence of nine years’ imprisonment, with new non-parole period of five years and three months’ – Sentence held manifestly excessive – Principle in *Mill v R* (1988) 166 CLR 59 – Sentence of three years’ imprisonment on trafficking count substituted, with twelve months cumulative on interstate sentence – Total effective sentence of six years - New non-parole period fixed of four years. See also *DPP (Cth) v Vestic* [2008] VSCA 12.
- *R v Luong & Ors* [2005] VSCA 94 - Trafficking in commercial quantity of heroin on wide scale – Applicants and several other co-offenders part of an elaborate heroin distribution organization – Sentences of 10 years with minimum of 7½ years, 9 years with minimum of 7 and 8 years with minimum of 6 not manifestly excessive.
- *R v Ken Ha Khanh Phong* [2005] VSCA 149 - Importation of 2.996 kg. of pure heroin – Sentence of 15½ years with non-parole period of 11½ years not manifestly excessive – At [85] Court of Appeal noted: “It has been repeatedly said by the courts in sentencing for offences dealing with the importation of, and trafficking in heroin, that much weight is to be given to general deterrence”: See e.g. *R v Berisha, Elmazovski and Rizmani* [1999] VSCA 112 per Tadgell JA at [39] to [43]; *R v Roberts and Urbanec* [2004] VSCA 1 per Batt JA at [147].
- *DPP v Barbaro & Zirilli* [2012] VSC 47 – Guilty plea to conspiracy to traffick 4.4ton MDMA & 1.4 ton pure MDMA (2900 times the commercial quantity), traffick in commercial quantity MDMA (1.2 million tablets – 50kg pure MDMA) and attempt to possess commercial quantity of cocaine (99.9kg pure) – Highest level of offending, international organized crime, conducted as business, greed, professionalism, profit. Barbaro at apex IMP Life/30y. Zirilli his right hand man IMP 26y/18y. Appeal dismissed [2012] VSCA 288.
- *R v Yim & Ors* [2012] VSC 325 – Guilty plea to importing a commercial quantity of a border controlled drug (207kg pure cocaine: “one of the largest ever detected by our authorities”) – IMP 20y/16y & 29y/15y. Young offender aged 20½ guilty plea to attempting to possess a commercial quantity – IMP 11y/6y6m.
- *R v A Mokbel (sentence)* [2012] VSC 255 – Guilty plea two counts of trafficking in a drug of dependence (MDMA & methylamphetamine) in an amount not less than a large commercial quantity and a count of incitement to import a prohibited import – Accused was “the principal head of this enterprise” – IMP30y/22y – in footnote [37] a number of comparable cases are listed.
- *R v Doble* [2007] VSCA 47 - Trafficking in amphetamine & heroin and possession of cocaine, ecstasy & amphetamine: – 4y2m/25m not manifestly excessive – Defendant was one of 16 persons who played various parts in the conduct of a major drug distribution syndicate controlled by Dominic Parisi, all of whom pleaded guilty to various offences and were sentenced by the same judge.
- *R v Mr Z* [2005] VSC 90; *R v Bosio, Clarke & Zogheib* [2005] VSCA 209 [“one step above street level dealing”]; *R v Komljenovic* [2006] VSCA 136 [cannabis trafficking business conducted “at street level” but heroin traffic business “at least two strata above street level” – “the evils of drug trafficking...and its effects on the community...criminal conduct of the kind committed by the applicant is regarded as being particularly reprehensible”].
- *DPP v Willis & Hossack* [2009] VSCA 14 – Trafficking & cultivation of commercial quantity of cannabis – Court of Appeal upheld wholly suspended sentences and fines.
- *Polimeni v The Queen* [2014] VSCA 72 – 13 day trial of charge of conspiracy to traffick more than 50 times the commercial quantity of cocaine – IMP18y/12y: “Given the nature and gravity of the applicant’s offending and the level of his moral culpability, any suggestion that the sentence is excessive is...untenable.”

- *Dao v The Queen; Tran v The Queen* [2014] VSCA 93 – Trafficking in more than 30 times a large commercial quantity of heroin and methylamphetamine – Offence committed on a single day – Late plea of guilty – Insufficient evidence adduced of extent of appellants’ role – Offence correctly characterized as “most serious example of most serious offence” – Sentences IMP18y/13y characterized as “stern sentences at the upper end of the available range” but not crushing.
- *Anthony Pham v The Queen* [2018] VSCA 200 – Convicted following trial to attempting to traffick in a large commercial quantity of cocaine – 250kg which is 250 times the applicable large commercial quantity – IMP15y/11y6m – No reasonable prospect that sentence would be reduced on appeal.
- *Djordjic v The Queen* [2018] VSCA 227 – Two charges of trafficking in a commercial quantity of a drug of dependence involving 4.2kg of substances (cocaine & methylamphetamine), a charge of knowingly dealing with proceeds of crime involving cash totalling \$3.7 million and possession of an unregistered handgun – TES IMP 19y6m/14y6m characterised as “stern but reflecting, appropriately, the seriousness of the offending that the applicant had engaged in, and, as such fulfilled the requirement that sentences imposed for such offending be sufficient to constitute a clear and unambiguous message by the courts that those, who wish to reap large profits from the egregious trade of drug trafficking, must, if detected, expect to lose their liberty for a long period of time.”
- *Foley v The Queen* [2019] VSCA 99 – One charge of attempting to possess a commercial quantity (815g) of MDMA – IMP7y6m/5y not manifestly excessive.
- Cultivation of cannabis: *R v S* [2006] VSCA 134; *R v Sibic & Sibic* [2006] VSCA 296; *R v Garlick (No 2)* [2007] VSCA 23; *R v Vardouniotis* [2007] VSCA 62; *R v Evans* [2007] VSCA 76; *R v McKittrick* [2008] VSCA 69; *Nguyen v The Queen* [2010] VSCA 127 where the Court of Appeal set out in a table numerous cases in which an offender was sentenced for the offence of cultivating a commercial quantity of a narcotic plant and where the sentences imposed ranged from 10m to 5y IMP; *R v Chhim*, *R v Arslanov* [2010] VSCA 347; *R v Hanks* [2011] VSCA 7; *Barton v The Queen* [2013] VSCA 360; *Romano Falzon v The Queen* [2018] VSCA 179 [commercial quantity – IMP3y9m/2y6m]; *Jamel Mohtadi v The Queen* [2018] VSCA 238 [commercial quantity – IMP3y3m]; *Muaremov v The Queen* [2018] VSCA 298 [high end quantity but cultivation *simpliciter* – IMP2y]; *Tuan Pham v The Queen* [2018] VSCA 308 [commercial quantity + 2 counts of theft IMP4y6m/2y9m]; *Quan Quan Le v The Queen* [2018] VSCA 309 [IMP2y/18m for a ‘crop-sitter’ cultivating cannabis characterized as ‘stern’ but within range]; *Kennedy v The Queen* [2019] VSCA 127 [IMP4y]; *Nguyen v The Queen*; *Ho v The Queen* [2019] VSCA 134 [IMP3y8m/2y3m]; *Dang v The Queen* [2020] VSCA 24 [IMP3y6m/2y7m]; *Brown (aka Davis) v The Queen* [2020] VSCA 60 [commercial quantity + theft – IMP5y6m/3y reduced on appeal to 4y/2y3m]; *Delaci v The Queen* [2020] VSCA 276 [commercial quantity electricity + theft – IMP 3y10m/2y2m].
- Trafficking: *R v Van Xang Nguyen* [2006] VSCA 158 [commercial quantity of cannabis]; *R v Downing* [2007] VSCA 154 [MDMA]; *R v Wright & Gabriel* [2008] VSCA 19 [ecstasy & amphetamine]; *R v Hoa Trong Vu & Duc Tien Vu* [2008] VSCA 64 [commercial quantity of heroin]; *R v Koumis & Ors* [2008] VSCA 84 [heroin & methylamphetamine]; *R v Demaria* [2008] VSCA 105 [large commercial quantity of cannabis]; *R v Van Dat Le* [2008] VSCA 155 [heroin]; *R v Crabbe* [2008] VSCA 160 [commercial quantities of methylamphetamine & methylenedioxy]; *R v Taric & Sindik* [2008] VSCA 166 [commercial quantity of cannabis]; *R v Mansour* [2008] VSC 226 [42kg methylamphetamine]; *R v Vasic* [2010] VSCA 89 [two presentments: large commercial quantity of MDMA/large commercial quantity of cocaine]; *R v Velevski* [2010] VSCA 90 [methylamphetamine & commercial quantities of MDMA & pseudoephedrine]; *R v Duncan* [2010] VSCA 92; *DPP v Fleiner* [2010] VSCA 143 [commercial quantity of cannabis plus trafficking in other drugs and possession of firearms]; *R v Bui* [2010] VSC 342 [large commercial quantity of MDMA, cocaine, methylamphetamine and Methorphan]; *R v Rizzo* [2011] VSCA 146 [manufacture and distribution of at least 42kg of methylamphetamine, traffick in cocaine and MDMA and money laundering activities]; *R v Samac* [2011] VSCA 171 [large commercial quantity of MDMA]; *R v Kneifati*, *R v Taha* [2012] VSCA 124 [cocaine, large commercial quantity of MDMA]; *Nguyen v The Queen* [2016] VSCA 198 [middle/high level of cultivation of a commercial quantity of cannabis]; *Rocco Arico v The Queen* [2018] VSCA 135 [traffick by offering to sell a large commercial quantity of drug]; *Volkan v The Queen* [2019] VSCA 33 [1 count of trafficking 1,4–4 butanediol & 13 counts of possession]; *Roach v The Queen* [2020] VSCA 205 [trafficking in 3 times the commercial quantity 1,4-Butanediol].
- Importation: *Alavy v The Queen* [2014] VSCA 25 [marketable quantity of methamphetamine – 7y/5y not outside range]; *Hibgame v The Queen* [2014] VSCA 26 [marketable quantity of benzylpiperazine [BZP] – IMP 5y reduced to 4y/1y9m]; *Lee James Matthews v The Queen*; *Tuyet*

Thi Vu v The Queen & Sayeed Hashmi v The Queen [2014] VSCA 291; *Cuthbertson v The Queen* [2019] VSCA 104 [plea guilty to importation of 837.9 grams of pure cocaine, which represented 419 times the marketable quantity and 41% of the commercial quantity of cocaine – IMP8y3m/5y9m].

- Conspiracy to traffick: *DPP v Johnson, Zerna and Bugeja* [2008] VSC 330 [not less than commercial quantity of methylamphetamine]. Sentence of 10y/8y on *Johnson* upheld: see [2010] VSCA 321.

11.2.26 Sentencing for armed robbery / aggravated carjacking / aggravated home invasion

11.2.26.1 Sentencing for armed robbery

In *R v Bortoli* [2006] VSCA 62 at [23], Redlich AJA (Maxwell P & Buchanan JA agreeing), said:

“Armed robbery is a particularly serious offence because of the impact of threatened violence upon its victims and because the use of a weapon carries with it the risk of serious injury or death. An armed robbery involving the use of loaded firearms at secured premises, with a likely presence of security guards, increases the risk of serious injury or death in the course of the commission of the offence. The armed robberies committed by the appellant fell into this category. These are, as this Court observed in *R v Willis* [1975] VR 292 at 302 offences of such gravity that they call for a “condign sentence”. The high maximum sentence for such an offence has been viewed as indicating that deterrence is a matter that should be given priority: *Sentencing - State and Federal Law in Victoria* – Fox & Frieberg, 2nd ed, para 12.501. Armed robberies which are carefully and professionally planned and executed must be viewed as more deserving of exemplary punishment: *Barci v Asling* (1994) 76 A Crim R 103.”

In *R v Crossley* [2008] VSCA 134 at [17] Ashley JA (with whom Buchanan & Nettle JJA agreed) said:

“Armed robbery and attempted armed robbery, committed at all hours of the day, in public places, against vulnerable victims, committed in order to feed a drug habit (as was here the case) are serious offences. Considerations of just punishment, denunciation and general and specific deterrence are evidently important. The learned judge recognised that this was so.”

In *R v Kittikhoun* [2004] VSCA 194 the Court of Appeal dismissed an appeal by a 27 year old man, with no relevant priors, against a sentence of 10 years imprisonment, with a non-parole period of 7 years, imposed after he pleaded guilty to:

- 12 counts of armed robbery (each attracting 4 years imprisonment);
- 1 count of attempted armed robbery (2 years imprisonment); and
- 2 counts of false imprisonment (each attracting 12 months imprisonment).

At [15] Chernov JA, with whom Vincent JA & Gillard AJA agreed, said:

"Given the nature of the offences and of the appellant's offending conduct, the principle of general deterrence assumes particular significance for sentencing purposes, even if one assumes that specific deterrence is to be regarded as of little relevance in light of the appellant's prospects of rehabilitation. It is true that there are significant mitigating circumstances that operate in the appellant's favour, to which reference has already been made, but as this Court has said in the context of other cases where armed robberies have been perpetrated against soft targets, 'because of the prevalence and the seriousness of offences of this nature... the mitigating and other personal circumstances of the offender must, to a degree, give way to the primary purpose of punishment of such offences, namely, deterrence'. See, for example, *R v Cotry* [2002] VSCA 13 at [8] per Winneke P and *R v Pratt* [2003] VSCA 186 at [20] per Eames JA where a blood-filled syringe was used. As Buchanan JA (with whom Callaway JA and Coldrey AJA agreed) observed in *R. v. Swingler* [2001] VSCA 26 at [11], 'the crime of armed robbery perpetrated against defenceless, isolated persons late at night is a serious offence and calls for condign punishment in order to deter others'. His Honour also cited with approval in that case the following observations of Winneke P in *R v Orlikowski* [Unreported, Court of Appeal, 16/10/1997, at p.4] made in the context of the attempted armed robbery of a service station by a youth wielding a knife:

'One has to be careful, I think, in entertaining applications against sentences of this sort, not to allow too readily the personal circumstances of the offender to mask the features of this crime which required the sentencing judge to properly regard principles of general and specific deterrence as

important features in the exercise of the sentencing discretion. The crime is one which is perpetrated upon usually defenceless members of the community whilst those persons are going about their business, often in circumstances of isolation. The crime is one which instils terror into its victims ...'

I consider that these observations apply to the facts of the present case. That is not to say that the significant mitigating factors that operate here are to be minimised or that the sentencing disposition should be determined otherwise than in the context of the facts and circumstances applicable to the particular case. See *R v Roy* (2001) 119 A Crim R 147 at 149 per Tadgell JA with whom Winneke P and Buchanan JA agreed. In the end, his Honour had to balance the mitigating factors against the aggravating circumstances to which I have referred and determine, as I have said, a proper sentence, having due regard to the principles of general deterrence and the requirement to impose just punishment for these offences."

In *DPP v Gardner & Coates* [2004] VSCA 119 the Court of Appeal allowed a Director's appeal against sentences of 8 years & 7 years, each with 5 years non-parole, and increased the sentences to 11 years with 8 years non-parole. The defendants were aged 37 & 47 respectively and had some prior criminal history. They had been found guilty of armed robbery and reckless conduct endangering life in circumstances where they had held up an Armaguard van servicing an ATM. At [20] Winneke P, with whom Buchanan JA agreed, said:

"The armed robbery was about as serious an example of that offence as can be imagined, short of one in which death or serious injury has been actually inflicted. It was planned, it was premeditated, it was callous in its execution, and it involved the use of weapons in circumstances which exposed the robbers' victims to the maximum prejudice – namely the firing of bullets into a confined space where the victims were trapped. It is remarkable in those circumstances that no one was killed or seriously injured; although, as his Honour noted, the ruthlessness with which this crime was executed has left an indelible mark on at least one of its victims."

In *R v Winslett* [2004] VSC 426 where Cummins J, after discussing at [17]-[19] the cases of *R v Roy* [2001] VSCA 61, *R v Cotry* [2002] VSCA 13 and *R v Pratt* [2003] VSCA 186, found exceptional circumstances and imposed a fully suspended sentence of 3 years imprisonment on a 25 year old woman who had pleaded guilty to 2 counts of armed robbery of a convenience store attendant using a blood-filled syringe. At [21] his Honour said:

"Offences such as this should be dealt with ordinarily by substantial sentences of imprisonment to be immediately served in custody. That is because the victims are vulnerable, the victims usually are alone, the quality of the offence is particularly terrible and dreadful psychologically speaking, is very oppressive upon victims and often is haunting thereafter and there are high objective risks. Further, often such offenders, as the courts have pointed out, are young persons, often drug addicts, and the means of committing the offences, namely a blood-filled syringe, is readily available to such persons. All of those considerations involve that normally the proper disposition of such cases is a substantial term of imprisonment to be served immediately, including for persons with no prior convictions. The courts rightly have emphasised that in such cases deterrence of others (even if the individual accused does not require substantial specific deterrence) is the primary factor in sentencing."

Nevertheless his Honour found that specific facts personal to the defendant, including the fact that she was a mother of 3 small children aged 7, 4 & 2, had no relevant priors and had worked for 7 years as a child care assistant, justified suspending the sentence for a period of 3 years.

In *R v Roy* [2001] VSCA 61 at [7] Tadgell JA said of such offences:

"These kinds of armed robberies, prevalent as they are and easy to perpetrate as they are upon soft targets, need to be dealt with as a particularly horrible species of an undesirable genus, but always having regard to their own facts. They are commonly perpetrated by unstable criminals, usually drug addicts, and calculated to instil into the victim an exquisite sense of anguish and fear of the unknown. It is almost as if the criminal is engaged in a kind of biological warfare that will naturally introduce great apprehension into the mind of the victim. To that extent armed robbery with the wielding of a syringe full of blood is to be viewed *sui generis* (meaning of a special kind) and in the context of all other circumstances surrounding the case, dealt with appropriately."

Winneke P agreed and said at [9]:

"Blood-filled syringes are undoubtedly a fearful weapon because they instil into the victim a legitimate fear of being pricked by a person who is usually a drug addict and out of control, with the consequence that the victim goes through the anguish of not knowing whether any of the fatal ramifications might flow. This no doubt is a factor which judges will take into account in imposing the appropriate sentence, including the weight which should be given for the purpose of general deterrence."

In *R v Cotry* [2002] VSCA 13 Winneke P, with whom Brooking & Charles JJA agreed, said at [8]:

"Our courts are all too commonly being called upon to deal with relatively young drug-addicted offenders who threaten and rob law-abiding citizens at the point of a syringe ... [Judges] must bear in mind sentencing principles which this Court has, from time to time, stated for their guidance. In cases of armed robbery of citizens with the use of syringes, this Court has frequently said that a primary purpose of punishment must be deterrence... The point has been made that syringes, whether blood-filled or not, are particularly fear-producing and provide a cheap and effective weapon for robberies of soft targets. Nor can sentencing judges lose sight of the fact that Parliament has been increasing the maximum penalties for armed robbery and the maximum now stands at 25 years."

In *R v Pratt* [2003] VSCA 186 at [20] Eames JA, with whom Winneke ACJ & Phillips JA agreed, said:

"This Court has on many occasions stated that offences of this type are prevalent and that because of their seriousness, mitigating factors personal to offenders must, to a degree, give way to the primary purpose of punishment for such offences, namely, deterrence."

For further judicial comment on armed robberies of "soft targets" see *DPP v Spiteri* [2006] VSCA 214 at [23]; *R v Mekal* [2006] VSCA 218 at [4]; *R v Pio* [2007] VSCA 180 at [20]-[21]; *R v Piper* [2008] VSC 569 at [12]-[18]; *DPP v Singh* [2011] VSCA 333 at [15]-[16].

In *R v McNamara* [2007] VSCA 267 Redlich JA (with whom Callaway JA & Coldrey AJA agreed) said at [15]:

"The prevalence of armed robbery committed by relatively youthful offenders who are addicted to drugs and who steal to finance their addiction is well recognised: *R v Nguyen and Okobagerish* [2002] VSCA 130 per O'Bryan AJA, with whom Batt JA agreed. Armed robbers affected by drugs are unpredictable and have the potential to injure or kill a victim should things go wrong. One community interest which bears upon both the head and minimum sentence to be fixed is the need of the community to be protected from a violent offender, 'especially one whose prospects for rehabilitation are bleak': *Attorney-General v Morgan and Morgan* (1980) 7 A Crim R 146; *Bugmy*, at 531-2. In such circumstances, protection of the community and deterrence, both specific and general, are very important in the sentencing process: *R v Nguyen and Okobagerish*, at [36]."

In *DPP v Karipis* [2005] VSCA 119 at [9] the Court of Appeal allowed a Director's appeal against a sentence of 3 years YJC detention imposed on a 20 year old man who had pleaded guilty, *inter alia*, to 3 counts of armed robbery and 3 counts of aggravated burglary arising from 3 separate incidents when he was 17 & 18. He was sentenced to 2 years YJC on each count and 6 months of the 2nd & 3rd aggravated burglaries were ordered to be cumulative on the sentence on the 1st aggravated burglary. The victims were known by K to be drug suppliers. K had prior and subsequent matters to be taken into account. The Director had acknowledged that there were mitigating circumstances, including K's youth; his lesser role in the offending than the co-offender; his personal history and background, the family support available to him; his plea of guilty and co-operation and the remorse that the judge accepted on the basis of K's record of interview and evidence led on the plea. The Director also accepted that there was favourable material in a psychological report from Ms Elizabeth Warren and reports from the Juvenile Justice Court Unit and the Malmsbury Juvenile Justice Centre regarding K's suitability for a youth training centre sentence and the progress he had made following the sentence of detention imposed on 26th July 2004. Rehabilitation was important too and the trial judge had accepted that K had a reasonable likelihood of rehabilitation. Nevertheless the Court of Appeal held at [14] that a longer period of custody than 3 years was required, partly because of the gravity of the offences and their separation in time and partly because of K's antecedents and subsequent convictions. The sentences on the individual counts of aggravated burglary and armed robbery were increased to 3 years' imprisonment and the accumulation altered to produce a total effective sentence of 4½ years' imprisonment. The Court of Appeal fixed a non-parole period of 2 years and

recommended to the Adult Parole Board that it consider transferring K to a YTC pursuant to s.244 of the CYPA [now s.471 of the CYFA].

In *DPP v Jason Thomas Roe* [2005] VSCA 178 the Court of Appeal dismissed a Director's appeal against a sentence of 12 months imprisonment, to be served by way of intensive correction order, on a respondent aged 25 with an IQ in the region of 75-79 who had pleaded guilty to one count of armed robbery and one count of intentionally causing serious injury. He had 41 prior convictions and 10 previous findings of guilt, mostly related to offences of dishonesty but including one conviction for robbery in 2000 for which he was sentenced to 12 months' imprisonment, 8 months of which was suspended. The offences were committed in the context of a heroin addiction against a fellow heroin user to whom the respondent had given \$100 to provide heroin. In dismissing the appeal, Charles JA, with whom Vincent & Ashley JJA agreed, said at [18]:

"The circumstances of the offences make them both unquestionably very serious. Specific and general deterrence were both of great significance. Having regard to the respondent's prior convictions, a substantial sentence involving immediate incarceration might have been expected to be almost inevitable. But the judge was perfectly entitled, on the available evidence, to detect a possibility of genuine rehabilitation in the respondent, and to act on that possibility. In so doing, her Honour was obliged to place in the balance the interests of the community and the victim, both for their future protection and the proper punishment of the respondent, as well as general and specific deterrence on the one hand, and, on the other, the fact that a sentence which resulted in the immediate incarceration of the respondent might well extinguish the last hopes for his rehabilitation. Her Honour's sentence was plainly framed with the rehabilitation of the respondent at the forefront."

In *R v Kilmartin* [2006] VSCA 12 at [10] Charles JA (Vincent JA & Mandie AJA agreeing), said:

"The armed robbery was, I think, a very serious example of a serious offence. The appellant had been invited into the premises by people with whom he was acquainted. It was for this reason that the circumstances did not give rise to a burglary, but his entry rapidly developed into a home invasion with terrifying consequences for the inmates and actual violence brought to bear on them. The application of this violence to Mr and Mrs Bird had as an aggravating feature that it took place in the presence of their children."

In *R v Woolley* [2008] VSCA 44 a 19 year old appellant with no prior convictions had pleaded guilty to one count of attempted armed robbery and had been sentenced to 12 months imprisonment with a non-parole period of 6 months. On appeal he was sentenced to 12 months imprisonment with the balance to be served by way of intensive correction in the community. The Crown conceded that the sentencing judge erred by misapplying *DPP v Candaza & Others* [2003] VSCA 91. In that case Chernov JA (with whom Winneke ACJ & Phillips JA agreed) accepted the DPP's submission "that it would be necessary to establish rare and exceptional circumstances to justify a sentencing disposition that did not result in a conviction for a crime as serious as armed robbery". However, in *R v Woolley* the sentencing judge appeared to have considered that *Candaza* was authority for the proposition "that it would be necessary to establish rare and exceptional circumstances to justify a non-custodial disposition for an offender who had committed an armed robbery".

In *Agoc Deng Shok v The Queen* [2020] VSCA 294 the Court of Appeal upheld a sentence of IMP 5y imposed on a 23 year old offender of North Sudanese background. At [38]-[40] & [44] Maxwell P & Niall JA said:

[38] "Plainly, armed robbery of a store in which there is both a staff member and a number of innocent shoppers present, and in which the disguised perpetrator uses an imitation handgun and threatens to shoot the staff member, is a serious offence.

[39] The maximum penalty is 25 years. Such an offence is terrifying for the victims, extremely dangerous, and cannot be tolerated in a law abiding society. As Osborn J observed in *DPP v Stevens* [2013] VSCA 187 at [31], such offending is 'predatory in its violence and fundamentally destructive of the security and confidence in the law which those who operate facilities such as convenience stores are entitled to enjoy.'

[40] The fact that the gun was an imitation made the offending less serious than if the applicant had been armed with a genuine, loaded weapon. However, brandishing an accurate replica of a handgun to commit two serious offences over the course of a day is a very dangerous activity. It is likely to provoke an armed response from police who have no way of knowing that the handgun is an imitation. More importantly, given how lifelike the replica was, the fact that it was an imitation would not have reduced the terror felt by

the victims. Plainly, this was a serious example of armed robbery.”

[44] “In *Walker v The Queen; Dargan v The Queen* [2019] VSCA 137 the two offenders had committed an armed robbery on a bottle shop with a large knife and an imitation handgun. The manager was robbed at gun point and a staff member and two customers were also threatened. The offenders had relatively modest prior convictions. They were sentenced by a judge in the County Court to 12 years’ imprisonment each. Those sentences were set aside by this Court on the basis that they were manifestly excessive. Each offender was resentenced to a term of eight years and six months’ imprisonment for the offence. In arriving at that conclusion, this Court surveyed a number of cases dealing with armed robbery that showed sentences of five years {*Lord v The Queen* [2018] VSCA 52; *Driver v The Queen* [2012] VSCA 242}, six years {*Umi v The Queen* [2013] VSCA 211}, seven years {*Cottee v The Queen* [2010] VSCA 285; *DPP v Stevens* [2013] VSCA 187}, eight years {*Waugh v The Queen* (2013) 38 VR 66; [2013] VSCA 36}, 10 years {*Johnson v The Queen* [2011] VSCA 348} and 14 years {*Binse v The Queen* [2016] VSCA 145}.”

See also *R v Sullivan* [2005] VSCA 286; *R v PSA, PSB & PSC* [2006] VSC 91; *R v Dickson & Ryan* [2007] VSC 59; *R v Benton* [2007] VSCA 71; *R v Ozbec* [2008] VSCA 9; *R v Carmichael* [2008] VSCA 10 at [22]-[24]; *R v Harrison* [2008] VSCA 65; *R v Kitson* [2008] VSCA 77; *R v TG* [2008] VSCA 83; *DPP v Rizkalla* [2010] VSC 535; *R v Raccosta* [2012] VSCA 59; *DPP v Rancie* [2012] VSCA 258; *Mendelle v The Queen* [2018] VSCA 204; *DPP v Hodgson* [2019] VSCA 49, esp. at [70], [72] & [76]-[77]; *DPP v Heyfron* [2019] VSCA 130.

11.2.26.2 Sentencing for aggravated carjacking / aggravated home invasion

In their majority judgment in *Jason Mammoliti v The Queen* [2020] VSCA 52, McLeish & Emerton JJA said at [8]-[11]:

[8] “In 2016, amendments were made to the Crimes Act 1958, the Sentencing Act 1991 and the Bail Act 1977 to create new offences of carjacking, aggravated carjacking, home invasion and aggravated home invasion, and to impose special sentencing and bail requirements for those offences. In Parliament, the Attorney General explained the reason for the new offences and penalties as follows:

‘The Andrews Labor government is very concerned about recent serious criminal offending, which has involved breaking into people’s homes and dragging people out of their cars. There is absolutely no place for this sort of behaviour. All Victorians should be able to feel safe and secure in their own homes. All Victorians should be able to drive around without fear of being set upon by criminals.

The government is introducing offences and penalties which appropriately reflect the terrifying nature of these crimes. In doing so, the government, and the Parliament, denounce the perpetrators of such crimes in the strongest terms and send a message to the community that such activities will not be tolerated.’

[9] In relation to aggravated carjacking, the Attorney General said:

‘The offence carries a maximum period of imprisonment of 25 years. In order to recognise the particular seriousness of this offence there is also a statutory minimum sentence of three years. This is intended to be a serious deterrent to those who plan to use weapons and violence to take another person’s vehicle.’

[10] As foreshadowed, s 79A of the Crimes Act prescribes a maximum sentence of 25 years’ imprisonment for aggravated carjacking. Section 10AD of the Sentencing Act requires the imposition of a term of imprisonment for an offence against s 79A and the fixing of a non-parole period of not less than three years, unless the court finds under s 10A that ‘a special reason’ exists.’

[11] These provisions mirror the applicable laws for aggravated home invasion.”

In dismissing the appeal of the 39 year old applicant with an extensive criminal record against a sentence of IMP6y/4y imposed on a plea of guilty to an aggravated carjacking involving an 84 year old victim who was left lying on the road for two minutes before he was attended to by a passer-by and emergency services were called, McLeish & Emerton JJA said at [61]: “Although stern, we do not consider that the sentence of six years with a nonparole period of four years is manifestly excessive.

At [39]-[41] their Honours discussed some of the principles involved in sentencing where a mandatory minimum non-parole period is involved:

[39] “[W]here an offender is sentenced on a single charge or where, as here, only one charge attracts a sentence of imprisonment, the mandatory minimum non-parole period, in combination with the requirement that the term of the sentence exceed the non-parole period by at least six months, serves to create an effective ‘minimum sentence’ for aggravated carjacking of three years and six months’ imprisonment. As we have said, it may be that in this circumstance, there will be some compression of sentences for offending falling within the least serious category and offending that does not quite fall into that category, being slightly more serious. However, equally, when determining the head sentence for aggravated carjacking, the sentencing judge must steadily bear in mind that the offending attracts a maximum sentence of 25 years’ imprisonment, and the offending must be assessed using both the maximum sentence and the mandatory minimum non-parole period as guideposts. By the maximum sentence and the mandatory gaol term to be served for no less than three years, the legislature has made it clear that aggravated carjacking is a serious offence. There is no escaping a relatively long custodial sentence. Accordingly, the mandatory minimum non-parole period must be reflected in the head sentence.

[40] For these reasons, in a single-charge case, or where only one charge attracts a term of imprisonment, we accept the [following] summary of principles advanced by the applicant and broadly accepted by the respondent:

- (a) the mandatory minimum non-parole period operates as a legislative yardstick: *Magaming v The Queen* (2013) 252 CLR 381, 396 [48]; [2013] HCA 40 (French CJ, Hayne, Crennan, Kiefel and Bell JJ);
- (b) the imposition of a minimum sentencing regime ‘does not oust either the sentencing principles of the common law or those affected by [statute], but necessarily modifies both’: *DPP (Cth) v Haidari* (2013) 230 A Crim R 134, 144 [42]; [2013] VSCA 149, [42] (Harper JA, Weinberg and Priest JJA agreeing at [1] and [55]);
- (c) although the mandatory minimum non-parole period is a yardstick, it is not necessarily reserved only for those cases falling at the lowest extreme of the spectrum. An offender may still receive the mandatory minimum non-parole period despite having relevant prior convictions and/or despite running a trial: *DPP v Hudgson* [2016] VSCA 254;
- (d) the principles governing a discount for a plea of guilty do not cease to apply in cases where there is a statutory minimum term. Rather, there will be a compression of sentences towards the lower end of the range, with offences at the bottom of the range of culpability treated effectively in the same way as those which are towards the lower end, but not at the extreme lower end, of culpability: *Haidari* (2013) 230 A Crim R 134, 144 [42]; [2013] VSCA 149 [42] and *Atherden v Western Australia* [2010] WASCA 33, [42]–[43] (Wheeler JA, McLure P and Owen JA agreeing at [1] and [3]);
- (e) the requirement to impose a mandatory minimum non-parole period should not be permitted to swamp the sentencing discretion.”

[41] It is not presently necessary to say more about the operation of s 10AD in cases involving multiple charges attracting terms of imprisonment. As the Court pointed out in *Hudgson* [2016] VSCA 254, [6] (Weinberg, Whelan and Priest JJA), the sentencing process becomes problematic and unorthodox if a sentencing judge has to start with the non-parole period and ‘work upwards’. That problem does not really arise in a single charge case.”

Since the mandatory minimum non-parole periods provided in relation to aggravated carjacking and aggravated home invasion are contained in ss.10AC & 10AD of the Sentencing Act 1991 and since under s.4 that Act does not apply to the Children’s Court, *Mammoliti’s Case* is not relevant to children sentenced under the CYFA, under which there is no power to fix a non-parole period in any event.

11.2.27 Sentencing for burglary / aggravated burglary / home invasion

In *DPP v Lehmann* [2005] VSCA 9 the Court of Appeal dismissed a Director's appeal against a non-custodial sentence – an intensive correction order – imposed on a 26 year old man with a significant criminal history who had pleaded not guilty to burglary of a former employer's home. At [15] Nettle JA analysed the four major factors taken into account in imposing sentences for burglary and discussed recent Victorian sentencing statistics:

“In my opinion the sentence was remarkably lenient. It looks to me to be very much towards the bottom end of the scale and, given the respondent's antecedents and apparent lack of remorse, it is difficult to conceive of the offence as amongst the least serious examples of burglary likely to be encountered. A survey of past decisions essayed in Fox & Frieberg's work on sentencing identifies as the four major factors that have been taken into account in imposing sentences for burglary: the amount stolen and recovered (even though strictly speaking it should be the subject of separate charge); the degree of skill involved in the planning and execution of the offence (which may encompass the element of breach of trust where the burglary has been carried out by a person who is or has been employed by the victim); the amount of damage cause to premises; and the risk of injury or violence to returning house holders or the degree to which those in occupation have been subjected to fear). It may be noted that all but one of those considerations is present in this case. The same survey suggests that the median custodial sentence for burglary ranged in the period surveyed from 10 ½ months to 18 months, and that it was only in the least serious of cases that a sentence of less than 12 months imprisonment might be expected. The mid-range was comprised in the large part of sentences of between one year and three years, and more serious cases were shown to have attracted sentences of greater than three years. Similar conclusions emerge from the most recently published sentencing statistics for superior courts in Victoria. They show a sentencing range for burglary of two months to six years with an average of 21.5 months and a median of eighteen months: Victorian Higher Courts Sentencing Statistics 2002/03 at p.33. So, other things being equal, I should have thought that the respondent's offence warranted a sentence of imprisonment of between one year and three years and that an intensive corrections order was really not an option.”

However, at [17] His Honour was ultimately not satisfied that the sentence was manifestly excessive taking into account the fact that “respondent had undergone some sort of attitudinal metamorphosis since his marriage, and that it was of a kind and extent which rendered complete rehabilitation a real likelihood...[A]n immediate custodial sentence might so much disrupt the financial stability of the respondent's young family as seriously to threaten and perhaps to destroy that prospect of rehabilitation.” Cummins AJA dismissed the appeal for a different reason, holding at [26]: “I do not consider that the sentence imposed was manifestly inadequate, nor do I consider that the sentence was remarkably lenient. It was at the bottom of the range.”

In *R v Glenn* [2005] VSCA 31 Nettle JA (with whom Vincent JA agreed) said at [13]: “Property invasion and assault occasioning injury are serious offences, even when they are committed by a youth of only 17 years of age, and it cannot be gainsaid that there is need for general deterrence of them. I am unable to accept that a suspended sentence of imprisonment of 15 months was manifestly excessive, even if it were stern. Cummins AJA dissented, holding at [31] & [35] that the proper sentence below would have involved no conviction being recorded: “This appellant, in my view, is a decent young man with a worthwhile future. The question is whether it should be burdened, if not afflicted, for the rest of his life by one brief error of serious, but limited, physical character.”

In *DPP v Brooks* [2008] VSCA 253 at [22] the Court of Appeal (Maxwell P, Buchanan & Vincent JJA) said:

“The violation of the privacy and safety of the home of any person, whatever be their age or situation, must be seen to be regarded as extremely serious by the Courts. As the present case demonstrates, the financial loss occasioned by the victim will often be its least serious consequence. Where the entry is effected for the purpose of violence or intimidation, or where the perpetrator engages in such behaviour whilst there, the level of criminality is clearly aggravated. Put at its simplest, the members of this community are entitled to feel and remain safe in their homes and the Courts must play their part through the sentencing process to ensure that this right is vindicated.”

See also *R v Davis* [2006] VSCA 8.

In *R v Aujla & Anor* [2012] VSC 503 T Forrest J imposed a sentence of IMP6y6m on a 40 year old man who had been found guilty of aggravated burglary of his estranged wife's cousin's house in the course of which he seriously injured the cousin. The accused Mr Aujla believed that the victim had encouraged his wife to leave him and to obtain an intervention order against him. At [14]-[15] his Honour said:

"Some years ago, Winneke P captured the essence of the crime of aggravated burglary. Offences of this type 'strike directly at the heart of people's domestic security and their capacity to feel safe in their own homes': *Director of Public Prosecutions v Jovicic* (2001) 121 A Crim R 497, 507...The community has a legitimate expectation that those who intrude into private homes intending violence to the innocent occupants will be punished sternly. That punishment must deter others from similar conduct and it must express the community's denunciation of the impugned conduct."

In *R v Ray & Vella* [2014] VSC 165 T Forrest J imposed sentences of IMP3y/2y & IMP2y9m/1y9m on accused who were aged 20 & 23 at the time of the offending and who had been found guilty of aggravated burglary and false imprisonment but not guilty of manslaughter. Described by his Honour as a "serious example of the offence of aggravated burglary", this was a confrontational aggravated burglary in the context of a dispute concerning stolen property. His Honour found that remorse and the prospects for rehabilitation of both accused were high.

In upholding a sentence of 18 months imprisonment on a count of aggravated burglary in *R v McCarthy* [2010] VSCA 87, Buchanan JA (with whom Maxwell P agreed) said at [11]:

"In my opinion the sentence imposed upon the appellant was appropriate, even lenient. The invasion at night of Stewart's home and the cowardly assault upon him in company were serious crimes. In cases of this kind general deterrence is a significant aim. Home invasion and unprovoked violence occasioning serious injury are not to be countenanced. The appellant's record discloses a continuing disregard for the law. Notwithstanding the pleas of guilty, I am of the opinion that no less a sentence should be imposed."

In *R v Saltamacchia* [2010] VSCA 83 the appellant, who had no prior convictions, pleaded guilty to offences involving the invasion of his ex girlfriend's home and was sentenced to 2 years imprisonment for aggravated burglary. On appeal the sentence was partly suspended. At [26] Maxwell P said:

"[W]e are imposing, as her Honour did, a sentence of two years for the aggravated burglary. In my view, counsel for the Crown was right to describe that as a lenient sentence, though as the Court pointed out (and as may be gleaned from the table of sentences for this offence set out in the judgement of the Court in *DPP v El Hajje* [2009] VSCA 160), this would appear to be reflective of current sentencing practices. As the Court said in that case, there is a real question about the adequacy of current practices, having regard to the 25 year maximum and the community expectation that home invasions be severely punished."

In his judgment in *R v Le* [2010] VSCA 199 at [37] Maxwell P responded to counsel's submission about sentencing statistics for aggravated burglary in the period 2002/03 to 2006/07 as follows:

"Those statistics suggest that there is a very serious question to be examined about whether current sentencing practices for aggravated burglary can be justified, in view of Parliament's clear instruction to the Courts in 1997 to sentence for this offence within parameters marked out by an increased maximum of 25 years. {As to the significance of the maximum, see *R v AB (No 2)* (2008) 18 VR 391, 403-4, [40]-[41].} This Court raised the same issue, in relation to the same offence, in *DPP v El Hajje* [2009] VSCA 160, [33], decided more than a year ago."

In *Hogarth v The Queen* (2012) 37 VR 658; [2012] VSCA 302 the Court of Appeal dismissed the prisoner's appeal against a sentence of 4½ years imprisonment on a count of aggravated burglary, referred to by the Court as a "home invasion" or "confrontational aggravated burglary" and described as follows:

"Home invasion is a particularly nasty form of criminal conduct. For further discussion of the terror which this offence often causes its victims, see *Bonacci v The Queen* [2012] VSCA 170, [1]. Typically, a home invasion involves multiple offenders entering a person's home, carrying weapons, intending to rob or injure the victims in revenge for some actual or perceived wrong. The entry of the offenders — acting in anger and often fuelled by alcohol — is itself a terrifying experience for the householder(s), irrespective of what may occur after entry."

Annexed to the judgment are two tables. Table A is a compilation of 23 cases from the Court of Appeal and the County Court (the latter cases selected by the DPP) dealing with sentences for this species of the offence since 2005. Table B is a compilation prepared by the DPP of all sentences for aggravated burglary in the superior courts in 2011. The tables show that a sentence of greater than 5 years imprisonment has been “quite exceptional”. The Court of Appeal said at [61]-[62]:

“To insist upon appropriate relativities between individual sentences and the maximum is to recognise that the maximum is to be treated as a sentencing yardstick, as explained by the High Court majority in *Makarjian v The Queen* (2005) 228 CLR 357, 372 [31]. For the reasons we have given, current sentencing practices for confrontational aggravated burglary do not adequately reflect that yardstick. As this Court has said previously, where there is a conflict between the guidance afforded by the maximum penalty and that afforded by current sentencing practices, it is the maximum which must prevail: *CPD* (2009) 22 VR 533, 550–1 [74]; *DPP v DDJ* (2009) 22 VR 444, 461 [70]; *AB (No 2)* (2008) 18 VR 391, 405–6 [47]–[49]. It follows, in our view, that current sentencing for this form of aggravated burglary can no longer be treated as a reliable guide.”

In *DPP v Meyers* [2014] VSCA 314 the Court of Appeal granted a DPP appeal against a total effective sentence of IMP 3y6m/1y6m on charges [including IMP 3y on a charge of aggravated burglary – referred to by the DPP as an “intimate relationship aggravated burglary”] and substituted a total effective sentence of IMP 5y6m/3y [including IMP 4y on the aggravated burglary charge]. At [25]-[46] the Court of Appeal discussed the case of *Hogarth v The Queen* (2012) 37 VR 658 and stressed the need to avoid debate about classification of various types of aggravated burglary. The Court also referred with approval to recent cases of *Gale* [2014] VSCA 168 [offender breached intervention order by entering home of former wife in the early hours of a Sunday morning, shouted abuse at both of them and threatened her new partner with a cattle prod], *Filiz* [2014] VSCA 212 & *Anderson* [2014] VSCA 255 [both with facts broadly similar to *Gale*]. In *Filiz* the Court of Appeal (Maxwell P & Redlich JA) had said at [23]:

“It is a shameful truth that family violence is a leading cause of illness, disability and death among Victorian women aged between 15 and 44. It is also sadly true that there are a great number of women who live in real and justified fear of the men who are, or were, their intimate partners.”

It had also said at [21] – citing *Felicite v The Queen* (2011) 37 VR 329 and *DPP v Pasinis* [2014] VSCA 97 – that general deterrence was of particular significance where violence was used against a former domestic partner and where a family violence intervention order was in place. In *DPP v Meyers* Maxwell P, Redlich & Osborn JJA said at [45]:

“We would wish to endorse the remarks in *Filiz* about the particular seriousness of offending involving former domestic partners. Violence of this kind is alarmingly widespread, and extremely harmful. The statistics about the incidence of women being killed or seriously injured by vengeful former partners are truly shocking. Although the cases under consideration do not fall into that worst category, they are symptomatic of what can fairly be described as an epidemic of domestic violence.”

In *Jamie Fisher v The Queen* [2018] VSCA 222 the Court of Appeal dismissed an appeal against a sentence of IMP 6y3m/4y3m on a charge of aggravated burglary. The appellant – aged 23 at the time of the offending and 26 at the time of sentence – had originally been charged with murder but was discharged at committal. He was then charged with manslaughter but after three trials he was acquitted of that charge. Hollingworth J had summarised the offending in the following terms [2017] VSC 21 at [32]:

“This is a serious example of the offence of aggravated burglary. The offending took place at night, in a suburban house, where its occupants were entitled to feel safe. Thirteen men, similarly dressed in intimidating clothing, carrying a range of dangerous and frightening weapons, swiftly and unexpectedly invaded the property as a united force, noisily smashing things as they pursued the occupants into and through the house. Although the entire episode only lasted around two minutes, it caused your victims to fear for their lives, and left two people physically injured. It must have been an absolutely terrifying ordeal for those who were present at the house at the time. The ‘run through’ had been pre-planned, and all of the offending that occurred was within the scope of the enterprise which you had helped to orchestrate (presumably as some sort of retaliation for what members of the L group were understood to have done to Mr P’s cousin).”

Referring to *Hogarth v The Queen* (2012) 37 VR 658, Whelan, Beach & Kaye JJA said at [32]-[34]:

“This was a very serious aggravated burglary. It was undertaken by a large group of men, armed with weapons, in ‘uniform’, consequent upon a ‘call to arms’ by Mr P and by

the appellant. The confrontation was pre-meditated and planned. It was motivated by an intention to confront, to intimidate and to injure. It occurred at a residential property at night. An armed group, of which the appellant was one of the organisers and one of the participants, determined that they would, in effect, take the law into their own hands, and visit their form of justice on their adversaries. Conduct of this kind is intolerable and strikes at the foundations of a law abiding civil society. It demands a stern response. In such cases, general deterrence and denunciation are most important. The appellant's own role in this offending was a serious one...The appellant had been involved in prior violent offending in company less than two years before the aggravated burglary."

Describing the sentence as "a moderate one", Whelan, Beach & Kaye JJA dismissed the appeal, concluding at [36]: "The appellant was youthful at the time of the offending but, as the sentencing judge observed, in accordance with authority [of] *DPP v Lawrence* (2004) 10 VR 125, 132-3, the weight to be given to youthfulness is significantly reduced in relation to offending of this kind."

In *Sovolos v The Queen* [2018] VSCA 148 at [43] Priest JA upheld a sentence of IMP 7y on a charge of aggravated burglary, saying "[T]he applicant's offending was extremely grave. I recall having encountered no other case of aggravated burglary where an offender has fired seven rounds from a firearm, at or near the innocent occupants of a residence. As far as 'home invasion' cases of aggravated burglary are concerned, this is, to say the least, a very serious example."

In *Comensoli v The Queen* [2020] VSCA 2 the Court of Appeal upheld a sentence of IMP3y3m/1y8m on 11 charges including one count of aggravated burglary. At [3]-[5] Maxwell P & Whelan JA said:

"The sentencing judge was right to treat this as a serious instance of aggravated burglary. The applicant entered the premises by force, at night, aware that someone was likely to be at home. The householder lived there with her two young children. She was in bed when she saw a shadow near the door. She then saw the applicant with her purse in his mouth and screamed. As his Honour said, the applicant's actions 'resulted in what would have been a very frightening experience for the victim'.

This was, in many respects, the archetypal aggravated burglary. The offender makes a forced entry to premises at night, intending to steal, well aware that there are likely to be persons present. It is the kind of offending which strikes terror into the hearts of members of the community.

The sentence of 3 years' imprisonment must be regarded as lenient, in our view, given what was said in *Hogarth v The Queen* (2012) 37 VR 658; [2012] VSCA 302 and *Director of Public Prosecutions v Meyers* (2014) 44 VR 486; [2014] VSCA 314 about the need for increased sentences for aggravated burglary. Furthermore, specific deterrence and community protection were very important considerations in this case, as the applicant was on bail at the time and — as part of an extensive history of drug-related offending — had a prior conviction for aggravated burglary."

See also *R v Stanbury* [2010] VSCA 49; *R v Secombe and Butkovic* [2010] VSCA 58; *R v Denman* [2012] VSCA 261; *DPP v Bonacci and Vasile* [2012] VSCA 170; *Saxon v The Queen* [2014] VSCA 296; *Kargar v The Queen* [2018] VSCA 148; *Wood v The Queen*; *Bell v The Queen* [2019] VSCA 39 at [90]-[93]; *DPP v Tuite* [2019] VSC 159; *Zhen Jiang v The Queen* [2019] VSCA 126; *Frost & Deen v The Queen* [2020] VSCA 53; *Hill v The Queen* [2020] VSCA 220; *Jiaming Gui v The Queen* [2020] VSCA 273; *DPP v JK (aged 17)* [2020] VSC 510; *Taleb v The Queen* [2020] VSCA 329.

11.2.28 Sentencing for rape / other sexual offences

11.2.28.1 Sentencing for rape

In *DPP v Mokhtari* [2020] VSCA 161 the Court of Appeal (Maxwell P, Beach & Weinberg JJA) said at [41]:

"The very act of rape is inherently serious, simply by virtue of the invasion of the victim's bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration."

In *R v Daniel Roy Simon* [2010] VSCA 66 at [60] Bongiorno JA said:

“The crime of rape, like many other crimes in the criminal calendar, covers a very wide spectrum of criminal culpability. A sentence which is clearly appropriate in one case of rape will be manifestly excessive in a different case and even manifestly inadequate in another.”

In *DPP v Avci* [2008] VSCA 256 the respondent had pleaded guilty to 13 charges arising out of attacks on six separate women, four of whom he had raped. The plea was to seven counts of rape, two counts of indecent assault, three counts of robbery and one count of aggravated burglary. The respondent had turned 19 just before the first of the offences. He was sentenced to 16 years imprisonment with a non-parole period of 9 years. The Court of Appeal allowed a Director’s appeal and increased the non-parole period to 11 years. At [26]-[27] Maxwell P (with whom Buchanan & Redlich JJA agreed) set out the principles governing sentencing for rape in Victoria:

“In his submissions, the Director rightly emphasised the fact that Parliament has fixed a maximum penalty of 25 years’ imprisonment for rape. As to the significance for sentencing purposes of the maximum penalty, see *R v AB (No 2)* [2008] VSCA 39. This is the highest maximum provided for by the *Crimes Act*. (The same maximum is provided for armed robbery, aggravated burglary and trafficking in a commercial quantity of a drug of dependence). The fixing of such a high maximum reflects the community’s abhorrence of this crime. [In *R v Hall* (1994) 76 A Crim R 454, 475 (Crockett and Southwell JJ)] the Full Court in 1994 expressed the view that, in the 14 years which had passed since an earlier decision in *R v Vaitos* (1981) 4 A Crim R 238, community concern about ‘the prevalence and seriousness of rape and like crimes’ had undoubtedly hardened, and there was a greater need for salutary sentences to punish those who committed such crimes. Difficult though it is to generalise about community attitudes, I have little doubt that community concern about rape and like crimes, and the need for salutary sentences to punish and to deter, are stronger than ever.

This point was forcefully made in 2006 by Vincent JA (with whom Buchanan and Neave JJA agreed) in *DPP v FHS* [2006] VSCA 120 at [42]:

“The courts, when dealing with [rape] cases, must have regard to the vindication of the community’s social values, pre-eminent among which are the protection of the personal integrity and physical safety of its citizens. They must punish, justly, those whose criminal conduct causes harm to others, and, through the sentencing process, endeavour to deter potential offenders from acting in this fashion ... [W]hen [these considerations] cannot be seen to be reflected in the responses of the courts, not only ... does the individual victim justifiably feel betrayed and devalued, but the criminal justice system itself fails to achieve its objectives.”

In *R v Brown* [2009] VSCA 23 at [31] the Court of Appeal (Neave & Weinberg JJA) cited with approval the above dicta of Maxwell P in *DPP v Avci* and the following dicta of Crockett & Southwell JJ in *R v Hall* (1994) 76 A Crim R 454, 475 on which it was based:

“[C]ommunity concern about the prevalence and seriousness of rape and like crimes has undoubtedly hardened. And the need for salutary sentences to punish offenders has undoubtedly increased. This change of attitude is reflected in the increase in the maximum sentence that from time to time has been fixed for the crime of rape. Whilst not giving way to public clamour for revenge, the courts in turn are expected to recognise clearly defined and rational community expectations by the sentences that they impose.”

In *R v Brown* their Honours continued at [33]:

“Sex workers are no less entitled to be protected from rape than anyone else. The victims in this case were both vulnerable. Each was subjected to what must have been a horrifying ordeal. These were cowardly attacks, committed at night against different women on different occasions. There appears to have been some measure of premeditation. Obviously, they warranted severe punishment.”

In *R v Gill* [2010] VSCA 64 in approving a 16 year sentence of imprisonment on a count of rape, Ashley, Bongiorno & Harper JJA said:

[52] “The rape was perpetrated by the appellant upon a person unknown to him. He was larger than she. She was, in substance, dragged off the street late at night whilst going peaceably about her own business. The incident took place over some time. The rape itself was unarguably savage. The injuries which the appellant inflicted upon EO were life-threatening. She suffered the physical and emotional sequelae to which we have referred. Her victim impact statement, reserved in tone but the more eloquent for that, highlighted her suffering.

[53] The circumstances to which we have referred explain why this rape fell into the category of extremely serious rapes. But this does not mean that matters relied upon for the appellant, to the extent that they are valid, can be disregarded.

[54] The maximum penalty for the offence of rape is 25 years’ imprisonment.

[55] The maximum penalty should be reserved for the very worst cases of rape: See, for instance, *Markarian v The Queen* (2005) 228 CLR 357, 372 [31], *R v Sibic* (2006) 168 A Crim R 305 [14] (Redlich JA) and *R v AB* (No 2) (2008) 18 VR 391, 403 [40] (Nettle JA).

[56] Counsel for the appellant submitted that a rape involving violence similar to that used in the present case would have been worse if – (1) committed in company; (2) planned; (3) committed by a man with prior convictions for sexual offences; (4) committed by a ‘serious sexual offender’ (this term has a particular meaning in the criminal law in this State. It did not apply to the appellant.); (5) the offender had pleaded not guilty, and had been convicted after trial; (6) there had been a multiplicity of rapes; (7) gross injuries had been inflicted upon the victim in addition to any injuries inflicted in the course of the rape. Cases involving one or more of those circumstances are *DPP v Devaldez* [2003] VSCA 29, *R v WCE* [2004] VSCA 243 and *R v Welsh* [2005] VSCA 285.

[57] We agree with that submission. To that list may be added the case of a revenge rape attended by violence such as was here used; and, arguably also, rapes involving invasion of the sanctuary of the victim’s home, or the use or threatened use of a weapon.

[58] It follows from what we have thus far said that this rape, serious though it was, was not a rape which, other things being equal, could attract the highest of penalties.”

In *R v Hasan* [2010] VSCA 352 allowed an appeal against a sentence of 6y/4y on one count of rape. The victim had been asleep and the rape was unprotected penile intercourse. A DNA match had been obtained and the offender had fled the jurisdiction for two years. The offender had no prior convictions, had been intoxicated and had pleaded guilty. He was resentenced to 4y/3y. In the course of their joint judgment Maxwell P, Redlich & Harper JJA said:

[40] “Rape is a very serious offence, as the maximum of 25 years fixed by Parliament indicates. As Winneke P said in *R v Mason* [2001] VSCA 62 at [8]:

‘It should not be forgotten that the crime of rape is an intensely personal crime which, for sentencing purposes, cannot be divorced from its effects on the victim. But the effects include not only those which flow from the physical invasion of the victim’s person and security, but also those which flow from the violation of the more intangible intellectual properties of the victim’s rights and freedoms.’

[41] This case was far from the most serious of its kind. It involved no violence, no threats and no weapon. The victim’s home was not invaded. On the other hand, advantage was taken of a sleeping woman. She was subjected not merely to an invasion of her body but to an invasion by way of unprotected penile penetration followed by ejaculation. While far from the worst, it was nevertheless a very bad case.”

In its judgment at [48] the Court of Appeal stated – with reference to dicta of Mason J in *Lowe v The Queen* (1984) 154 CLR 606, 611 and Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584, 591 – that “it is contrary to the rule of law for there to be unjustified inconsistency of sentencing between offenders in comparable circumstances”. It went on to detail at [56]-[58] a large number of cases illustrating current sentencing practice for the offence of rape. These included *DPP v Maynard* [2009] VSCA 129; *DPP v Patterson* [2009] VSCA 222; *DPP v Moses* [2009] VSCA 274; *R v Schubert* [1999] VSCA 25; *R v Brown* (2002) 5 VR 463; *R v Mason* [2001] VSCA 62; *DPP v Fellows* [2002] VSCA 58; *Nous v The Queen* [2010] VSCA 42; *DPP v Sibanda* [2010] VCC 605; *Coulson v The Queen* [2010] VSCA 146; *Simon v The Queen* [2010] VSCA 66; *R v Yankovski* [2007] VSCA 259. At [60] the Court of Appeal said that but for the constraints of current sentencing practice and the requirement for consistency, it would have dismissed the appeal. It went on to stress “the need for a review of current sentencing practices for rape”.

In *Bradley Webster (a pseudonym) v The Queen* [2016] VSCA 66 the 17 year old offender had been found guilty of seven charges of rape arising from a single episode. A number of other charges were dismissed. BW was sentenced in the Children's Court to a 12 month youth supervision order. On a Director's appeal – in which BW pleaded guilty – he was sentenced in the County Court to 2 years YJC detention. In the Court of Appeal the majority allowed BW's appeal and sentenced him to a 12 month youth attendance order. In dissent, Beach J granted leave to appeal but dismissed the appeal. Extracts from the majority judgment are set out in 11.1.3 above.

In *Wheeldon v The Queen* [2018] VSCA 344 the offender had pleaded guilty to rape (4 representative charges), false imprisonment and intentionally causing injury to the same victim in Victoria. After a trial he had been found guilty of aggravated sexual intercourse without consent (3 counts), indecent assault (2 counts) and one count of detaining for advantage involving the same victim in New South Wales. On the NSW charges he had been sentenced to IMP 11y/7y. On the Victorian charges he was sentenced to IMP 13y4m of which 4y4m was concurrent with the NSW sentence. A new non-parole period of 14y was set. The Court of Appeal said at [2]: "Apart from their extended duration, these offences are unusual for the degree of torment and degradation which the applicant inflicted on B. There is a strikingly sadistic quality about his treatment of B, whom he had got to know when she took him in as a boarder. As will appear, his offending was an 'overwhelmingly aggressive' response to her rejection of his sexual advances." Describing the sentence as "lenient" and applying dicta from *Mill v The Queen* (1988) 166 CLR 59, the Court of Appeal refused leave to appeal.

In *James Forbes (a pseudonym) v The Queen* [2018] VSCA 341 the 38 year old accused had been found guilty of a number of offences – including 3 counts of rape – against his former domestic partner. He received a total effective sentence of IMP 10y10m/7y3m which included a sentence of IMP 7y on each of the counts of rape. Refusing leave to appeal, the Court of Appeal emphasized the importance of general deterrence in relation to offences committed in the context of domestic violence, saying at [41]-[42]:

[41] "As to the total effective sentence and the non-parole period, counsel for the applicant rightly accepted that the three rape offences were serious because they occurred in the context of domestic violence and because of the other features of the offending which the respective counsel highlighted. It is true that certain of the features referred to in *Jurj* are absent. The offender did act alone, no weapon was used, and no injuries were inflicted apart from the temporary unconsciousness and the inevitable psychological impact of offending of this kind. But the features set out by this Court in *Jurj*, as the judgment in that case itself explained, are 'descriptive', rather than 'prescriptive': *Jurj* [2016] VSCA 57 [81]. The gravity of each offence must be considered in the totality of the circumstances which relate to that particular offence.

[42] In our view the offending here was very serious for the reasons set out by counsel for the respondent when describing the sequence of the offences. The context of domestic violence is also very important. This Court in *Pasinis* [2014] VSCA 97 [53] said:

'Historically perpetrators of family violence were rarely prosecuted. Even when offenders were convicted of such offences, they often received lenient sentences. Fortunately the criminal law now gives greater recognition to the devastating effects of family violence. It has also been recognised that women who are killed by their husband, boyfriend or de facto partner have frequently been assaulted by them many times previously. This makes both specific and general deterrence very important factors in sentencing men who assault their partner.'

The importance of general deterrence in this context, and its application to offending by former domestic partners, was again emphasised by this Court in *Filiz* [2014] VSCA 212 [21]."

In *DPP v Jayadev Patil (a pseudonym)* [2020] VSCA 337 the Court of Appeal allowed a Crown appeal against a TES of IMP 9y7m/6y7m imposed on a 33 year old accused who had been found guilty of 10 charges of rape in an arranged marriage which had lasted only 6 months, 3 charges of assault and one charge of threat to kill. The rapes were categorized as "Forcible rapes with violence – Humiliating and degrading treatment – Breach of trust – Vulnerable victim – Severe victim impact". Holding that the individual rape sentences and the TES were manifestly inadequate the Court of Appeal substituted a TES of IMP 14y/10y6m.

See also *R v Balassis* [2010] VSCA 296; *DPP v Sibanda* [2011] VSCA 285 at [90]-[106]; *R v Werry* [2012] VSCA 208; *DPP v Roberts* [2012] VSCA 313; *Hayden Samuels (a pseudonym) v The Queen* [2018] VSCA 251; *Hayden Samuels (a pseudonym) v The Queen* [2019] VSCA 14; *Bolton v The Queen* [2019] VSCA 21; *DPP v Elfata* [2019] VSCA 63; *DPP v Za Lian & Hlawnceu* [2019] VSCA 75; *DPP v Drake* [2019] VSCA 293; *Mush v The Queen* [2019] VSCA 307f; *Julian Lockyer (a pseudonym) v The Queen* [2020] VSCA 321 at [66].

11.2.28.2 Sentencing for other sexual offences

In *AS v The Queen* [2019] VSC 260 the appellant – aged 17 at the time of the offending – had pleaded guilty to charges including **assault with intent to commit a sexual offence** and aggravated burglary. At approximately 9.30am he had entered a residential premises with intention to steal. He had been living with his uncle next door but he did not know the victim, a 19 year old female who was asleep in one of the bedrooms. The appellant got a large cooking knife from the kitchen, entered the victim's bedroom and stood beside her pointing the knife towards her. He was wearing a black mask that covered the bottom half of his face. He said: "Get your clothes off now." The victim refused. The appellant placed the knife on her left leg and moved it up and down. The victim was on her back and continued to move away, saying, 'Please, no'. The appellant rolled her onto her stomach using his hands, reached down to pull her pants up her left leg and grabbed at her top to pull it up. The victim began crying and repeating 'no, please'. The appellant continued to attempt to take off her clothes. He reached for her from behind and positioned his right arm around her neck so that she was in a headlock. He tightened his grip, putting pressure on and squeezing her neck. The victim struggled and the appellant continued squeezing and pushing against her left shoulder. She was very fearful, believing the appellant would rape her and that she may die. The victim is unsure if she lost consciousness, but next found herself alone on the floor, with the appellant no longer in the bedroom. She was dizzy, scared and confused. AS had had issues with the abuse of drugs. He smoked marijuana in New Zealand while at high school, which escalated to daily use once he moved to Australia. He had also abused methamphetamine and alcohol. He had been referred to a mental health nurse after an episode of self-harm whilst in detention.

At [38] & [40] Champion J described the aggravated burglary and associated theft charges as "being in the mid-range of seriousness" and the assault with intent to commit a sexual offence as "very serious". Nevertheless his Honour allowed AS' appeal against an aggregate sentence of YJC30m and re-sentenced him to YJC24m with a base sentence of YJC18m on the assault charge and a cumulative sentence of YJC6m on the aggravated burglary charge.

See also *Guirguis v The Queen* [2020] VSCA 48, esp. at [33]-[37].

11.2.29 Sentencing for offences against the person committed on public transport

In *DPP v Eli* [2008] VSCA 209 the Court of Appeal (Vincent & Weinberg JJA and Mandie AJA) allowed a DPP appeal and increased the sentence on a charge of intentionally causing serious injury from 2y to 4y6m. The defendant and the victim, who were strangers to each other, were passengers on a train. Without provocation the defendant had struck the victim to the face about ten times with his fist and a glass beer bottle. In attempting to escape the victim forced the train doors open and jumped out of the moving train. In the incident the victim sustained an extremely serious permanent injury. At [32] the Court of Appeal said:

"The rights and safety of the members of this community who travel on the public transport system must be protected. It cannot be accepted that they will be exposed to abuse, violence or the threat of personal injury as they go about their ordinary activities using these facilities. Those who physically or verbally interfere with or endanger them must anticipate that the response of the courts will be stern. In short, there must be no doubt in anyone's mind that conduct of the kind in which the respondent engaged will simply not be tolerated. General deterrence is an important sentencing consideration in cases of the present kind for this reason."

11.2.30 Sentencing for attempting to pervert the course of justice

In *R v Tognolini* [2011] VSCA 113 the Court of Appeal allowed an appeal against a sentence of 6 years imprisonment on a charge of attempting to pervert the course of justice and replaced it with a sentence of 4 years imprisonment. In an annexure to the judgment the Court set out the following research by counsel for the applicant into sentences imposed in the previous 10 years for the offence of attempting to pervert the course of justice.

CASE	CITATION	INDIVIDUAL TERM
<i>DPP (Cth) v Fincham</i>	(2008) 75 ATR 545	6 months' imprisonment
<i>DPP v Aydin and Kirsch</i>	[2005] VSCA 86	2 years' imprisonment
<i>DPP v Josefski</i>	(2005) 13 VR 85	15 months' imprisonment
<i>R v Aydin</i>	(2005) 11 VR 544; [2005] VSCA 85	15 months' imprisonment
<i>R v Aydin and Flett</i>	[2005] VSCA 87	2 years' imprisonment and 2½ years' imprisonment
<i>R v Briggs</i>	(2000) 117 A Crim R 114	12 months' imprisonment
<i>R v Carey</i>	[2007] VSCA 319	2 years' imprisonment
<i>R v Coombe</i>	[1999] VSCA 94	4 months' imprisonment
<i>R v Davis</i>	[2007] VSCA 276	18 months' imprisonment
<i>R v Dunmall</i>	[2008] VSCA 22	9 months' imprisonment
<i>R v Galea</i>	[2001] VSCA 115	4 years' imprisonment
<i>R v Johns</i>	[2010] VSCA 63	2 years' imprisonment (reduced from 2 ½ years)
<i>R v Matheas</i>	[2003] VSCA 221	6 months' imprisonment
<i>R v Redmond & Anor</i>	[2006] VSCA 75	3 months imprisonment & 4 months' imprisonment
<i>R v Ripper</i>	[2008] VSCA 40	2 years' imprisonment
<i>R v Rodden</i>	[2005] VSCA 24	18 months' imprisonment
<i>R v Rogers</i>	[2008] VSCA 114	15 months' imprisonment
<i>R v Stevens</i>	[2009] VSCA 81	12 months' imprisonment
<i>R v Walsh</i>	[2002] VSCA 98	3 years' imprisonment
<i>R v Yacoub</i>	[2006] VSCA 203	2 years' imprisonment
<i>R v Zaydan & Ors</i>	[2004] VSCA 245	4 years' imprisonment

In *R v Godfrey* [2011] VSC 179 Coghlan J imposed a sentence of 3 years imprisonment, suspended for all but the 51 days already served, on a 28 year old woman who had pleaded guilty to a charge of attempting to pervert the course of justice in circumstances where she had provided a false alibi for her then boyfriend who had strangled and dismembered another woman.

In *R v Buscema* [2011] VSC 206 Nettle JA also reproduced the above list of cases and said at [6]:

“Offences of attempting to pervert the course of justice are conceived of as striking at the heart of the justice system and, therefore, as ordinarily necessitating a custodial disposition. The offence is broadly defined, however, and so may be committed in a wide range of circumstances, and the particular circumstances of each case inform the gravity of the offending. Circumstances which bear upon the assessment of the nature and gravity of particular offending, and so upon the sentence to be imposed, have been identified in *Ranford v Western Australia (No 2)* (2006) 166 A Crim R 451, 462 as including the following:

- a) The consequences which the offending was calculated to avoid;
- b) The time for which the deception was maintained and whether it was actively repeated or persisted in or merely allowed to continue;
- c) Whether the deception involved some other person, either as an accomplice or as a victim;
- d) Whether there was any threat or violence involved;
- e) Whether the offence was spontaneous or premeditated;
- f) Whether the deception resulted in the deception of the court or the creation of false public records and, if so, the extent and consequences of that.

Nettle JA said at [7] that judged by reference to these criteria the accused's offence (of providing false alibis to help a person avoid detection for drug trafficking activities) was relatively serious, albeit falling well short of the most serious category of cases. His Honour imposed a wholly suspended sentence of IMP 2.5y.

See also *DPP v Thymiopoulos* [2012] VSCA 220; *R v Pantazis & Ors* [2012] VSCA 160; *Zotos v The Queen* [2014] VSCA 324.

11.2.31 Sentencing for property damage

In *Grajewski v Director of Public Prosecutions (NSW)* [2019] HCA 8 a protestor G had harnessed himself to a ship loader which was then shut down due to safety concerns and was inoperable until G was removed. There was no alteration to physical integrity of ship loader. The High Court held that the ship loader had not been damaged within the meaning of s.195(1)(a) of the *Crimes Act 1900* (NSW). Kiefel CJ, Bell, Keane & Gordon JJ [Nettle J dissenting] held at [53]:

“The physical element of the offence created by s 195(1) is conduct that ‘destroys or damages’ some article of tangible property. A person does not damage a thing by conduct which does not bring about any alteration to the physical integrity of the thing. The alteration may be relatively minor and temporary as in letting the air out of a tyre, which physically alters the tyre and renders it imperfect: see *Director of Public Prosecutions (NSW) v Lucas* [2014] NSWSC 1441 at [187]. By contrast, unless the attachment of a wheel clamp to the tyre causes some physical alteration to the tyre it has not damaged the tyre even though the vehicle may be inoperable while the clamp remains in place.”

In *DPP v Eade* [2012] VSCA 142 the accused, Mr Eade & Mr Vanstone, had pleaded guilty to one count of arson and one count of criminal damage and had been sentenced to 2y4m youth detention on the first count and 3m concurrent youth detention on the second count. After having drunk bourbon and coke all evening, they broke into the heritage-listed Camperdown Milk and Cheese Factory and lit the plastic wrapping on some milk crates on the floor of the factory. They then went to the next door dairy where they gained entry by smashing a window with a metal pole. Subsequently the fire destroyed the Milk and Cheese Factory. However, it was common ground that the accused had not intended to destroy the building. The Court of Appeal held that on the uncontested evidence as to their state of mind, the accused could not have been convicted of intentionally destroying the factory. At [16]-[18] Maxwell P, Neave JA & Lasry AJA analysed the nature of the offence of arson as follows:

[16] “Arson is a sub-category of the offence of intentionally destroying or damaging property, under s.197 of the *Crimes Act 1958*. Section 197(1) provides:

‘A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).’

Section 197(6) provides:

‘An offence against this section committed by destroying or damaging property by fire shall be charged as arson.’

[17] The element of intention is dealt with exhaustively by s.197(4), which provides:

‘For the purposes of subsections (1) and (2) a person who destroys or damages property shall be taken as doing so intentionally if, but only if-
(a) his purpose or one of his purposes is to destroy or damage property; or
(b) he knows or believes that his conduct is more likely than not to result in destruction of or damage to property.’

[18] This subsection makes clear that proof of the offence depends on showing that the offender had turned his/her mind to the likely destruction or damage of property, either because that was his/her conscious purpose or because (s)he was aware that destruction or damage was ‘more likely than not to result’. Of these alternatives, only the first is what would ordinarily be understood as intentional conduct. The second alternative is a statutory form of recklessness: cf. *The Queen v Crabbe* (1985) 156 CLR 464, 469-70; see *R v Stephenson* [1979] 1 QB 695 (CA). As the Director’s submission noted, the subsection does not incorporate any concept of negligence.”

The accused had already been in youth detention for 4m. The Court of Appeal held that the presentments be amended to reflect the actual offence which the accused committed, namely the intentional destruction of milk crates by fire. At [2] & [58] the Court held that though the unintended consequences of their conduct were very serious, the actual offence was one of very low culpability and no further penalty was warranted. The appeal was allowed and the appellants were convicted and discharged pursuant to s.73 of the *Sentencing Act 1991*.

See also *Davies v The Queen* [2019] VSCA 66 where the 40 year old applicant was sentenced to IMP12y3m/10y3m on 5 counts of arson of public buildings; *Maddocks v The Queen* [2020] VSCA 47 where the 29 year old applicant with a significant criminal record was sentenced to IMP6y/4y; *Andrew Nolch v The Queen* [2020] VSCA 195 at [26]-[27]; *Salmi v The Queen* [2020] VSCA 250 at [41]-[45].

11.2.32 Sentencing for child homicide

In *R v Rowe* [2018] VSC 490 the accused had pleaded not guilty but at a second trial had been found guilty of one count of child homicide arising from an isolated incident in which he had shaken his three month old baby daughter. He was otherwise a caring and devoted parent. He had no prior criminal history and excellent prospects for rehabilitation. Although he had grieved for his daughter that did not translate into remorse in circumstances where for nearly 3 years he had denied his role in her death. In sentencing him to IMP 9y/6y T Forrest JA said:

[19] “I remarked to your counsel during the plea hearing that Child Homicide is a very serious offence. Its victims are always defenceless. The community trusts adults charged with the care of children to do so responsibly and conscientiously. You have breached that trust and the effects of that breach have been profound. They will be felt in the [mother’s] family, and probably in yours, for a lifetime. The Victim Impact Statements expose the suffering and emotional rawness that members of [the child’s] family still feel nearly three years after her death.”

[28] “I must give significant weight to the sentencing aspects of general deterrence, denunciation and punishment. Whilst I consider that your objective moral culpability is lower than some examples of child homicide (for example, protracted courses of cruelty, stomping or punching), it is still grave offending and demands exacting punishment.”

In *R v Vinaccia* [2019] VSC 683 the 22 year old accused was found guilty of killing his girlfriend’s infant son aged 3½ months by violent shaking/handling. The offence classifiable as either unlawful and dangerous act or criminal negligence or both. The objective gravity was held to be lower than many other instances of child homicide or manslaughter of young/infant children. The accused had made extensive admissions in a record of interview in which remorse was apparent. The accused had a history of positive behaviour towards the deceased. There was a delay of 3y9m between offence and sentence and the accused had used the delay wisely. The accused was likely to suffer hardship in prison and beyond via odium and fear. He had good prospects of rehabilitation. At [72] Croucher J referred to dicta of Vincent J in *R v Dempsey* [2001] VSC 123 and said:

“This particular offence is also serious because a totally helpless 3½ month-old child has lost his life at the hands of an adult entrusted with his care. The law has a special duty to protect the very young and vulnerable, and to hold to account adults who cause harm to children entrusted to their care.”

In imposing a sentence of IMP 8y6m/5y6m, Croucher J said at [124]:

“In my view, general deterrence, just punishment and denunciation are important considerations in this case of child homicide. The community should understand that behaviour of the type engaged in by Mr Vinaccia is denounced by the courts and will result in a substantial term of imprisonment that reflects that a very young and vulnerable child’s life has been taken by the unlawful and dangerous act or criminal negligence of a person entrusted with his care, and that the lives of the deceased child’s loved ones have been marred forever.”

See also *DPP v Staples* [2020] VSC 683 [PG, IMP9y/7y]; *DPP v McDonald* [2020] VSC 845 [PG, IMP9y/6y8m].

11.2.33 Sentencing for terrorism offence

In *R v Shoma* [2019] VSC 367 the accused had pleaded guilty to a charge of intentionally engaging in a terrorist act. Within 8 days of arrival in Australia with the express purpose of committing a terrorist act in the name of Islamic State, she stabbed the sleeping victim in the neck using a knife that she had brought to Australia for that purpose. The attack was done with the intention of advancing a political, religious or ideological cause, and with the intention of coercing or influencing by intimidation a government of this country or another, or part of this country or another, and/or intimidating the public or a section of the public. She had expressed no remorse and had made no renunciation of ideology. On the contrary she had expressed the hope that the victim would die. Considering her to have poor prospects of rehabilitation Taylor J sentenced her to IMP42y/31y6m. At [103]-[104] her Honour held that *Guden v The Queen* (2010) 28 VR 228 – which establishes that the prospect of deportation is a factor which may bear upon the impact of a sentence of imprisonment – was not well demonstrated in this case.

In *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 498 the 3 accused were found guilty of engaging in and attempting to engage in a terrorist act. The three were Sunni Muslim adherents to the

ideology of Islamic State who had destroyed a Shia mosque at Fawkner by fire, after earlier unsuccessful attempts by two of them. The crimes were carried out to advance the ideology of Islamic State and to intimidate Shia Muslims. There was no acceptable evidence of de-radicalisation. Mohamed & Chaarani were sentenced to IMP22y/17y, Moukhaiber to IMP16y/12y. At [1] Tinney J said:

“[M]otivated by hatred, intolerance, malevolence, and misguided piety, the three of you went by cover of night into a place of religious worship in a suburb of Melbourne, intent on destroying it by fire. You comprehensively achieved your aim, deriving, so it seems, great satisfaction from the outcome. The crime you committed on that morning was motivated by a strong belief in extreme views which have no place in this or in any civilized society. Your particular purposes were to advance what to most sensible people can only be seen as being a perverse ideology, and more particularly, to strike a blow against, and to intimidate and cause terror to, Shia Muslims. Stated thus, your crime was a heinous one. However, there is more to it than that. What you did reflected an attack upon a fundamental value in our society, namely, religious freedom, an attack upon the conventions and beliefs that all Australians hold dear, and indeed, an attack upon this society itself, a society under whose protection and sharing whose benefits you have lived throughout your lives in Australia. Looked at rationally, your crime is very difficult to understand, and quite impossible to excuse.”

In *DPP (Cth) v Ali* [2020] VSCA 330 the Court of Appeal allowed a Director's appeal against a sentence of IMP10y/7y6m imposed on the respondent who had pleaded guilty before Champion J to a single charge of intentionally doing an act in preparation for, or planning, a terrorist act contrary to s.101(6) of the *Criminal Code* (Cth). The respondent who was 20 years old at the time of the offence and 23 years old at the time of sentence had planned a mass murder of civilians and the taking of hostages in Federation Square Melbourne on New Year's Eve in 2017. The core features of the planned attack were the killing of civilians, targeting a crowd of people to maximise casualties and the respondent's eventual death, to achieve martyrdom. The respondent planned to repeatedly shoot into the crowd moments before midnight using a rapid fire assault rifle, before taking hostages in a neighbouring bar and making one of the hostages hold the Islamic State ('ISIS') flag up to a window. The respondent had attempted to arrange the purchase of a rifle. His plan was likely to have been carried out but for his arrest. At [68]-[70] Maxwell P, McLeish & Weinberg JJA said:

[68] “[I]t cannot be doubted that the terrorist act for which the respondent planned and prepared was of the most terrible kind. He intended to inflict mass casualties on random members of the public, gathered together at a time of annual civic celebration. An additional sinister element, involving the taking of hostages, was calculated to subject a smaller group of victims to a more intimately terrifying encounter. The whole plan was designed with the objective of instilling widespread fear in the community, and to inspire others by the respondent's example. If the planned events had come to fruition, they would have left an indelible stain on the civic and national consciousness.

[69] The gravity of the acts, and the respondent's preparedness to commit them, which subsisted until his arrest, goes to both the objective gravity of the offending and the respondent's moral culpability. Both were of the highest level. As in *MHK* (2017) 52 VR 272, 291 (Warren CJ, Weinberg and Kaye JJA), the respondent's mentality was one of 'total callousness'. He was 'devoid of any sense of conscience about the tragedy and suffering he was planning to inflict'. He spoke of his plan with enthusiasm.

[70] The case can be distinguished from others where the planning or preparation was more advanced, but the truth of the matter is that, at the time of the charged acts, the respondent had little left to do in that regard other than acquire the funds and then proceed with the purchase of the weapon and ammunition he thought he had arranged with the UCOs, then wait for the date when he planned to act. This was not a case where components were yet to be assembled into an explosive device or co-offenders needed to be recruited: Cf *Lodhi* (2006) 199 FLR 364, 369 [31], where Whealy J found the planning was 'at a very preliminary stage' and (at 373 [51]) 'a good deal more work and preparation would have been necessary to advance the construction of a physically assembled bomb'. The respondent had contemplated where and when to launch his attack so as to have maximum impact, including working out where he could achieve an elevated position above the crowd.”

In holding that the sentence was manifestly inadequate and fixing a sentence of IMP16y/12y in lieu, Maxwell P, McLeish & Weinberg JJA said at [90]:

“[T]he authorities are clear that that, just as youth is of diminished significance in cases of extreme violence, so mitigating factors personal to the offender may be given reduced weight in sentencing for terrorist offences, given the protective purpose of the legislature in creating those offences. It must also be acknowledged that there was a qualification attached by the judge to his findings regarding rehabilitation...derived from the fact that the respondent was not exposed to terrorist propaganda while in prison and could in future again fall under its influence.”

In the course of its consideration of the appeal the Court of Appeal discussed and analysed a number of terrorism sentences which it said at [102] “provide useful guidance when looked at comparatively in the light of the criteria of offence seriousness...; the nature of the contemplated terrorist act; the nature and extent of the preparatory conduct; the degree to which the planning/preparation had advanced towards its objective; and whether the terrorist act was likely to have occurred had the offender not been arrested”. These include:

- at [92] *Lodhi* (2006) 199 FLR 303; (2007) 179 A Crim R 470: the 33 year old offender had sought information about the availability of materials capable of being used to make explosives, and obtained maps of electricity supply systems with the intention of bombing those systems to ‘advance the cause of violent jihad’; after a trial the judge found there was no evidence the offender had renounced his fundamentalist beliefs and he had shown no remorse or contrition; in mitigation he had no prior convictions and had a strongly supportive family background; sentence IMP20y upheld on appeal, Spiegelman CJ emphasising at [32] that the main consideration in sentencing for terrorism offences is protection of the community;
- at [93] *MHK* [2016] VSC 742 (Lasry J); (2017) 52 VR 272, 289 (Warren CJ, Weinberg & Kaye JJA): offender – aged 17 at the time of the offending – having fallen under the influence of ISIS propaganda planned to build an explosive device and detonate it in the Melbourne CBD or a train or police station; sentence of IMP7y/5y increased to IMP11y/8y3m;
- at [94] *Fattal* [2011] VSC 681 (King J); [2013] VSCA 276 (Buchanan AP, Nettle and Tate JJA): 3 offenders aged between 25 & 32 were charged with conspiracy to do acts in preparation for or planning of a terrorist act, namely for 6 people to enter Holdsworthy army barracks and shoot as many people as possible before being killed as martyrs: sentence of IMP18y/y upheld on appeal, the Court noting that in *R v Kruezi* [2020] QCA 222 at [47] McMurdo and Mullins JJA observed that the offence of conspiracy to commit an offence under s 101.6 of the Code is objectively more serious than the commission of an offence under s 101.6 by a single offender, citing *Elomar* (2010) 264 ALR 759, 775–6 [64] (Whealy J) and *Abbas (CA)* [2020] VSCA 80, [60] (Priest, Kaye and T Forrest JJA);
- at [95] *Besim* [2016] VSC 537, (Croucher J); [2017] VSCA 158 (Warren CJ, Weinberg & Kaye JJA): offender – aged 18 at the time of the offending – planned to crash a car into a police officer on Anzac Day and then behead the officer with a knife; sentence of IMP10y/7y6m increased to IMP14y/10y6m;
- at [96] *Abbas* [2016] VSC 742 (Lasry J); [2020] VSCA 80 (Priest, Kaye and T Forrest JJA): aged 22 and driven by ‘violent and extreme teachings’ he was one of 4 co-conspirators who had purchased materials to make an explosive device and had tried to make a bomb, had conducted reconnaissance of Federation Square with a view to detonating explosives or using bladed weapons or firearms there with the intention of causing maximum death, damage and fear, had detonated or attempted to detonate explosive devices in rural Victoria and had also purchased two machetes; the level of preparation was described by the sentencing judge as ‘well advanced’ and the planned attack was ‘imminent’ – sentence IMP24y upheld on appeal where the sentence was described at [68] as ‘quite moderate’;
- at [97] *Khaja* [2018] NSWSC 238 (Fagan J): 18 year old offender engaged in reconnaissance of an army barracks and court buildings as potential targets for a shooting and suicide attack involving up to 50 deaths; the planning was found to be at an advanced stage; Fagan J did not regard the plea of guilty, made very late, as evidencing remorse or contrition but regarded the offender’s denunciation of ISIS as disingenuous and was not satisfied that his support for ISIS had changed or had any foreseeable prospect of doing so; IMP19y; no appeal.
- at [98]: *Baladjam* (2018) 341 FLR 162, 172 (Bathurst CJ);
- at [100] *Elomar* (2010) 264 ALR 759, 777 (Whealy J); 5 co-offenders aged 20-39 intended at least to cause serious damage to property but envisioned the possibility of serious injury or death as a result of use of explosives or firearms; sentences IMP23-28y upheld on appeal.

See also *CDPP v Galea* [2020] VSC 750 – acts in preparation for, or planning, a terrorist act and attempting to make a document likely to facilitate a terrorist act – IMP12y/9y.

11.2.34 Sentencing for firearms offences: importation

In *DPP v Moore* [2019] VSCA 89 the 64 year old respondent had pleaded guilty to six charges involving the importation of 150 firearms – being fully automatic machine guns and semi-automatic hand guns – over a period of 3½ years. Four of the charges involved completed importations, two involved attempts. The respondent was aware that some of the weapons had been used in connection with criminal activity. Describing the offending as “persistent, planned and sophisticated” and referring to the danger to the community posed by firearms, the Court of Appeal allowed the DPP appeal, set aside the sentence of IMP10y3m/6y and resented the respondent to IMP15y/11y. At [97] the Court said:

“Over a period of some three and a half years, Munro engaged in persistent, planned, sophisticated offending to bring into Australia mass killing machines the only purpose of which was their use in the threatened or actual taking of human life in the course of criminal activity. The total effective sentence and non-parole period are well below what was required to reflect the aggregate criminality of the offending: See, for example, *Postiglione v The Queen* (1997) 189 CLR 295, 307–8; *Azzopardi v The Queen* (2011) 35 VR 43, 59–60 [57]–[58].

11.2.35 Sentencing for theft and theft of motor vehicle compared

In *Chamma v The Queen; El Houli v The Queen* [2020] VSCA 232 the Court of Appeal (Priest, Beach and T Forrest JJA) said at [71]:

“Underlying the submissions of each applicant was a contention that thefts of motor vehicles are somehow less serious forms of thefts than other thefts. That contention is incorrect. The objective gravity of any theft needs to be considered by reference to what was taken (including its value), from whom it was taken, and all other relevant surrounding circumstances, including the purpose for which it was taken. It simply does not follow that because the theft concerned a motor vehicle, then necessarily the theft is in some lower category of the offence.”

11.3 Some mechanics of sentencing

11.3.1 “Instinctive synthesis” or “two-tiered approach”

In recent years there has been a great deal of high-level judicial debate as to whether a sentencing judge must impose a sentence which represents his or her “instinctive synthesis” of all of the various aspects involved in the sentencing process or whether, on the other hand, he or she is entitled to adopt a “two-tiered” approach, namely first to determine what would be a proper sentence absent mitigating factors and then reducing that sentence by reference to such mitigating factors as may exist. The distinction was discussed by the Court of Appeal in *R v McIntosh* [2005] VSCA 106 at [25] where the “two-tiered” approach was described as “impermissible”. The Court of Appeal continued:

“It seems clear enough that...a two-tiered approach to the imposition of the sentence effectively constitutes sentencing error in this jurisdiction. The proper approach that must be adopted in this jurisdiction is based on the instinctive or intuitive synthesis, as that concept was explained in *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292 at 300-301 and affirmed in *R v Young* [1990] VR 951 (and in later decisions of this Court).”

In *R v Young* [1990] VR 951 the sentencing judge determined the sentence which was proportionate to the gravity of each of the charges. Then, having regard to other considerations, including factors peculiar to the particular offender such as previous convictions, he determined the actual sentence to be imposed. In their joint judgment Young CJ, Crockett & Nathan JJ disapproved this approach, holding at p.960 that “its adoption would be likely to lead either to the imposition of inadequate sentences or to injustice”. Their Honours continued:

“What is a sentence proportionate to an offence is a matter of discretion and there must in most cases be a range of sentences open to a sentencing judge which are proportionate to the offence. There cannot be said to be a sentence which is *the* proportionate sentence...Thus to attempt to fix a proportionate sentence before fixing the sentence to be imposed will only multiply the possibilities of error.”

In so holding, the Court of Criminal Appeal in *R v Young* approved and applied dicta of Adam & Crockett JJ in their majority judgment in *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292 at 300:

“Now, ultimately every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless (as it was thought to be in *Kane’s Case* [1974] VR 759 at 764-766) to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.”

See also *R v Holder* [1983] 3 NSWLR 245 per Priestley JA at p.270; *DPP v Rose, DPP v Miller* [2005] VSCA 275 at [29]; *Brown v The Queen* [2019] VSCA 286 at [13]-[18].

Following *R v Young*, Victorian courts have continued to reject the two-stage approach {see e.g. *R v Nagy* [1992] 1 VR 637; *R v Li* [1998] 1 VR 637; *R v Ken Ha Khanh Phong* [2005] VSCA 149 at [84]} save, of course, for situations where a statute required specific identification of the extent of an adjustment to a sentence, as for instance in s.21E of the Crimes Act (Cth).

In *Markarian v The Queen* [2005] HCA 25, a decision handed down on 18/05/2005, the High Court re-entered the debate in earnest in relation to a sentence handed down by the NSW District Court and subsequently increased on appeal by the NSW Court of Criminal Appeal. In their joint judgment Gleeson CJ, Gummow, Hayne and Callinan JJ - while noting that “identifying ‘instinctive synthesis’ and ‘transparency’ as antonyms in this debate misdescribes the area for debate” – nevertheless adopted the majority view in *Wong* (2001) 207 CLR 584 and the minority view in *AB v The Queen* (1999) 198 CLR 111 that the adoption of a two-stage approach to sentencing was wrong. In his judgment at [50]-[68] McHugh J endorsed his earlier minority view in *AB v The Queen*, strongly preferring the ‘instinctive synthesis’ approach. At [35]-[39] Gleeson CJ, Gummow, Hayne and Callinan JJ set out in detail their reasons for endorsing *Wong*:

[35] “The appellant’s next submission invited the Court to reject sequential or two-tiered approaches to sentencing taking as their starting point the maximum penalty available, and to state as a universal rule to the extent that legislation does not otherwise dictate, that a process of instinctive synthesis is the one which sentencing courts should adopt.

[36] No universal rules can be stated in those terms. As was pointed out earlier, much turns on what is meant by a ‘sequential or two-tiered’ approach and, likewise, the ‘process of instinctive synthesis’ may wrongly be understood as denying the requirement that a sentencer give reasons for the sentence passed. So, too, identifying ‘instinctive synthesis’ and ‘transparency’ as antonyms in this debate misdescribes the area for debate.

[37] In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed. As Gaudron, Gummow and Hayne JJ said in *Wong* (2001) 207 CLR 584 at 611-612 [74]-[76]:

‘Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be ‘increment[s]’ to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a ‘two-stage approach’ to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.

It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say ‘may be’ quite wrong because the task of the sentencer is to take account of *all* of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an ‘instinctive synthesis’. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

In *R v Thomson* (2000) 49 NSWLR 383, Spigelman CJ reviewed the state of the authorities in Australia that deal with the ‘two-stage’ approach of arriving at a sentence, in which an ‘objective’ sentence is first determined and then ‘adjusted’ by some mathematical value given to one or more features of the case, such as a plea of guilty or assistance to authorities. As the reasons in

Thomson reveal, the weight of authority in the intermediate appellate courts of this country is clearly against adopting two-stage sentencing and favours the instinctive synthesis approach. In this Court, McHugh and Hayne JJ, in dissenting opinions in *AB v The Queen* (1999) 198 CLR 111 expressed the view that the adoption of a two-stage approach to sentencing was wrong. Kirby J expressed a contrary view. We consider that it is wrong in principle. The nature of the error can be illustrated by the approach adopted by the Court of Criminal Appeal in these matters. Under that approach, the Court takes, for example, the offender's place in the hierarchy and gives that a particular significance in fixing a sentence but gives the sentencer no guidance, whatever, about whether or how that is to have some effect on other elements which either are to be taken into account or may have already been taken into account in fixing the guideline range of sentences. To take another example, to 'discount' a sentence by a nominated amount, on account of a plea of guilty, ignores difficulties of the kind to which Gleeson CJ referred in *R v Gallagher* (1991) 23 NSWLR 220 when he said:

'It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.'

So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.'

[38] Following *Wong* benches of five judges in New South Wales in *R v Sharma* (2002) 54 NSWLR 300 and *R v Whyte* (2002) 55 NSWLR 252 and in South Australia in *R v Place* (2002) 81 SASR 395, have sought to state general sentencing principles to be applied in those States. In the first two of these cases the Court of Criminal Appeal of New South Wales endorsed an approach of instinctive synthesis as a general rule but also accepted as a qualification that departure from it may be justified to allow for separate consideration of the objective circumstances of the crime. On occasions intermediate courts of appeal have however refused to find error where a staged approach has been undertaken. In *Place* at 424-425 the Court of Criminal Appeal of South Australia (Doyle CJ, Prior, Lander, Martin and Gray JJ) although it rejected a staged approach in general, made it clear that a reduction of penalty for a plea of guilty should be identified. This approach, their Honours held, was in conformity with the relevant sentencing legislation of South Australia.

[39] Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of 'instinctive synthesis', as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression 'instinctive synthesis' may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge."

Although agreeing with the orders proposed by the other members of the Court, Kirby J was strongly in dissent on the "minor judicial controversy" on the proper approach to sentencing. His Honour had previously suggested that "some of the debates over the two-stage approach and instinctive or intuitive synthesis may be semantic, not substantive": see e.g. *Cameron* (2002) 209 CLR 339 at 362. To that extent he agreed with what was said in paragraph [36] of the joint reasons. But a sticking point remained, his Honour being unable at [132] to "accept a *Willisroft* 'instinct' or a *Young* prohibition on two-stage reasoning as sentencing principles, where a more transparent course is available,

appropriate and more conformable with modern legal principles governing the deployment of public power". At [124] Kirby J stated:

"Where so many judges in Australia, experienced in criminal trials and in sentencing, have expressed their disagreement with the approaches derived from *Williscroft* and *Young*, it is undesirable, in my respectful opinion, for this Court (even in the present watered-down version) to impose those authorities on sentencing judges throughout the Commonwealth."

And at [139] his Honour concluded:

"So analysed, the residue of this judicial debate over twenty years – in this Court over the past five years – is revealed for what it is. Australian judges must now express their obeisance to an 'instinctive synthesis' as the explanation of their sentencing outcomes. It might be prudent for them to avoid mention of 'two stages' or of mathematics. Yet in many instances (and increasingly by statutory prescription) if judges do so, no error of sentencing principle will have occurred. Such mention may, in fact, sometimes even be required. The lofty and absolute prescriptions of *Williscroft* and *Young* remain in place like the two vast and trunkless legs of stone of Ozymandias. But, with all respect, they are now beginning to look just as lifeless. One day, I expect that travellers to the antique land of this part of the law of sentencing will walk this way without knowing that the two proscriptions once were there."

In *R v DCP* [2006] VSCA 2 two members of the Court gave cautious support to a two-tier approach in very limited circumstances. At [36] Callaway JA said: "It is usually unhelpful to speculate as to what a sentence would have been absent a plea of guilty, but there are some cases where such an argument may with due caution be permissibly advanced. See, for example, *R. v. Monardo* [2005] VSCA 115 at [4]." And at Vincent JA said:

"Like Callaway JA, I acknowledge that whilst there may be some situations in which assistance can be derived from a consideration of the sentence that would have been appropriate in the absence of mitigating circumstances, to embark upon such an exercise would rarely be helpful and, in any event, would need to be approached with care. In this case, what counsel for the appellant endeavoured to do was to ascribe to the mitigating factors a particular value measured in years of imprisonment and say that, allowing for them, a sentence of specific length would otherwise have been ordered. As Chernov, J.A. pointed out, to do so runs quite counter to the approach which has been adopted in this Court for a number of years."

In *R v Flaherty (No.2)* [2008] VSC 270 at [8] Kaye J held that it was not the intention of s.6AAA of the Sentencing Act 1991 [as amended] – which like s.362A of the CYFA requires a court to quantify a sentencing discount for a plea of guilty in certain circumstances – "to abrogate, in its entirety, the fundamental approach to sentencing, as an 'instinctive synthesis' of all relevant circumstances". However, his Honour went on to discuss at [9]-[15] the practical difficulties of applying s.6AAA while still holding true to the concept of an "instinctive synthesis" in sentencing.

Other cases involving a discussion of instinctive synthesis include *R v Bangard* [2005] VSCA 313 at [20] per Eames JA; *R v Mladenov* [2006] VSCA 246 at [4]-[5] per King AJA with whom Ashley JA & Smith AJA agreed; *R v Eastham* [2008] VSCA 67 at [11]-[12] per Buchanan JA with whom Neave JA & Lasry AJA agreed; *R v Johnston* [2008] VSCA 133 at [16] per Nettle JA with whom Buchanan & Ashley JJA agreed; *R v Hasan* [2010] VSCA 352 at [47] per Maxwell P, Redlich & Harper JJA; *R v Trajkovski & Waters* [2011] VSCA 170 at [44]-[93] per Weinberg JA (with whom Ashley JA & Hargrave AJA agreed); *Muldock v The Queen* [2011] HCA 39; (2011) 244 CLR 120 at [28].

11.3.2 Use of sentencing statistics and sentencing snapshots

In *DPP v Ross* (2006) 166 A Crim R 97, 104 Maxwell P said that consistency "in sentencing is absolutely fundamental to public confidence in the criminal justice system. It is also a basic requirement of the rule of law." It is therefore legitimate to consider the sentences imposed in other cases: see *DPP v TY (No 3)* [2007] VSC 489 at [66] per Bell J; *Shields v The Queen* [2011] VSCA 386 at [40] per Robson AJA.

In a schedule to the judgment of the Court of Appeal in *DPP v OPQ* [2012] VSCA 115 there are two tables detailing respectively:

- six sentences imposed for possession and attempted possession of a marketable quantity of a border controlled drug contrary to s.307.6(1) of the Cth Criminal Code; and

- 24 sentences imposed for importation and attempted importation of a marketable quantity of a border controlled drug contrary to s.307.2(1) of the Cth Criminal Code

Neave JA (with whom Maxwell ACJ specifically agreed) stated at [39] that the “provision of information of this kind is particularly helpful when it is claimed that a sentence falls outside the range of sentences which can be imposed for a particular offence.”

However, in *R v McIntosh* [2005] VSCA 106 the Court of Appeal sounded a note of caution in relation to the use of sentencing statistics in determining the appropriate sentence in any particular case, and specifically in that case in determining the appropriate sentence on a count of attempted murder: At [10] Chernov JA, with whom Batt & Vincent JJA agreed, said:

“It has been often said by this Court that past sentences and sentencing statistics are, at best, only a guide because ‘no two cases are the same and ... the circumstances of particular offences and particular offenders are infinitely various, especially where multiple offences ... are concerned’: see *R v Young* [1990] VR 951 at 955 per Young CJ, Crockett and Nathan JJ. And, as Callaway JA said in *R v Adajian* [1999] VSCA 105 at [28]: ‘Sentences are not precedents which must be applied unless they can be distinguished, and the paramount duty of the court is to do justice in individual cases’. Moreover, the time is long gone since there has been any serious suggestion that there is a specific practical ceiling on the period of imprisonment that may be ordered for this crime: *R v Kasulaitis* [1998] VR 224 at 233 to 234, per Batt JA, with whom Phillips CJ and Callaway JA agreed. As the learned President said in *R v. Boaza* [1999] VSCA 126 at [48]: ‘There are no ‘benchmarks’ setting binding limits for the crime of attempted murder...’ This is unsurprising given that, as I have said, each case must be decided on its own facts and given the serious nature of the offence, in respect of which the maximum custodial sentence has been raised from 20 to 25 years.”

In *DPP v Ralph* [2007] VSCA 305 at [56] Coldrey AJA (with whom Maxwell P & Cavanough AJA agreed) said in sentencing the applicant for intentionally causing serious injury:

“The use of sentencing statistics of this nature provides a crude tool by which to measure the appropriateness of any individual sentence. It is trite to observe that such statistics provide no indication of the facts and circumstances relating to a specific offence and specific offender. In this regard, such material is of even more limited assistance than that sought to be derived by a comparison of individual cases. However, what those statistics make clear is that the sentencing range for this offence during the period cited varied from immediate custodial sentences to suspended sentences, intensive correction orders and community based orders. See *DPP v Fevaleaki* (2006) 165 A Crim R 524; [2006] VSCA 212 at [19]-[20].”

In *R v Bangard* (2005) 13 VR 146; [2005] VSCA 313 Buchanan & Nettle JJA also referred to the limited value of sentencing statistics but were a little more positive. At [39]-[40] Nettle JA said:

“Apart from the inherent limitations of sentencing statistics [*R v Simon Milne Snowden* Unreported, Appeal Division, 22/3/94, at 6; *R v Papazisis and Bird* (1991) 51 A Crim R. 242 at 245; Fox & Freiberg, *Sentencing, State and Federal Law in Victoria*, 2nd ed. at [12.214]], those which are put forward imply that a number of judges in recent years have given insufficient weight to the increase in the maximum sentence for manslaughter, from 15 years to 20 years, which was implemented with effect from September 1997... So to say is not to ignore the importance of consistency in sentencing. If a sentence is higher than any other in statistics furnished to a court of criminal appeal, it goes without saying that it is a matter which calls for scrutiny [*The Queen v Bugmy* (1990) 169 CLR 525 at 538.] That is why trial judges should and do take sentencing statistics into account. But if upon analysis a sentence accommodates all of the criteria to which a sentencing judge must have regard, including the maximum sentence set by Parliament, the fact that the sentence may range above the current practice is not a basis to disturb it. [cf. *R v Josefski* [2005] VSCA 265 at [83], per Chernov JA].

At [11] Buchanan JA said:

“Sentencing statistics may be of limited value, for each sentence involves a unique synthesis of diverse factors stemming from the circumstances of the crime and the character and antecedents of the offender. Nevertheless, statistics may provide guidance by showing general trends in sentencing. In *R. v. Giordano* [1998] 1 VR 544 at 549 Winneke, P. said:

‘However, a general overview of the sentences imposed by courts over a substantial period for offences of a similar character must inevitably play its part in provoking the instinctive reaction of any court which is asked to consider whether a particular sentence is manifestly excessive or manifestly inadequate.’

His Honour was speaking of appellate courts, but in my view sentencing statistics may equally benefit judges imposing sentences at first instance.”

However, at [27]-[29] Eames JA spoke positively of the statistical analysis of 93 sentences for manslaughter which had been produced by counsel on the appeal: “I found the material very helpful, albeit in a ‘broad-brush’ way.” And at [31]-[32] & [34] His Honour gave unqualified approval to a trial judge’s use of statistics:

[31] “Computer data bases such as those of the Victorian Sentencing Manual (available to the public on the website of the Judicial College of Victoria) and of the Sentencing Advisory Council are very valuable research tools. The website of the Sentencing Advisory Council is also linked to a number of additional sites, both in Victoria and nationally, which also provide statistical information concerning sentencing.

[32] It is to be borne in mind that upon reserving to consider a sentencing decision a judge can conduct his or her own research on sentencing practices whether by consulting sentencing text books, decided cases or by searching relevant data bases...

[34] In my opinion the Courts should not discourage counsel from providing such practical assistance as [counsel] has demonstrated could have been provided to the judge in this case. The judge made it clear that he was inviting assistance in the exercise of his task; he was not inviting counsel to usurp his role.”

In *R v Hasan* [2010] VSCA 352 at [46] Maxwell P, Redlich & Harper JJA conceded that sentencing statistics and sentencing snapshots have “a part to play; but they must be used with their limitations in mind.” At [45]-[47] their Honours explained why and also explained how such statistics and snapshots are to be used and how they dovetail with the “instinctive synthesis”:

[45] “Tables or graphs showing average or mean sentences across the full spectrum from the statutory maximum to nothing, while important, will also be of limited use because they cannot of themselves identify the appropriate range for an offence of the particular gravity of that for which the particular offender is to be punished. Indeed, their limitations are conveyed by the description given to them by the Sentencing Advisory Council of Victoria as ‘snapshots’.

[46] The tables, therefore, have a part to play; but they must be used with their limitations in mind. As to the limitations in using comparable cases, this Court said in *Hudson v The Queen* [2010] VSCA 332 at [32]:

‘To undertake and utilise a comparative analysis, whether at first instance or on appeal, in an attempt to identify a sentence in a “like” case that is a fair comparison, is calculated to introduce a level of mathematical precision inimical to the instinctive synthesis. Where the parity principle is not enlivened, recourse to other cases is not undertaken to strike some equality with another particular sentence. Consistency is to be achieved by the application of the appropriate range and not from the application of single instances of “like” cases. The adoption of a sentence selected by an earlier court, even if the case is very similar, would be to sacrifice the proper exercise of judicial discretion in pursuit of consistency of sentencing.’

[47] Following an appropriate study of comparable cases, together with the application of the relevant sentencing principles, the judge will be in a position to identify the boundaries marking the range within which the particular sentence must fall. Up to this point, the exercise will have been a largely objective one, but with an element of the subjective introduced by the process of instinctive synthesis without which the case for which, and the offender upon whom, the sentence is to be imposed cannot be assessed. Beyond the point at which the boundaries are identified, however, the judge must exercise his or her discretion in deciding where within the range the particular sentence should fall.”

In *R v McNeill & Brown/Piggott* [2008] VSCA 190 at [130] Buchanan JA reiterated his qualified approval of the use of sentencing statistics and explained how they could most appropriately be used:

“In my opinion, counsel can best assist a sentencing judge, not by advancing what they consider to be sentences at the lower or upper limits of a sound sentencing discretion, but by making submissions as to the existence and nature of aggravating and mitigating

circumstances and providing some guide to the manner in which other judges have approached like cases by supplying sentencing statistics and citing passages from decided cases which bear upon aspects of the instant case. The synthesis of the raw material is the task of the sentencing judge, not counsel.”

In their joint judgment in *R v AB (No 2)* [2008] VSCA 39 at [42] Warren CJ, Maxwell P & Redlich JA were generally supportive of the use of sentencing statistics as an aid to the “instinctive synthesis”:

“Though sentencing statistics have ‘inherent limitations’ {*R v Bangard* (2005) 13 VR 146, 153 [39] (Nettle JA)} and are of limited assistance {*R v Musson* [1997] 1 VR 656, 660; *DPP v Josefski* (2005) 13 VR 85, 105-6 [83] (Chernov JA)}, it is generally accepted now that they provide useful guidance as to general trends in sentencing. Such information must ‘inevitably play its part in provoking the instinctive reaction of any court’ {*R v Giordano* [1998] 1 VR 544, 549 (Winneke P)}, whether in imposing, or reviewing, a sentence {*R v Bangard* (2005) 13 VR 146, [11] (Buchanan JA), [23] (Eames JA)}. Such information provides an extremely useful aid in achieving uniformity of sentence for a particular category of crime {*R v Zakaria* (1984) 12 A Crim R 386, 388 (Crockett J)}.”

However, in *R v Rowlands* [2007] VSCA 14 at [13] Eames JA outlined some of the limitations of statistics relating to sentencing trends for armed robbery published by the Sentencing Advisory Council and which showed the average head sentence to be 3y 9m and the average non-parole period to be 2y 2m:

“Useful as such statistics are, whether they relate to median or average sentences imposed on offenders, there are limitations to them. They cannot tell us, for example, what would be the sentencing range for persons such as this offender, who could not claim youth in his favour for sentencing and who had multiple very serious prior convictions for violence and dishonesty, which offences in some cases resulted in sentences of imprisonment.”

And in *R v Vandenberg* [2009] VSCA 9 at [27] Nettle JA was quite scathing about the utility of sentencing statistics:

“Statistical reference to the most common length of actual sentence imposed is seldom much of assistance, and in this case I think largely irrelevant. To state the obvious, each case depends upon its own facts and circumstances and, critically in a case of this kind, upon the effects on the victim of the offence.”

See also *R v Joan Mary Walsh* [2006] VSCA 87 at [28]-[32] per Neave JA; *R v Winter* [2006] VSCA 144 at [57] per Maxwell P; *R v Detenamo* [2007] VSCA 160 at [13]; *R v Casey* [2008] VSCA 53 at [56]-[60]; *R v Parker* [2009] VSCA 19 at [44]; *Alavy v The Queen* [2014] VSCA 25 at [24]; *Hili v The Queen* (2010) 242 CLR 520; *Barbaro v The Queen* [2014] HCA 2.

11.3.3 The Sex Offenders Registration Act 2004 and its relevance to sentencing

The Sex Offenders Registration Act 2004 (Vic) came into operation on 01/10/2004. Section 1(1) states that the purpose of the Act is:

- (a) to require certain offenders who commit sexual offences to keep police informed of their whereabouts and other personal details for a period of time-
 - (i) to reduce the likelihood that they will re-offend; and
 - (ii) to facilitate the investigation and prosecution of any future offences that they may commit;
- (b) to prevent registered sex offenders working in child-related employment.

By providing for the establishment of a Register of Sex Offenders, the Act requires certain offenders who are, or have been, sentenced for registrable offences, to report specified personal details to police for inclusion in the Register. Such offenders must then report annually to police, unless there is a change in their personal details beforehand, in which case such change must also be reported. Under s.46, failure to comply with any reporting obligations without a reasonable excuse is an offence for which the maximum penalty is level 6 imprisonment (5 years maximum).

The Act has application to both adult and juvenile offenders, albeit to a much more restricted class of juvenile offenders. Save for the uncommon cases referred to in s.6(2) of a corresponding registrable offender or a New South Wales registrable offender, it appears from ss.6-11 that the Act does not apply to a person sentenced under the CYFA, the CYP A or the Sentencing Act 1991 for an offence committed as a child unless-

- the person has been sentenced for a Class 1 or Class 2 offence (listed in Schedules 1 & 2 respectively); and
- the Court has imposed a fine, probation, YSO, YAO or detention under the CYFA or CYPA or a sentencing order under the Sentencing Act 1991; and
- the Court is satisfied beyond reasonable doubt that the child poses a risk to the sexual safety of one or more persons or of the community; for this purpose it is not necessary that the court be able to identify a risk to particular people, or to a particular class of people.

It appears from ss.11(2) & 11(3) that a court sentencing a person for a Class 1 or Class 2 offence committed as a child has a discretion whether or not to make a sex offender registration order but may make such an order only if it is satisfied beyond reasonable doubt that the child poses a risk to the sexual safety of one or more persons or of the community. An instructive case is *Victoria Police v MA* [2011] VChC7. The 17 year old offender – who had no prior criminal history – pleaded guilty to assault with intent to rape, stalking and rape, the three offences being committed over a 27 day period. On the charge of rape a magistrate had sentenced him to YJC 9m. In the course of deciding whether MA should be subject to the reporting requirements of the Act, her Honour referred to the decision of the Court of Appeal in *RJE v The Secretary to the Department of Justice, Attorney-General for the State of Victoria and Victorian Human Rights Commission* [2008] VSCA 265 where Maxwell P & Weinberg JA stated at [16]:

“Predicting whether a particular person will commit a criminal offence in the future is notoriously difficult...the making of such a prediction in a particular case requires expertise in observation and assessment of those who commit offences of a particular type, and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending.”

Her Honour also noted that in *RJE* at [24] Maxwell P & Weinberg JA had cited with approval dicta of Denning LJ in *Miller v Minister of Pensions* [1974] 2 All ER 372 at 373-374 in relation to the criminal standard of proof beyond reasonable doubt:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt must not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt but nothing short of that will suffice.”

Her Honour held that the word “risk” in s.11(3) means “a real or appreciable risk” for the following reasons:

- (1) It is not mandatory for young offenders to be registered. Accordingly, in order to give effect to and not undermine the exercise of a discretion, it must be more than a statistical risk which necessarily arises upon a person having been found guilty of a registrable offence.
- (2) Such an interpretation would be consistent with the acknowledgement by Parliament of the rehabilitative prospects of young offenders.”

Applying this test to the evidence – including the evidence of a forensic and clinical psychologist LB – her Honour was “satisfied beyond reasonable doubt that the respondent poses a risk, a real risk, to the sexual safety of the community”. Accordingly she ordered that MA be subject to the reporting requirements of the Act for a period of 7½ years. See also *Bowden v The Queen* [2013] VSCA 382 at [30]-[54]; *Singh v The Queen* [2013] VSCA 300 at [44]-[54].

Section 34 of the Act sets the length of reporting period for an adult registrable offender as follows:

- 8 years if he or she has only ever been found guilty of a single Class 2 offence; or
- 15 years if he or she has only ever been found guilty of a single Class 1 offence or of two Class 2 offences; or
- life if he or she has been found guilty of-
 - 2 or more Class 1 offences; or
 - a single offence referred to in item 2 of Schedule 1; or
 - a Class 1 offence and one or more Class 2 offences; or
 - 3 or more Class 2 offences.

Section 35 provides that the reporting period for a juvenile registrable offender is half that for an adult (or 7½ years in a case where an adult would be required to report for life).

In *DPP v Ellis* [2005] VSCA 105 Callaway JA, with whom Batt & Buchanan JJA agreed, said:

[16] “As a general rule...an offender’s reporting obligations under the Sex Offenders Registration Act are irrelevant. Parliament has decided that that persons sentenced for particular offences constitute a class in relation to whom such obligations are appropriate.

They are an incident of the sentence. It would unduly burden the sentencing process if judges were required to take them into account, any more than if they were required to take into account other ordinary incidents of the criminal justice system. An exception should be recognized only where the reporting obligations operate with unusual severity on a particular offender. In other words, they are relevant to sentencing only in exceptional circumstances. Like Brooking JA in *R v Stevens* [1999] VSCA 173 at [10], a case concerned with s.31(5A) of the *Sentencing Act*, I would be reluctant to see 'a jurisprudence of exceptional circumstances' develop for this purpose.

[17] The prohibition on taking part in child-related employment will usually be irrelevant too, but there will be occasions where it should be taken into account. The present case is an example: compare *Ryan v R* (2001) 206 CLR 267 at 285 [54] per McHugh J. The respondent was a qualified school teacher with some 12 years' experience who had been actively involved in voluntary activities. The loss of her career and her exclusion from those activities should be taken into account."

See also *R v Fidler* [2006] VSCA 17 at [14]-[17] per Charles JA; *WBM v Chief Commissioner of Police* [2012] VSCA 159.

In *Chan v The Queen* [2006] VSCA 125 at [17] Nettle JA noted that the regard which a sentencing judge might have to the effects of a sex offenders registration order in determining the requirements of general deterrence and community protection was now foreclosed by s.5(2BC) of the *Sentencing Act* 1991, enacted after the decision in *DPP v Ellis* and providing: "In sentencing an offender a court must not have regard to any consequences that may arise under the Sex Offenders Registration Act 2004 from the imposition of the sentence." However, as the *Sentencing Act* does not directly apply to juveniles sentenced under the CYFA, it may be that the principles in *DPP v Ellis* are still applicable in the Children's Court.

11.3.4 Power to direct that time held in detention before trial be reckoned as already served

In ss.18 & 35 of the *Sentencing Act* 1991 (Vic) a court sentencing a person to imprisonment or YJC pursuant to that Act is given express power to reckon as already served a period during which the person was held in custody before trial in relation to proceedings for any offences for which sentence was passed or proceedings arising from those proceedings.

Sections 411(5) & 413(1) of the CYFA import into the CYFA the powers which a sentencing court has under s.35 of the *Sentencing Act* when imposing imprisonment or adult YJC. Thus if a court sentences a young person to YRC or YJC under the CYFA, that court has statutory power to reckon as already served a period during which the person was held in custody before trial in relation to proceedings for any offences for which sentence was passed or proceedings arising from those proceedings.

In addition, a court sentencing a young person to YRC or YJC under the CYFA has power, as part of the exercise of a sentencing discretion quite distinct from the s.35 power, to take account, in the defendant's favour, a period during which he or she was held in custody before trial unless it is wholly unrelated to proceedings for the offences for which sentence is passed.

In *R v Arts and Briggs* [1998] 2 VR 261 at 264 the Court of Appeal referred with approval to dicta of Lord Bingham of Cornhill CJ in *R v Governor of Brockhill Prison; Ex parte Evans* [1997] QB 443 at 462 [emphasis added]:

"It has in our experience been the practice to assume that all periods of custody before sentence, other than custody *wholly unrelated* to the offences for which sentence is passed, will count against the period of the sentence to be served."

Applying this dictum and dicta from *R v Heaney* [Court of Appeal, unreported, 27/03/1996] and *R v Renzella* [1997] 2 VR 88, the Court of Appeal deducted from the head sentence a period that took account of the period of time the appellants' detention was "doubly warranted". See also *R v Wade* [2005] VSCA 276 at [11]-[12]; *R v Chimirri* [2003] VSCA 45 at [4]; *R v Orphanides* (2002) 130 A Crim R 403; *R v Greenslade* [2004] VSCA 213 at [31]; *R v Sheen* [2005] VSCA 296 at [7]; *R v Smith* [2006] VSCA 23 at [8]; *R v Watts & Black* [2007] VSCA 81; *R v Black* [2007] VSCA 82; *R v Harvey* [2007] VSCA 127; *R v Strezovski* [2007] VSCA 260; *R v Barrett* [2010] VSCA 133 at [39]-[53]; *R v Broad* [1999] 3 VR 31; *DPP v TY* [2009] VSCA 226; *R v Ciantar and Rose* [2010] VSCA 313; *R v Wheldon* [2011] VSCA 83 at [18]-[26]; *R v Cook* [2011] VSCA 187 at [12]; *R v Gavanas* [2013] VSCA 178 at [102]-[105]; *Pang v R* [2019] VSCA 56. For judicial discussion of the concept of deduction of "dead time", namely time spent in custody in respect of unrelated matters of which the prisoner was later

acquitted or in relation to which his or her sentence was reduced see *Warwick v The Queen* [2010] VSCA 166; *R v Karpinski* [2011] VSCA 94.

The outcome was similar in *R v Giakoumoghianakis* [2005] VSCA 156. The appellant had been kept in custody for “other offences” in respect of which he was ultimately acquitted. He had been on bail for the offences in respect of which he was sentenced and no application had been made to revoke that bail when he was taken into custody on the “other offences”. Hence that “period wasted” was not capable of being declared under s.18 of the Sentencing Act. The Crown conceded it was appropriate that “some adjustment to the sentence be made for the unwarranted time spent in custody”. Winneke ACJ, with whom Ormiston JA agreed, approved at [6] dicta of Callaway JA in *R v Kotzmann* [1999] 2 VR 123 at 137:

“There can be no question of a person on remand who is subsequently acquitted acquiring a kind of bank balance on which to draw in relation to subsequent offences unconnected with the reason for custody: see *R v Arts and Briggs* [1998] 2 VR 261 at 264; but sentencing involves a very wide discretion and the matters [relating to unconnected time in custody] are important parts of the applicant’s background. We are entitled to take them into account and to temper the sense of injustice that he entertains.”

At [7], while cautioning against regarding the outcome as a precedent, the majority in *Giakoumoghianakis’ Case* considered it “appropriate to make some adjustment to take account of the time spent in prison which...was unwarranted for reasons not the fault of the applicant”.

In *Underwood (a Pseudonym) v R (No 2)* [2018] VSCA 87 at [37] the Court of Appeal concluded that a person should have his or her time spent in immigration detention taken into account in a “broad and practical way” in the assessment of the sentence. Without further elucidating the phrase, the Court affirmed the general principle that “delay intervening between the offending and final resolution of criminal proceedings can, in recognised circumstances, be a significant factor going in mitigation of sentence”.

In *R v Sahhitanandan* [2018] VSC 550 the accused had pleaded guilty to a charge of dangerous driving causing serious injury. The victim had sustained significant and enduring injuries. Champion J had categorised the offence as “mid to upper level of seriousness”. The accused had spent 104 days on remand before being bailed. Then he was immediately taken into immigration detention where he remained for 527 days before being remanded back into prison custody for a period of 62 days. In imposing a sentence of IMP 2y3m/1y6m, his Honour said:

- at [49]: “[T]he period of immigration detention is not calculable as pre-sentence detention for the purposes of s 18(1) of the *Sentencing Act 1991*.”
- at [50]: “[E]ach day of that period of immigration detention should not result in a numerically equivalent reduction in the sentence...The period of immigration detention is nevertheless relevant to the assessment of sentence.”
- at [54]-[55]: “[I]t is appropriate to consider immigration detention in the overall intuitive synthesis of the sentencing process, rather than declaring a pre-sentence detention period to be deducted after the sentence is imposed...[T]he period spent in immigration detention should be regarded as a significant factor in mitigation of the head sentence and non-parole periods to be imposed.”

In [2019] VSCA 115 the Court of Appeal allowed an appeal by the accused on a narrow ground, stating at [37] that Champion J was in error in holding that the accused was in immigration detention for a reason not related to the proceeding. The appellant was resentenced to IMP 1y10m/1y3m. At [31]-[36] Priest, McLeish & Weinberg JJA stated-

[31] “Although there is a connection in the present case between the custody in immigration detention and the offence, the connection with the proceedings for the offence is too tenuous or remote to satisfy the statutory test. Custody in immigration detention is not brought about as part of the proceedings for the offence and does not have the conduct of those proceedings as its objective. Immigration detention exists in the context of executive powers to receive, investigate and determine applications for visas and to admit or deport applicants once the application is determined, and as such is lawful for that purpose alone and not for any punitive purpose: see, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 10, 32, 50 & 71 (McHugh J); *AlKateb v Goodwin* (2004) 219 CLR 562 at 571–3, 582, 584, 604-5, 636 & 638; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333 at 341, 343, 346, 355–6 & 359.

[32] The question is then, what account is to be taken of a period spent in immigration detention? As already noted, it was held in *Underwood* that the fact of such detention

must be recognised in a 'broad and practical way' in the sentence imposed, reflecting the fact that the offender has been deprived of his or her liberty during the relevant period: *Underwood* [2018] VSCA 87 [37] (Priest and McLeish JJA). That formulation drew upon the judgment of Brooking JA (with whom Winneke P and Hampel AJA agreed) in *R v Heaney* (Victorian Court of Appeal, 27 March 1996 at 6) where a period in remand which was outside the terms of an earlier version of s.18(1) was taken into account 'in a broad way': [2018] VSCA 87 [34]–[35]. See also *R v Renzella* [1997] 2 VR 88, 96, 98 (Winneke P, Charles and Callaway JJA) ('*Renzella*').

[33] The Court in *Underwood* referred also to *Akoka v The Queen* [2017] VSCA 214 (Warren CJ, Kyrou and Redlich JJA) where this Court gave credit for time spent in a residential rehabilitation facility. In the course of doing so, the Court explained how the question should be approached at [109]–[112] as follows:

'Self-evidently, it is in the community's interest that offenders — particularly young offenders with substance abuse problems — seek assistance from residential rehabilitation facilities and complete the rigorous treatment programs that they offer. Offenders will be encouraged to seek residential treatment if it is understood that sentencing judges will acknowledge, and give credit for, the punitive nature of residency in such a facility. The extent of that credit will depend on the circumstances of each case, including the nature and severity of the restrictions to which an offender has been subject and the duration of the offender's residency. Clearly, the period of residency must post-date the commission of the offences for which the offender is being sentenced. Further, a period of residency cannot be doubly credited. Thus, where the offender is sentenced on different occasions for separate offences following a period of residency, credit for that period can be given on only one of those occasions.

The credit referred to ... will, as with all other sentencing discounts, form part of the application of the instinctive synthesis without being numerically identified. However, as with other significant sentencing considerations, a sentencing judge should ordinarily explain how the punitive nature of residency at a rehabilitation facility has informed — in terms of the weight assigned to it — the instinctive synthesis.

Although residency at a rehabilitation facility has punitive elements, credit for it cannot be given in the same way as pre-sentence detention. Presentence detention involves time spent in custody and, in accordance with s 18(1) of the Sentencing Act 1991, it must be deducted from a custodial sentence in a precise mathematical manner for the entire period the offender has spent in detention. On the other hand, residence at a rehabilitation facility, no matter how restrictive and punitive, is not equivalent to time spent in custody. It will not ordinarily result in a deduction of the entire period of residency from a custodial sentence.

For these reasons, residency at a rehabilitation facility is also different in nature to *Renzella* time. Although *Renzella* time is actual time spent in custody, it falls outside s 18 of the Sentencing Act 1991. As *Renzella* time is real incarceration it will usually be given greater weight than time spent in a residential rehabilitation facility.'

[34] Several aspects of this reasoning are applicable to the case of immigration detention. First, the extent of the credit will depend on the circumstances of each case, including the nature and severity of the restrictions to which an offender has been subject and the duration of the detention. Secondly, the period of detention must post-date the commission of the offence for which the offender is being sentenced. Thirdly, the credit will form part of the application of the instinctive synthesis without being numerically identified. Fourthly, however, the sentencing judge should clearly explain what weight has been given to a period of immigration detention. It is important that this be done in order to explain what might otherwise appear to be an unduly low sentence.

[35] ...

[36] Unlike time spent in a residential facility, immigration detention is time spent in custody. On the other hand, unlike residency at a rehabilitation facility, no part of the purpose of immigration detention is punitive. This may mean that in practice the burden of immigration detention is less onerous than the burden of incarceration in a prison. However, again, each case will depend upon its circumstances."

11.3.5 Exercise of mercy

In *R v Leach* [2003] VSCA 96 at [48]-[49]; (2003) 139 A Crim R 64 at 74 Eames JA – with whom Vincent JA agreed - said of the Court of Appeal:

[48] “It is particularly important that this court should not devalue or deny the right of a sentencing judge to act mercifully in a case where it seems to the judge to be an instance where an opportunity for reformation of an offender ought be grasped. That, after all, may be a decision which redounds very much to the benefit of the community.

[49] Thus, I acknowledge the very important right of a sentencing judge to extend leniency in a case which seems to him or her to be appropriate, and to do so even if it is difficult to identify precisely what it is about the offender which leads to that conclusion.”

In *R v Markovic & Pantelic* (2010) 30 VR 589; [2010] VSCA 105 Maxwell P, Nettle, Neave, Redlich & Weinberg JJA said at [1]:

[1] “There must always be a place in sentencing for the exercise of mercy ‘where a judge’s sympathies are reasonably excited by the circumstances of the case’: *R v Osenkowski* (1982) 30 SASR 212, 212–3 (King CJ). This is a proposition of long standing and high authority, repeatedly affirmed in this Court: *Cobiac v Liddy* (1969) 119 CLR 257, 269; *R v Kane* [1974] VR 759, 766; *R v Clarke* [1996] 2 VR 520, 523 (Charles JA, with whom Winneke P and Hayne JA agreed); *Director of Public Prosecutions (Cth) v Carter* [1998] 1 VR 601, 607 (Winneke P); *R v Miceli* [1998] 4 VR 588, 592 (Tadgell JA), 594 (Charles JA). For a recent example, see *DPP v Najjar* [2009] VSCA 246, [11].”

In *R v Osenkowski* (1982) 30 SASR 212 King CJ remarked that there always remains a place for leniency and mercy “when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender’s life might lead to reform”.

In *R v Hanh Lam; R v Thanh Thuan Tran* [2007] VSCA 246 Curtain AJA (with whom Buchanan & Chernov JJA agreed) exercised mercy in allowing the appeal of the first appellant and setting a non-parole period which ensured her immediate release from custody, saying at [8]:

“Accepting as I do that the appellant’s incarceration in circumstances where she was the principal carer of her young family, and in particular her autistic child, and that that effects an undue hardship in particular to that child, I am satisfied that the exercise of mercy dictates that the appellant serve a non-parole period of nine months.”

In *DPP v King* [2008] VSCA 151 at [35] Redlich JA (with whom Warren CJ & Forrest AJA agreed) said of an “extremely lenient” 3y8m/1y9m sentence (described by Warren CJ at [6] as “merciful”) imposed on a respondent for culpable driving:

“Justice tempered by compassion required that the severe and permanent injuries sustained by the respondent in this act of criminality should ‘be regarded as some punishment for that criminality: *R v Barci and Asling* (1994) 76 A Crim R 103, 104 (Southwell, Hampel and Hansen JJ).”

In *DPP v Michaela Snow (a pseudonym)* [2020] VSCA 67 at [80]-[89], esp. at [86] where the judgment referred to

“What is of vital importance about the discretion of mercy, in our view, is that its exercise is an expression or embodiment of the essential humanity of the sentencing process: O’Neill (2015) 47 VR 395, 410 [59]. It is a reminder that, in passing sentence on an offender, the judge is making a moral judgment on behalf of the community, within the framework of legal principle, as to the appropriate sentence for the individual offender, based on the judge’s assessment of the particular circumstances of the offending and of the offender’s own particular circumstances. Viewed in this way, the exercise of mercy is not qualitatively different from the other elements of the sentencing process, in which the judge has to evaluate and weigh up a whole range of considerations and where, as sentencing law accepts, reasonable minds can differ on the ultimate conclusion.”

See also *DPP v Ramos, Delos Santos & Herasan* [2003] VSCA 215 at [38]; *DPP v Rzek* [2003] VSCA 97 at [33] per Eames JA and the dissenting judgment of Maxwell P in *R v Josefski* [2005] VSCA 265 at [33]-[34]; *DPP v Coley* [2007] VSCA 91 at [43]-[44] per Neave JA; *R v NAD* [2008] VSCA 192 at [3], [11]-[15] & [54]; *DPP v Najjar* [2009] VSCA 246; *DPP (Cth) v Parfrey* [2010] VSCA 212 at [33];

Ramezian v The Queen [2013] VSCA 71 at [23]-[32]; *DPP v Milson* [2019] VSCA 55 at [50]-[57]; *DPP v Huby* [2019] VSCA 106 at [68]; *Sara Borg v The Queen* [2020] VSCA 191 at [47]-[49]; *Akon Guode v The Queen* [2020] VSCA 257 at [45]-[46].

11.3.6 Conviction or non-conviction

In *R v P & Ors* [2007] VChC 3 the President of the Children's Court, Judge Grant, imposed youth supervision orders or probation on eight young co-offenders. Each had pleaded guilty to:

- representative counts of procuring by intimidation a young woman FS described as “mildly delayed in her intellectual development” to take part in an act of sexual penetration with two of them;
- assault of FS; and
- making child pornography, namely a film depicting FS engaging in sexual activity.

A major issue was whether or not each offender should be convicted. At [30]-[32] Judge Grant said:

[30] “Probation orders and youth supervision orders can be made with or without conviction. Fox and Freiberg in their book on Sentencing describe the consequences of conviction as follows-

‘The recording of a criminal conviction is a significant act of legal and social censure. It is a judicial act by which a person’s legal status is officially and, under present Victorian law, irretrievably altered. 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.’

[31] The fact that the general consequences of conviction are in the nature of a penalty is a relevant matter for a court to take into account. It is also relevant in those cases where the are particular, identifiable consequences arising from conviction in the individual circumstances of an offender.

[32] The CYFA is silent on the type of matters the Court should take into account in exercising its discretion to record a conviction or otherwise. I have been referred by a number of counsel to section 8(1) of the Sentencing Act 1991 which provides-

‘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 wellbeing or on his or her employment prospects.’

I accept these factors must apply when considering the exercise of discretion in the Children’s Court with an appropriate acknowledgement of the matters referred to in section 362 of the CYFA.”

Applying this test, Judge Grant imposed a conviction on 7 of the 8 co-offenders, explaining that he did so because of the seriousness of their offending, their active role in the criminal activity and the need for them to be accountable for their criminality: see e.g. [37]-[39] & [41].

11.3.7 Effect of an injury sustained by offender while committing a crime

In *Khoja v The Queen* [2014] VSCA 9 the appellant had pleaded guilty to one charge of culpable driving causing death and 4 charges of negligently causing serious injury and been sentenced to aggregate IMP 8y6m/5y6m. Following the accident the appellant developed a stress disorder and associated depression as a direct result of the accident, reflecting his guilt and shame and his feelings of responsibility for the grievous consequences of his own driving. In the course of dismissing the appeal against sentence, Maxwell P, Nettle & Priest JJA said at [32]-[34]:

[32] “It is well established that an injury sustained by an offender during the course of committing a crime is a relevant consideration on sentence. Depending on the circumstances, the injury may be viewed as constituting part punishment in itself: *RLP* (2009) 213 A Crim R 461, 471 [21]. The Court in *RLP* accepted — as would we — that there is no basis in principle to distinguish between physical injury and mental illness for this purpose.

[33] As counsel for Mr Khoja properly acknowledged, however, the Court in *RLP* was not persuaded that the offender’s supervening mental condition was to be treated ‘as a form of punishment that entitles him to some reduction in the sentence he would otherwise receive’: at [23]. Counsel sought to distinguish *RLP* on the same basis as before. That

is, Mr Khoja's mental infirmity was to be seen as having resulted, at least in part, from the commission of the offence itself.

[34] We are not persuaded by that submission. **Reactive mental illness of the kind in issue here is hardly ever likely to qualify as an injury of the relevant kind.** There is no real difference between this case and *RLP*. The trigger for Mr Khoja's illness — as it was for the offender in *RLP* — was his own reaction to the enormity of his crime, namely, a combination of shame, guilt, embarrassment and remorse."

11.3.8 Effect of the COVID-19 pandemic on sentencing

In Victoria a State of Emergency was declared on 16/03/2020 as a consequence of the health risks associated with the COVID-19 pandemic. Pursuant to this declaration, the Chief Health Officer has imposed various requirements – including what has been called “social distancing” – and various restrictions – including significant limitations on leaving one's residence. Some of the effects of this pandemic on various aspects of sentencing are discussed in the following cases:

(1) Sentencing generally

- *Brown (aka Davis) v The Queen* [2020] VSCA 60 (Priest & Weinberg JJA) – 23/03/2020

The applicant submitted that the COVID-19 pandemic impacted upon sentencing in that personal visits for prisoners were no longer permitted. Accordingly the Court should infer that prisoners and families would suffer a high level of anxiety – akin to a Markovic-type burden [hardship to the third parties: *R v Markovic & Pantelic* (2010) 30 VR 589; [2010] VSCA 105] that should give rise to a ‘palpable and discernable discount’. The Court of Appeal held that the extent to which additional stress for prisoners and their families caused by the pandemic was to be taken into account was a matter to be resolved on the particular facts of any individual case. At [48] the Court said:

“With regard to the COVID-19 pandemic, and the submission put forward [by] the applicant, we readily acknowledge that this is a matter that is certain to come before this Court again in the immediate future. In the absence of any adequate material concerning the impact of the virus upon the Corrections system, ... and given that the situation is one that is rapidly evolving, we are hesitant to express a general statement of principle regarding how this Court (and others) should deal with this crisis as regards its effect upon relevant sentencing principles. We do accept, however, that the situation is causing additional stress and concern for prisoners and their families, as it is for every member of the community. The extent to which that may be taken into account, if at all, will be a matter to be resolved on the particular facts of any individual case.”

- *Brown (aka Davis) v The Queen* was followed in *Sazimanoska v The Queen* [2020] VSCA 66 (26/03/2020) [leave to appeal refused]; *Nguyen v The Queen* [2020] VSCA 76 (01/04/2020) [leave to appeal refused - no occasion to consider 'fresh evidence' regarding COVID-19 pandemic].
- *Alejandro Mendieta-Blanco v The Queen; Chey Tenenboim v The Queen* [2020] VSCA 265 at [37]-[38] – 12/10/2020

“COVID-19 and its effects took their place in the sentencing calculus along with all other relevant considerations. We reject the submission that it acquires some special place in the mix, only to be considered after a synthesis is reached on all other factors. Nor do we accept the proposition, advanced in written submissions by AMB, that, where a person is ‘on the cusp’ of a sentence of imprisonment, the COVID-19 pandemic is a ‘powerful reason’ not to impose such a sentence.”

(2) Age

- *R v Madex* [2020] VSC 145 at [51], [61]
69 year old offender – impact of age and higher risk category – custody more onerous.

(3) Ill-health

- *DPP (Cth) v Politopoulos* [2020] VCC 338 at [76], [83]
Defendant feeling more concern due to health and susceptibility to COVID-19.

(4) Impact on custodial arrangements

- *DPP v Morey (a pseudonym)* [2020] VCC 320 at [85]-[86]
Limited prospect of visits by family living interstate.

- *DPP v Tennison* [2020] VCC 343 at [36]-[39]
Suspension of personal family visits. Prisoner work limited to essential tasks only, leading to reduced work opportunity and meaningful occupation in prison. Stress from fear of catching virus in a confined environment and fears for family and their exposure to the virus.
- *DPP v Hersi* [2020] VCC 347 at [26]
Pandemic may add to hardship in custody, especially as it was offender's first time in custody.

(5) Guilty plea

- *DPP v Bourke* [2020] VSC 130 at [32] (Jane Dixon J) – 16/03/2020
Her Honour accepted a substantial utilitarian value of the accused's guilty plea in the light of public health concerns regarding COVID-19 which may have impacted on the practical management of a jury and given that new jury trials have been suspended.

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11.4 Material admissible in sentencing hearings under the CYFA

Section 358 of the CYFA provides that if the Court finds a child guilty of an offence, it may, in considering sentence, take into account only the following categories of matters.

11.4.1 Pre-sentence & group conference reports

Section 358(a) permits the Court to take into account a pre-sentence report prepared by the Secretary DJCS [via Youth Justice or via the Children's Court Clinic] and the evidence, if any, of its author. These are the only two bodies which are authorised to prepare pre-sentence reports: see s.572 of the CYFA. The contents of pre-sentence reports are regulated by s.573 and their distribution is governed by ss.574-575.

Section 358(b) permits the Court to take into account a group conference report prepared by a group conference convenor [s.577] and the evidence, if any, of its author. The contents of group conference reports are regulated by s.578 and their distribution is governed by ss.579-580.

In *Le v Collins & Anor* [2004] VSC 524 Williams J held that a failure to provide a pre-sentence report to a 20 year old offender before sentence constituted a denial of procedural fairness, vitiating the sentence.

In *R v Bennett* [2006] VSCA 274 the sentencing judge had adjourned a plea in order to obtain a psychiatric report. The appellant had subsequently been sentenced without a further plea hearing and the sentencing judge had disregarded or discounted the recommendations contained in the psychiatric report. The Court of Appeal held that the failure to allow the parties to make submissions regarding the contents of the report was a denial of natural justice and constituted sentencing error.

In *R v O'Blein* [2009] VSCA 159 at [34] Coghlan AJA (with whom Vincent & Neave JJA agreed) held that the failure by the sentencing judge to have greater regard to a pre-sentence report amounted to sentencing error because his Honour did not have sufficient regard to the alternative to adult imprisonment, namely detention in a Youth Justice Centre, particularly having regard to the principles enunciated in *R v Mills* [1998] 4 VR 235, 241.

11.4.2 Report, submission & evidence on behalf of child

Section 358(c) permits the Court to take into account any report, submission or evidence given, made or tendered by or on behalf of the child who is to be sentenced.

11.4.3 Prior findings of guilt

Section 358(d) permits the Court to take into account any offences of which the child has been convicted or found guilty before the commission of the offence under consideration.

It follows from this that evidence that a child has been the recipient of a formal police caution in relation to a previous offence is not admissible: see *O v McDonald* [2000] TASSC 13. See also the judgment of McDonald J in *Y v F* [2002] VSC 166 at [33].

11.4.4 Prosecutor's submissions & duty

Section 358(e) permits the Court to take into account any submission on sentencing made by the informant or prosecutor or any person appearing on behalf of the Crown.

In *R v Rumpf* [1988] VR 466 at 471 the Full Court of the Supreme Court of Victoria cited with approval dicta from the judgment of Brennan, Deane & Gallop JJ in *R v Tait and Bartley* (1979) 24 ALR 473 at 477:

"The Crown has a duty to the Court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principle of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it."

In *DPP v Avci* [2008] VSCA 256 at [16] Maxwell P (with whom Buchanan & Redlich JJA agreed) said:

"In *R v MacNeil-Brown* [2008] VSCA 190 this Court recently reaffirmed the principle, first enunciated by the Full Court in the 1980s, that the Crown has an obligation to assist a

sentencing judge who seeks guidance on the sentencing range appropriate to the particular case. In *MacNeil-Brown* itself, the prosecutor had exhibited a similar reluctance to respond to a request from the sentencing judge for assistance on sentencing range: see *R v McNeill & Brown/Piggott* [2008] VSCA 190 at [77]-[80].”

At [29] Maxwell P said:

“By reason of his statutory functions, the Director [of Public Prosecutions] is, with this Court, the custodian of sentencing standards in this State. Prosecutors must therefore be appropriately instructed so that they can assist sentencing judges to avoid sentencing error. If current sentencing practices need to be changed, that is the place to start.”

In *R v Mansour* [2008] VSC 226 at [72]-[74] King J was very critical of the prosecutor for suggesting a specific term of imprisonment:

“The Director may, if he thinks it appropriate, suggest a range of sentence or sentences that he believes would ensure the court did not, in his view, fall into an appealable error. For the Director to state actual specific sentences in my view usurps the role of the sentencing judge, and if that is the sentence that the judge ultimately concludes is the appropriate sentence, it may appear to the members of the community that the sentencing judge is obeying the orders or directions of the Director of Public Prosecutions.

The sentencing judge, like the Director of Public Prosecutions, is an independent legal officer of the courts, and must consider many matters that do not necessarily fall within the matters that the Director has to consider when making his decision in respect of prosecutions. Accordingly, in my view it is not appropriate for the Director to make submissions to the court as to what actual sentence should be imposed rather than a range of sentence.”

In *R v AMP* [2010] VSCA 48 at [62] Redlich & Neave JJA approved and adopted the following dicta from *R v MacNeil-Brown* (2008) 20 VR 677; [2008] VSCA 190 at [45]:

“No judge is bound to accept counsel’s submission on any point, and a sentencing judge is entirely free to come to a different conclusion. Indeed, the judge is bound to do so if, in his/her judgment, a sentence outside the nominated range is called for and can lawfully be imposed. The weight to be given to a submission is to be judged according to the merits of the argument(s) which it advances. It would be wrong for a judge to accord weight to a Crown submission on sentence merely because it came from the Crown.”

In *Director of Public Prosecutions (Cth) v Barbaro & Zirilli* [2012] VSCA 288 King J had refused to hear what the Crown had proposed to submit was the applicable sentencing range. The Court of Appeal held at [15]:

“In our view, her Honour committed no error of law. Put simply, the function of a Crown submission on range is to assist the sentencing judge. Nothing said by the majority in *MacNeil-Brown* suggested that a judge who declined such assistance should nevertheless be compelled to receive it, still less that the decision whether or not to entertain such a submission rested on considerations of procedural fairness.”

However, on appeal the High Court of Australia went further, overruling *R v MacNeil-Brown* insofar as it stood as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences. In *Barbaro v The Queen; Zirilli v The Queen* (2014) 305 ALR 323; [2014] HCA 2, French CJ, Hayne, Kiefel & Bell JJ held at [21]-[23]:

[21] “In *MacNeil-Brown*, a majority of the Court of Appeal (Maxwell P, Vincent and Redlich JJA, Buchanan and Kellam JJA dissenting on this point) held (2008) 20 VR 677 at 678 that “the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court”. Accordingly, a sentencing judge could reasonably expect (2008) 20 VR 677 at 678 the prosecutor to make a submission on sentencing range if either “the court requests such assistance” or, “even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made”. The majority in *MacNeil-Brown* (2008) 20 VR 677 at 701 held in respect of the first appellant in that case that the sentencing judge had not erred in insisting that counsel for the prosecution state the range within which the sentence to be imposed on the offender should fall. The offender’s appeal against sentence was dismissed.

[22] As a result of what was said by the majority in *MacNeil-Brown*, a practice has developed in Victoria of a sentencing judge asking counsel for the prosecution to make a submission as to the "available range" of sentences. (Remarks made by King J in the course of the sentencing hearing in these matters suggest that the practice may not be followed at first instance in the Supreme Court.)

[23] To the extent to which *MacNeil-Brown* stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which *MacNeil-Brown* has given rise should cease. The practice is wrong in principle."

The majority in the High Court gave the following reasons why the practice is wrong in principle:

- 1) "stating the bounds of an 'available range' of sentences is apt to mislead.;
- 2) "The practice...depends upon the prosecution acting not only fairly (as it must) but in the role of 'a surrogate judge. That is not the role of the prosecution."
- 3) "the prosecution may have a view of the available sentencing range which gives undue weight to the assistance which the offender has given or promised [to the prosecution]."
- 4) "in cases...where pleas of guilty avoid very long and costly trials...the prosecution may have a view of the available sentencing range which gives undue weight to the avoidance of trial."
- 5) "The statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance...with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution."
- 6) "Fixing the bounds of a range within which a sentence should fall ... wrongly suggests that sentencing is a mathematical exercise...[in that]...[i]f a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view...[and] if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems well-nigh inevitable."
- 7) "If a party makes a submission to a sentencing judge about the bounds of an available range of sentences, the conclusions or assumptions which underpin that range can be based only upon predictions about what facts will be found by the sentencing judge."
- 8) "It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution ... considers should be reached or a statement of the bounds within which that result should fall."
- 9) "Contrary to the view of the majority in *MacNeil-Brown*, the prosecution's conclusion about the bounds of the available range of sentences is a statement of opinion, not a submission of law."

In the joint appeals of *Lee James Matthews v The Queen; Tuyet Thi Vu v The Queen & Sayeed Hashmi v The Queen* [2014] VSCA 291 the Court of Appeal held that "a quantified range submission [made before the judgment in *Barbaro's Case* was handed down] will not vitiate the sentencing discretion unless it can be demonstrated that the sentencing judge was influenced by the submission in arriving at his or her sentence." See e.g. judgment of Warren CJ, Nettle & Redlich JJA at [7]. At [22] their Honours concluded that the reasoning in *Babaro* did not preclude defence counsel from making submissions concerning an appropriate sentencing range. Speaking of the duty of the prosecution, their Honours stated at [27]:

"[I]t appears that, apart from proscribing the submission of a quantified sentencing range, *Barbaro* has not changed any of the pre-existing practice. Nothing said in *Barbaro* detracts from the Crown's obligation to make clear what type of sentencing disposition, whether imprisonment or otherwise, it contends is necessary or appropriate. It remains that the Crown is required to make its submissions as to sentence fairly and in an even-handed manner. It has a duty to assist the sentencing judge to avoid appealable error: *R v Tait* (1979) 24 ALR 473, 477. That includes making an adequate presentation of the facts, identifying any aggravating features and admitting any mitigating features, fair testing of the offender's case, correcting any error of fact which emerges in the course of the plea and drawing attention to the offender's antecedents including any sentence of imprisonment currently being served: *R v Rumpf* [1988] VR 466, 476. The Crown's duty also extends to making appropriate submissions on relevant questions of law, including

statutorily prescribed maximum penalties [*R v Travers* (1983) 34 SASR 112, 115-6], principles of sentencing reasonably thought to be applicable [*R v Tait* (1979) 24 ALR 473, 477] and comparable and other relevant cases [*Hilli v The Queen* (2010) 242 CLR 520, 536-7]. If it is submitted for an offender that he or she should receive a non-custodial disposition or a suspended term of imprisonment, the Crown should make clear whether it contends, and if so why, a disposition of the kind proposed would not be a proper exercise of sentencing discretion: *Malvaso v The Queen* (1989) 168 CLR 227; *Everett v The Queen* (1994) 181 CLR 295.”

See also *R v Bourne* [2011] VSCA 159 at [18]-[23]; *R v Campisi* [2010] VSCA 183 at [20]; *R v Hilder & Sandhu* [2011] VSCA 192 at [24]-[34]; *R v RPJ* [2011] VSC 363 at [18]; *DPP v Eagles* [2012] VSCA 102 at [48]; *R v A Mokbel (sentence)* [2012] VSC 255 at [44]-[48].

11.4.5 Victim impact statements

Section 358(f) permits the Court to take into account any victim impact statement made, or other evidence given, under s.359. Under s.359(4) a victim impact statement contains particulars of the impact of the offence on the victim and any injury, loss or damage suffered by the victim as a direct result of the offence. In *SD v The Queen* [2013] VSCA 133 at [13]-[23] the Court of Appeal discussed the equivalent provision in the Sentencing Act and said at [15] that there was no “warrant for a sentencing court taking into account injury, loss or damage (including pain and suffering) which is not a direct result of the offending”. See also *DPP v QPX* [2014] VSC 133 per Bongiorno JA.

In s.3 of the CYFA “victim” means a person who or a body that has suffered injury, loss or damage as a direct result of an offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender. In *DPP v Prasoeur* [2006] VSC 41 at [22]-[24] Bell J refused to admit a statement made by a person who had suffered as a consequence of false allegations which the offender made about him during the trial, “long after the event of the crime”. While accepting dicta in *R v Miller* [1995] 2 VR 348 at 354 that the definition of “victim” [in s.3 of the Sentencing Act 1991 which is in virtually identical terms to that in s.3 of the CYFA] should not be interpreted narrowly, His Honour held that he “must still give effect to the ‘particular language’ in which the definition is expressed” and accordingly that the maker of the statement had not suffered as a direct result of the offence.

In *R v Leatham* [2006] VSC 315 at [19]-[21] parts of victim impact statements were used. In *R v Swift* (2007) 15 VR 497; [2007] VSCA 52 at [4]-[41] there is an extensive discussion of the use which may be made by a sentencing judge of victim impact statements under similar provisions in the Sentencing Act 1991. The dicta in *R v Swift* was referred to with approval by the Court of Appeal in *R v Vandenberg* [2009] VSCA 9 at [15].

In *R v Katelis* [2008] VSCA 239 at [13] the Court of Appeal referred with approval to views about victim impact statements expressed in *DPP v DJK* [2003] VSCA 109 and noted: “It is also important to bear in mind that, as is often the case, the financial loss incurred by the victim [of a robbery] has been one of its lesser consequences to him.”

Under s.359(12) if a victim who has made, or on behalf of whom another person has made, a victim impact statement so requests, the Court must ensure that any admissible parts of the statement that are appropriate and relevant to sentencing are read aloud by the prosecutor in open court in the course of the sentencing hearing.

Under s.359(13) the presiding magistrate may read aloud any admissible part of a victim impact statement at any time in the course of the sentencing hearing.

There have been a number of cases in which the courts have warned that victim impact statements should not be misused so as to produce a sentence which is unfair and have commented that an articulate or emotional victim impact statement could not justify a sentence being imposed which was not just in all of the circumstances: see *R v Skura* [2004] VSCA 53 at [12]-[13] per Eames JA and at [45]-[50] per Smith AJA; *R v Sa* [2004] VSCA 182 at [39]; *R v Dowlan* [1998] 1 VR 123 at 138-140 per Charles JA; *R v Miller* (1995) 81 A Crim R 278; *R v R* (1999) 106 A Crim R 288 at 291-292 per Tadgell JA; *R v CLP* [2008] VSCA 113 at [28]-[36].

11.5 Deferral of sentencing

Under ss.360(2) & 414(1) of the CYFA the Court may defer sentencing a child if-

- (a) it is of opinion that sentencing should, in the interests of the child, be deferred; and
- (b) the child agrees to a deferral of sentencing; and
- (c) in the case of deferral of sentencing for the purpose of the child's participation in a group conference [see section 11.6]-
 - (i) the Court is of the opinion, after consultation with youth justice, that the child is suitable to participate in a group conference; and
 - (ii) the child agrees to participate in a group conference.

Under s.414(3)(a) the maximum period of deferral is 4 months. However, if the child is in custody and sentence is deferred for a group conference, the maximum period of deferral is 2 months [s.414(3)(b)].

Except for the purposes of a child's participation in a group conference under ss.414(1)(c) & 415(1)(d) or 415(1)(e), it appears from ss.414(2)(a) & 414(2)(ab) when read together that the Court cannot otherwise defer sentence for a child who is in custody and ineligible for bail.

Pursuant to s.414(2)(b), it is usual for the Court to order the preparation of a pre-sentence, or a further pre-sentence, report. In general cases, that report is usually prepared by the Youth Justice Division of the Department of Human Services under s.572(a) and an additional report may sometimes be prepared by the Children's Court Clinic. In cases referred to the Clinic, the pre-sentence report is prepared by the Clinic under s.572(b).

Under ss.414(1) & 415(1) the Court may defer sentence for the purpose of a child's participation in a group conference if the Court is considering-

- (a) placing the child on probation; or
- (b) releasing the child on a youth supervision order; or
- (c) convicting the child and making a youth attendance order; or
- (d) convicting the child and ordering that the child be detained in a youth residential centre [see also s.410(1)(f)]; or
- (e) convicting the child and ordering that the child be detained in a youth justice centre [see also s.412(1)(f)]-

and if-

- the Court is of the opinion, after consultation with Youth Justice, that the child is suitable to participate in a group conference; and
- the child agrees to participate in a group conference.

Section 416(1) gives the Court express power, on application by the child, to re-list the adjourned case at short notice if the Court considers it appropriate to do so. Under s.416(2) such notice must be given to the Court, the informant and, if appropriate, the Secretary DJCS. If a child is found guilty of an offence during the deferral period or if a group conference does not proceed, s.416(4) permits the Court to relist the adjourned case at short notice and on the adjourned hearing make any order which the Court could have made if it had not deferred sentence.

On the adjourned hearing date, s.416(3) requires the Court, in determining the appropriate sentence for the child, to have regard to-

- (a) the child's behaviour during the period of deferral; and
- (b) any pre-sentence report ordered; and
- (c) if the child participated in a group conference, the fact of that participation; and
- (d) any group conference report ordered; and
- (e) any other relevant matter.

11.6 Group Conference

11.6.1 Restorative justice

In a paper entitled "Restorative Justice: Emerging Views" (*The Drawing Board, An Australian Review of Public Affairs*) Chris Cunneen said of restorative justice:

"Prevailing views on law and order emphasize longer and longer prison sentences in the belief that more and 'tougher' punishment will deter crime. Restorative justice begins from a different premise: the need to make an offender accountable for their actions through confronting the harm they have caused the victim, and by providing the offender with an opportunity to offer recompense for that harm...[M]any restorative justice programs actually in operation have been introduced in response to young people's criminal behaviour...In the vast majority of cases, restorative justice is translated into a

system of 'conferencing', where the offender and the victim meet before a convenor and with other support persons in attendance. An 'outcome' is reached that is acceptable to the offender and the victim...All states and territories in Australia now have some type of conferencing in place for juveniles".

11.6.2 The Victorian Group Conference program

The Victorian Group Conference program is a joint venture involving the Children's Court of Victoria, Victoria Police, Victoria Legal Aid and the Department of Human Services. It consists of a formal meeting of parties affected by the young person's offending. It is based on the concepts of restorative justice and derives from a New Zealand model for the processing of juvenile offenders set out in the Children, Young Persons and their Families Act 1989 (N.Z.).

Until 2002 it remained a pilot program, contracted to Anglicare Victoria and available to only about 50 young offenders per year, limited to the Melbourne and suburban Children's Courts. In January 2003 funding was confirmed for a full program. The successful contractor to provide conferencing services, Jesuit Social Services, took over from Anglicare in July 2003.

Commencing on 23/04/2007 the Group Conference Program was given legislative standing in ss.362 & 414-416 of the CYFA and now operates state-wide.

Under ss.415(4) & 415(5) of the CYFA the purpose of a group conference is to facilitate a meeting between the child and other persons (including, if they wish to participate, the victim or their representatives and members of the child's family and other persons of significance to the child) which has the following objectives-

- (a) to increase the child's understanding of the effect of his or her offending on the victim and the community;
- (b) to reduce the likelihood of the child re-offending;
- (c) to negotiate an outcome plan, agreed to by the child, that is designed to assist the child to take responsibility and make reparation for his or her actions and to reduce the likelihood of the child re-offending.

Some of the following is taken from an information brochure prepared by Anglicare Victoria.

11.6.3 Goal

The primary goal of a Group Conference is to divert young people from further or more serious offending by harnessing the often untapped resources of the young person's immediate and extended family and by involving them and significant others in decision making. The aim is to address the offending behaviour of young people and help them avoid further or more serious offending by:

- strengthening the young person's family and community supports;
- making amends to the victim(s) where appropriate which can be constructive for both victim and offender; and
- holding the young person accountable for the impact of his or her offending.

11.6.4 Consultation with Youth Justice

If the Court was considering imposing a sentence of probation or a higher sentencing order in respect of one or more offences, it may instead consider deferring sentence for the purpose of a child's participation in a group conference if the child agrees to participate: ss.414(1) & 415(1) of the CYFA. In that event, the Court is required to consult with Youth Justice as to whether the child is suitable to participate in a group conference. There is no formal legislative basis for determining suitability. Some of the current criteria are that the young person-

- must have been found guilty by the Court;
- is before the Court on charges that warrant probation or a youth supervision order or a youth attendance order or detention in a youth residential centre or a youth justice centre;
- would benefit from a greater awareness of the impact of his or her offending on victims and the community;
- must, with his family, be prepared to meet with the convenor prior to the conference, attend the conference and agree to return to the Court following the conference.

There is no bar on young persons who have previously been subject to supervisory orders participating in the group conference program.

Although the Court must consult with Youth Justice, it is not bound by Youth Justice's opinion as to whether or not the child is suitable. If the Court does order a group conference, the case is generally adjourned for a period of 6-8 weeks to permit the group conference to be prepared and conducted.

11.6.5 Mechanics

Under ss.415(2) & 415(6) of the CYFA, a Group Conference involves a meeting chaired by a convenor appointed by a service approved under s.480 which must be attended by-

- the young offender and his legal practitioner; and
- the police informant or other police officer.

Section 415(7) permits other people to attend-

- members of the child's family and other persons of significance to the child;
- the victim(s) of the offence or their nominated representative(s) if they wish to attend;
- any other person permitted to attend by the convenor.

Section 415(8) requires the convenor to prepare a group conference report for the Court which must contain the outcome plan, if any, agreed to by the child.

Subject to ss.415(8) & 415(11) and the group conference report provisions of ss.576-580, the proceedings of a group conference are confidential [s.415(9)] and disclosure of any statement made at, or information provided to, the conference without the leave of the Court or the consent of all the parties is subject to a penalty of 10 penalty units [s.415(10)].

The conference itself has 3 stages:

1. **Information sharing:** Information about the offence(s) is provided by the police informant. Participants then provide information about why each offence was committed, and how others have been affected by the offence(s).
2. **Family deliberation:** The young person, together with family members and support persons, are left alone to talk about what can be done to repair the harm caused and discuss plans to help the young person take a more positive direction in his or her life.
3. **Agreement:** An 'Outcome Plan' is then developed and prepared, explaining the agreements that have been made during the conference. Following preparation of the 'Outcome Plan', it is discussed among the group and input from all participants is encouraged.

11.6.6 Conference Outcomes

Outcomes from a Group Conference could include:

1. **Assistance and support for the young person** in such areas as education, employment, skill development, recreation & counselling (drug & alcohol, individual and/or family).
2. **Dealing with the offence:** This could mean that the young person apologizes and/or agrees to pay for all or part of the damage and/or make a donation or be involved in some sort of community service.

After a group conference the case returns to the Court for completion of the sentencing process. Although the Court is not in any way bound by the 'Outcome Plan', it will usually craft a sentence to incorporate the plan and in any event will almost always give weight to the plan. However, if the child has participated in a group conference, the Court is bound by s.362(3) of the CYFA to impose a lesser sentence than it otherwise would have imposed had the child not so participated. Further, if the child has failed to participate in a group conference s.362(4) prohibits the Court from imposing a more severe sentence than it would have imposed had sentencing not been deferred.

In 2019/2020 there were 186 group conferences conducted across Victoria. Of these 49% were ultimately sentenced to a non-supervisory order, 47% to a supervisory order and 4% to YJC detention.

11.7 Criminal Division Statistics

11.7.1 Victorian statistics

Chart [1](#) sets out sentences imposed in the Criminal Division of the Children's Court on children who pleaded guilty or were found guilty of one or more criminal offences between 01/07/2005 and 30/06/2020. The chart does not include charges which were dealt with by diversion, no plea being entered in such cases. Nor does it include the few cases in which all charges were found proved but dismissed.

The chart contains a count of sentencing orders, not of individual charges. It includes only the most intensive sentencing order made in a particular case, not every sentencing order in the case. So, for example, if in a particular case the child was fined on some charges and placed on a youth supervision order on others, only the youth supervision order – the most intensive of the orders – is counted. The number of children sentenced to detention is a very small percentage of the total.

The total number of sentencing orders made in 2011/12 is by far the lowest of any of the preceding six years shown in chart 1. There was a further substantial drop in 2012/13 and that trend has continued in every subsequent year. The spikes in 2006/07 & 2007/08 are a consequence of an increased number of sentencing orders (primarily fines) made in respect of transit offences. Since then most children's transit offences have been processed through the Children and Young Persons Infringement Notice System [CAYPINS], as to which see Chapter 7.7. The CAYPINS outcomes are not included in charts 1 or 2.

Youth offending rates published by the Australian Bureau of Statistics on 08/02/2018 for the financial year 2016/17 included a finding that there were 8,280 youth offenders in Victoria, a decrease of 5% (446 offenders) from 2015/16. The highest decreases in numbers of youth offenders were for the principal offences of Miscellaneous offences (down 28% or 290 offenders) and Theft (down 7% or 162 offenders).

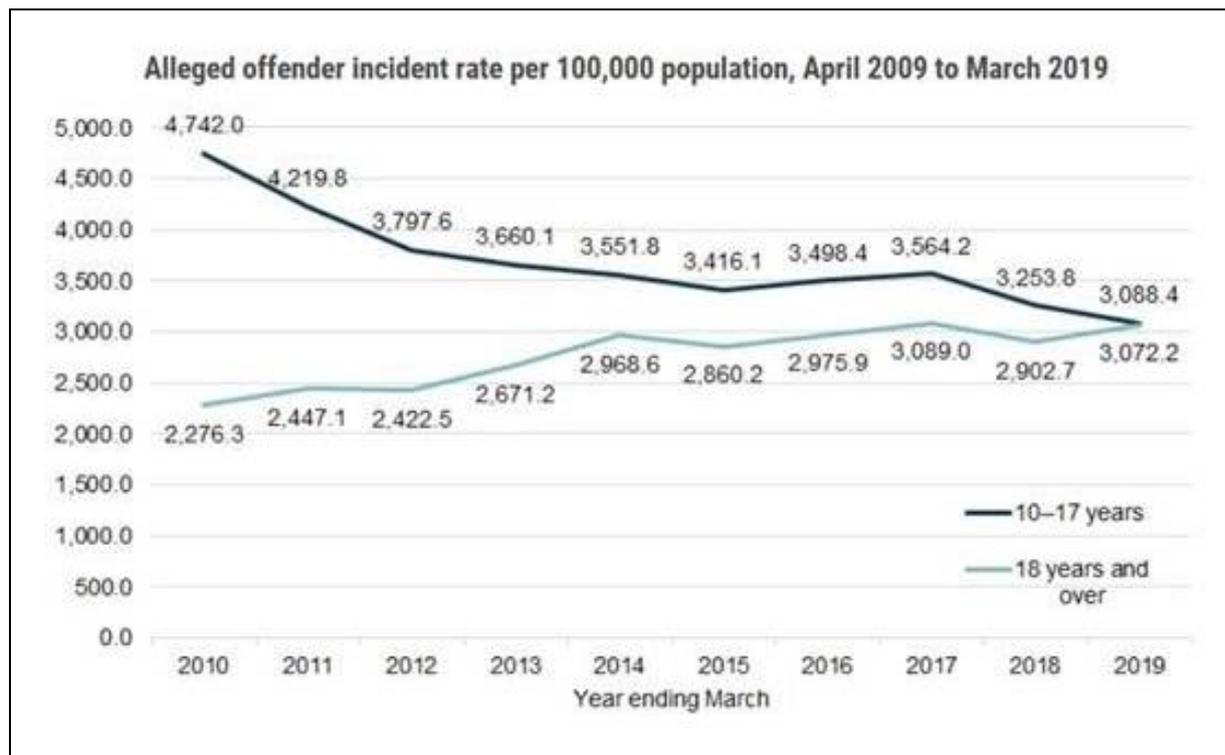
1 SENTENCES IN FINALIZED VICTORIAN CHILDREN'S COURT CRIMINAL CASES COMMENCING 01/07/2005								
ORDER	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13
Non-accountable undertaking	41	47	60	48	33	39	33	27
Accountable undertaking	481	514	616	626	640	593	481	430
Good behaviour bond	1691	1778	1914	1963	1947	1793	1684	1524
Fine	2393	7151	5030	2349	1672	1236	802	752
Probation	717	870	939	984	1113	1038	882	829
Youth supervision order	245	288	340	368	407	391	367	368
Youth attendance order	47	47	55	79	101	82	57	49
Youth residential centre order	14	9	20	7	14	18	7	7
Youth justice centre order	149	158	179	202	232	229	212	162
TOTAL	5778	10862	9153	6626	6159	5419	4525	4148

ORDER	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20	
Non-accountable undertaking	41	33	23	20	16	15	9	
Accountable undertaking	302	305	175	174	128	129	99	
Good behaviour bond	1364	1357	1045	950	836	836	661	
Fine	790	532	414	549	243	187	115	
Probation	778	751	642	456	497	406	312	
Youth supervision order	293	335	353	366	318	246	238	
Youth attendance order	62	47	43	59	43	30	31	
Youth control order	UNAVAILABLE				0	12	2	
Youth residential centre order	8	12	11	8	13	12	4	
Youth justice centre order	133	143	208	232	261	198	157	
TOTAL	3771	3515	2914	2814	2355	2071	1628	

Chart 2 shows the respective percentages of the three sentencing types imposed in the Criminal Division of the Children’s Court. “Non-supervisory” orders are undertakings, bonds and fines. “Supervisory orders” are probation, youth supervision orders and youth attendance orders. “Detention orders” are youth justice centre orders and youth training centre orders but do not include remand orders.

2 PERCENTAGES OF SENTENCING TYPES IN FINALIZED VICTORIAN CHILDREN’S COURT CRIMINAL CASES										
TYPES	2010 /11	2011 /12	2012 /13	2013 /14	2014 /15	2015 /16	2016 /17	2017 /18	2018 /19	2019 /20
Non-supervisory	68%	66%	66%	66%	64%	57%	60%	52%	56%	54%
Supervisory orders	28%	29%	30%	30%	32%	36%	31%	36%	34%	36%
Detention orders	4%	5%	4%	4%	4%	7.5%	8.5%	12%	10%	10%

Figures published by the Crime Statistics Agency show that in the year ending 31/03/2019 youth offenders had a rate of 3,088 incidents per 100,000 population. This is a decrease of 34.9% from the rate of 4,742 incidents per 100,000 population in the year ending March 2010. Further, in the 12 months up to 31/03/2019 the proportion of youth offenders decreased from 11.6% to 10.6% of all person alleged offender incidents, continuing a trend which has seen the proportion of youth offenders steadily decreasing over the last 10 years, down from 20.9% in the year ending March 2010. By contrast, the offender incident rates for alleged offenders aged 18 and over increased by 35.0% from 2,276 to 3,072 incidents per 100,000 population.



11.7.2 Australian & world statistics

The data contained in charts 3 & 4 was collected by the Australian Institute of Criminology and is taken from the Institute’s website www.aic.gov.au. Both charts provide a snapshot of the comparative rate of detention of persons aged 10-17 in Juvenile Corrective Institutions – both as sentenced detainees and as remandees – in each of the Australian States & Territories in each of the listed years. In chart 3 Tasmanian figures are not available from 1997 to 2002. Data formatted as in chart 3 is not available after 2008 and has been superseded by chart 4. In chart 4 W.A. & N.T. figures are not available for 2009-2010.

Chart 3 is a comparative study of the overall rate of detention of young detainees across each of the Australian States and Territories between 1981 & 2008. The rate is measured as the number per 100,000 of the 10-17 population being detained on 30 June in each of the listed years. The study demonstrates that there has been a general decline in the number of persons aged 10-17 in juvenile detention over the period from 30 June 1981 - when 1352 young people [64.94 per 100,000] were detained in juvenile detention facilities throughout Australia – to 30 June 2004 – when 564 juveniles [25.50 per 100,000] were so detained. The trend reversed thereafter with 32.80 per 100,000 juveniles being detained on 30 June 2007 and 37.00 per 100,000 detained on 30 June 2008.

3 RATE PER 100,000 OF PERSONS AGED 10-17 IN JUVENILE CORRECTIVE INSTITUTIONS									
Year	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust
1981	87.60	59.63	32.90	84.28	41.34	54.26	5.53	77.32	64.94
1982	91.63	53.04	30.67	78.10	38.78	36.99	55.89	48.47	62.76
1983	84.57	49.83	31.91	49.03	32.89	53.21	72.11	55.41	57.30
1984	59.61	49.50	28.98	41.18	22.12	43.41	78.88	24.32	46.01
1985	38.75	47.57	34.13	55.70	23.44	27.40	103.35	34.53	40.84
1986	40.42	46.41	25.79	49.30	23.80	35.69	132.22	47.08	39.88
1987	55.08	36.38	26.09	42.19	23.73	36.61	135.70	33.59	41.43
1988	38.24	36.64	26.89	40.50	26.61	35.62	177.45	35.89	36.50
1989	40.01	31.68	21.98	66.65	18.20	29.43	208.56	15.51	36.57
1990	51.84	29.26	29.70	63.04	22.92	17.52	137.98	23.62	40.39
1991	48.17	13.75	20.68	58.32	28.74	29.88	166.17	18.54	34.21
1992	38.88	10.34	20.06	46.49	33.25	8.79	127.06	26.80	28.55
1993	46.40	10.23	22.68	51.59	38.45	15.83	102.71	16.15	32.19
1994	54.77	12.89	24.93	64.31	36.42	17.59	57.45	24.27	36.89
1995	57.83	14.87	35.06	49.33	24.44	17.51	74.78	37.77	38.33
1996	49.33	13.98	34.44	50.41	51.64	45.38	56.14	18.91	37.66
1997	51.39	14.12	25.00	51.95	47.80	N/A	88.34	43.53	37.12
1998	48.06	13.23	33.64	62.72	30.95	N/A	103.59	30.44	37.04
1999	39.47	11.79	33.57	56.99	20.99	N/A	57.40	44.62	32.78
2000	38.30	10.12	25.20	51.90	36.40	N/A	60.70	42.24	31.46
2001	32.20	12.70	20.30	43.30	34.40	N/A	24.00	68.40	27.40
2002	27.90	10.80	22.70	35.00	28.90	N/A	83.60	41.20	24.90
2003	30.50	14.40	23.20	46.30	43.70	34.60	92.10	64.20	29.10
2004	27.20	11.70	20.60	51.90	31.50	32.70	39.80	45.10	25.50
2005	29.70	11.80	21.70	46.50	36.40	63.50	66.80	28.40	27.20
2006	35.00	7.10	29.90	46.60	25.20	54.60	97.50	48.60	29.10
2007	38.00	9.00	32.30	59.40	36.50	29.10	127.90	37.00	32.80
2008	50.10	14.30	26.40	66.40	32.90	47.60	90.00	22.90	37.00

Chart 3 shows some interesting things about incarceration of 10-17 year olds in Victoria-

1. Victoria has by far the smallest rate of juvenile detention of any Australian State or Territory.
2. The rate of detention has decreased by a factor of more than four over 27 years between 1981 & 2008.
3. The greatest annual decrease occurred between 1990 & 1991, a reduction of more than 50% in one year coinciding with the commencement of operation of the CYPA.
4. Since 1991 the rate of detention has nearly always been substantially less than in any other State or Territory. In 2008, the NSW rate was 3½ times higher, the WA rate 5 times higher, and so on.
5. The Victorian rate increased significantly in 2003, as did the Australian average numbers and rates of detainees, but in 2004 the Victorian rate declined again to about the average of the 2001 & 2002 rates. The Victorian rate declined significantly in 2006, increased by a small factor in 2007 but increased significantly in 2008 to just below the 2003 figure.
6. The Victorian rate of detention on 30/06/2008 was just over one-third of the total Australian rate.

As the bar graph below shows, the Australian rate of youth detention in 2008 was vastly greater than the rate in Japan and much greater than the rates in Finland & Sweden. That year the Australian rate – described as 24.9 per 100,000 – was about 3 times greater than the Victorian rate. Both rates – but especially the Victorian rate – compare very favourably with those in the British Isles, New Zealand, the Netherlands & South Africa and extremely favourably with the extraordinarily high rate in U.S.A., a rate which is some 40 times greater.

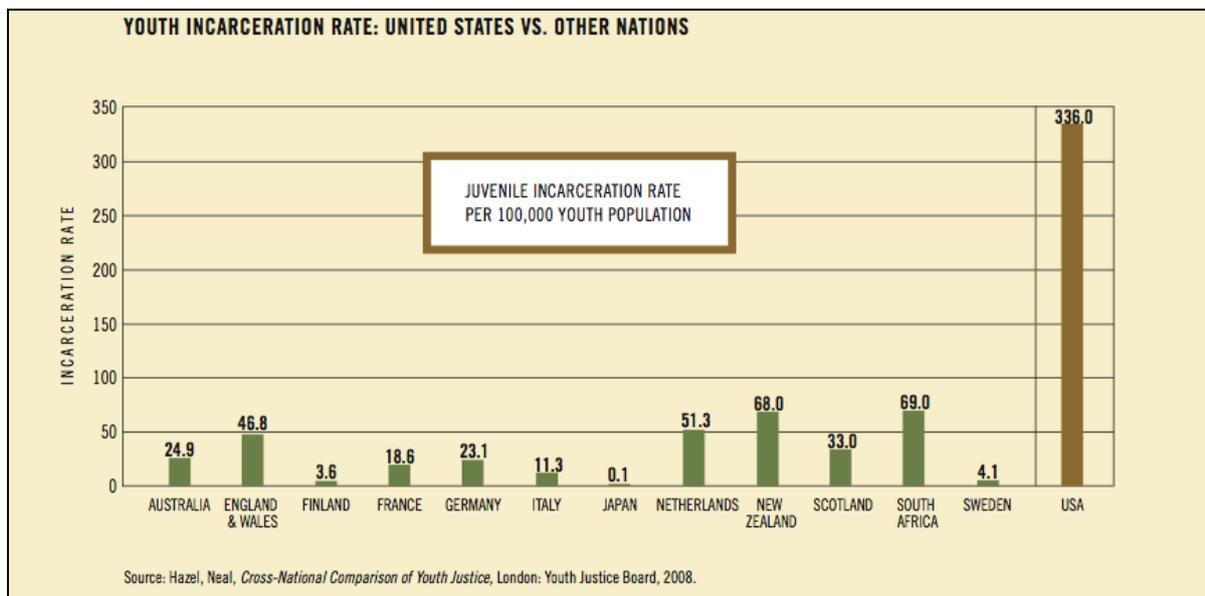


Chart 4 is a comparative study of the rate of detention of indigenous and non-indigenous young persons aged 10-17 in each of the Australian States & Territories in each financial year from 2006-07 to 2009-10. The rate is measured as the number per 1,000 of the 10-17 population. The total rate of detention in Victoria in each of the years from 2006-07 to 2009-10 is substantially lower than in any other State or Territory – rarely more than one-half of the second lowest State/Territory. Overall, the rate of indigenous detention in Victoria is lower than in any other State or Territory but the rate of over-representation of indigenous detainees remains grossly disproportionate, varying between 16 and 18 times the rate of non-indigenous detention.

4 RATE PER 1,000 OF PERSONS AGED 10-17 IN JUVENILE CORRECTIVE INSTITUTIONS INDIGENOUS [UPPER] – NON-INDIGENOUS [MIDDLE] – TOTAL [LOWER]									
	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aust
2006-07									
Indig.	25.73	7.86	13.88	42.67	27.93	10.95	11.17	42.61	21.48
Non-ind	1.74	0.46	0.66	1.43	1.84	1.33	0.72	2.78	1.18
Total	2.82	0.57	1.48	3.79	2.71	2.00	5.16	3.68	2.11
2007-08									
Indig.	28.70	10.44	14.01	48.18	34.57	10.96	10.50	46.99	23.60
Non-ind	1.92	0.62	0.68	1.38	1.97	1.69	0.91	2.95	1.30
Total	3.13	0.74	1.52	4.06	3.06	2.34	4.99	4.06	2.33
2008-09									
Indig.	28.72	11.22	12.04	N/A	35.25	10.33	10.53	37.58	20.49
Non-ind	1.92	0.62	0.69	N/A	2.02	1.91	0.99	3.73	1.31
Total	3.16	0.75	1.40	4.43	3.15	2.49	5.08	4.53	2.37
2009-10									
Indig.	28.98	11.76	13.51	N/A	32.72	10.68	N/A	44.11	24.10
Non-ind	1.93	0.75	0.84	N/A	1.94	1.98	N/A	3.78	1.44
Total	3.19	0.89	1.65	N/A	3.02	2.58	N/A	4.78	2.51

In a paper entitled “State based comparative assessment of juvenile justice in Australia”, Ms Kasey Tyler (Senior Police Advisor, Children’s Court of Victoria) has analysed Australian-wide data on the numbers and characteristics of youth in Australian Children’s Courts and subject to juvenile justice supervision in Australia. By “juvenile justice supervision”, Ms Tyler is referring to children on bail or on probation, youth supervision orders, youth attendance orders, youth detention orders or their interstate equivalents. In an overview of Children’s Courts in Australia, Ms Tyler noted, *inter alia*:

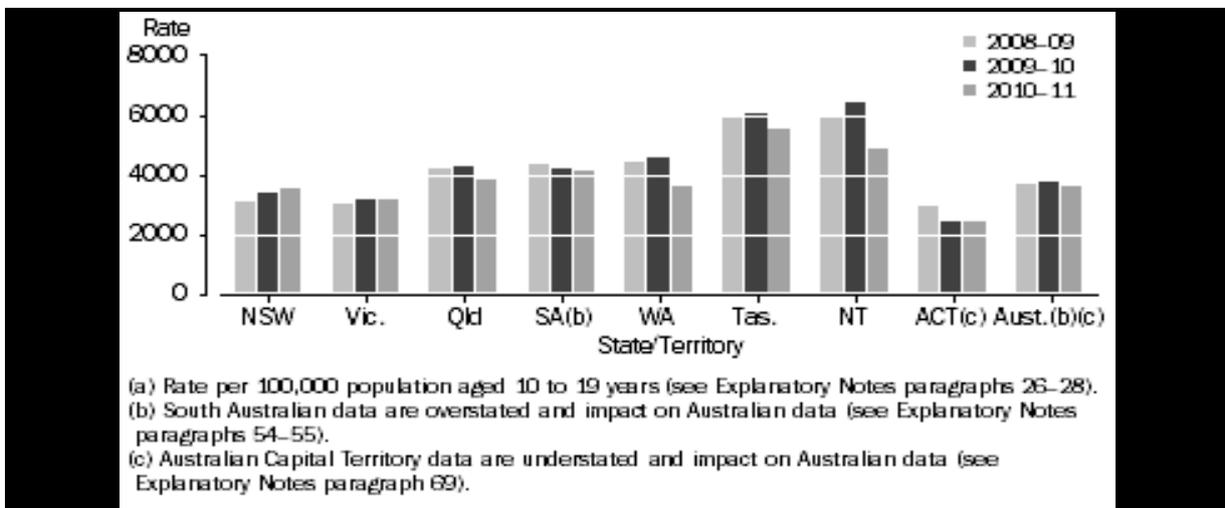
- In 2010-11, youth aged 10-19 make up 15% of the general Australian population but make up 28% of Australia’s offender population.
- In 2010-11 the lowest number of accused were recorded since collection began in 2006-07. Victoria recorded a drop of 22%. Males accounted for 79% of all accused finalised.
- On an average day in 2010-11, 79% of all accused pleaded or were proved guilty, 4% were acquitted and 17% of all prosecutions were withdrawn, transferred to other courts or closed via

non-adjudicated finalisations. Of the 29,961 young persons whose charges were heard in Australia in 2010-11, 95% were found guilty of at least one offence.

- The national average length of sentenced detention for young persons in 2009-10 was 111 days, very slightly greater than the Victorian average of 110 days. The national average length of detention on remand was 36 days, very slightly less than the Victorian average of 38 days.
- On an average day in 2009-10, approximately 0.3% of young persons in Australia were under juvenile justice supervision. Of these 84% were male, up to 37% of whom were indigenous. Of the 16% of females under supervision, 43% were indigenous. Most young persons supervised in 2009-10 had first entered supervision when they were aged 14-17 years. Victoria's supervision rate in 2009-10 was 3.69 per 1,000 compared to a national average of 5.11 per 1,000. Victoria had the lowest average number of community-based orders per person (1.8) in 2009-10.
- The average number of days a young person spent under juvenile justice supervision in 2009-10 varied from 218 in Tasmania to 152 in A.C.T. The Victorian average of 179 days was just above the Australian average of 177 days. The more remote a young person's residence, the more likely he/she is to be subject to supervision. Membership of the lowest socio-economic group increases a young person's chance of being under supervision by a factor of more than four.
- Overall 10 to 19 year olds made up 28% of all offenders in 2010-11. Offending rates are at their highest (23% of all offenders) for youths aged 15 to 19. The most common offence was theft. For males offending peaked at age 18, for females at age 16.

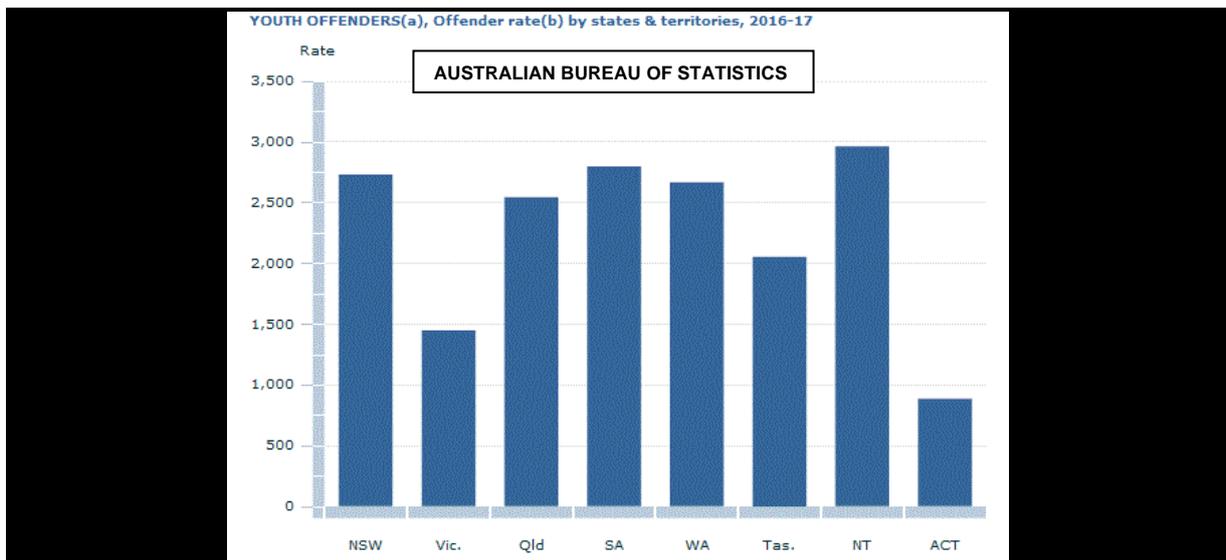
Australian youth offender rates per 100,000 from 2008-2011

It is interesting to note that Victoria – which has by far the lowest youth detention rate – also has the lowest rate of youth offending of any Australian State or Territory other than the A.C.T. whose data is described in notes to the chart below as “understated”. So much for the ‘law and order’ philosophy that increasing the detention rate lowers the crime rate. Modern thinking about child brain development referred to in *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 at [77] explains why this old ‘law and order’ philosophy is flawed, at least so far as children are concerned: “The risk that a period of detention will be counter-productive for an offender – and hence for the community – is never higher than in relation to a young offender who has not previously been in custody. Research to which the Chief Scientist of New Zealand has recently drawn attention has highlighted the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely.”



Australian youth offender rates per 100,000 in 2016/17

Youth offending rates published by the Australian Bureau of Statistics on 08/02/2018 for the financial year 2016/17 demonstrate a decrease in the Australia-wide youth offender rate for the seventh consecutive year. Between 2009/10 & 2016/17 the rate fell from 3,339 to 2,330 offenders per 100,000 persons aged 10-17. This is a fall of 28% or 20,860 youth offenders over a period in which the total offender population in Australia has increased by 5%. In 2016/17 Victoria has recorded – as it also did from 2008-2011 – the lowest rate of youth offending (1,447 offenders per 100,000 persons) of any Australian State or Territory other than the A.C.T.



11.8 Parole & Remissions

11.8.1 Parole

A court sentencing an **ADULT** to a term of imprisonment of 12 months or more has power - and in some circumstances an obligation - under s.11 of the Sentencing Act 1991 (Vic) to set a non-parole period.

In *R v Josefski* (2005) 13 VR 85; [2005] VSCA 265 at [43] Callaway JA, with whom Chernov JA agreed, reiterated principles applicable to fixing a non-parole period which he and Batt JA had earlier stated in *R v VZ* (1998) 7 VR 693:

- “1. When a sentencing judge decides to fix a non-parole period that is unusual, reasons for taking that course should ordinarily be given.
2. A non-parole period may be unusual by comparison with other cases or having regard to the facts of the instant case or the course of the plea. Those examples are not exhaustive.
3. Where a non-parole period is unusual, a failure to give reasons does not inevitably betoken error but it invites appellant scrutiny.
4. The purpose of fixing a non-parole period is to provide for mitigation of punishment in favour of the prisoner’s rehabilitation through conditional freedom.
5. The fixing of a non-parole period requires discrete consideration of the factors bearing upon the question when the prisoner should be eligible for release.
6. The non-parole period is the minimum time that the sentencing judge determines that justice requires the prisoner to serve having regard to all the circumstances of the case.
7. It follows from 5 and 6 that a non-parole period cannot be fixed mechanically by some such method as taking two years, or one-third or one-quarter, off the head sentence.
8. All the relevant factors have to be taken into account. They are many and varied but they include-
 - (a) that a non-parole period has a penal element;
 - (b) that, where either general or specific deterrence is important, that objective should not be undermined by an unduly short non-parole period; and
 - (c) that the prisoner’s prospects of rehabilitation are almost always a significant consideration.”

His Honour also noted that rehabilitation achieved and in prospect is relevant to the head sentence as well as the non-parole period, but it is often given additional weight in fixing the latter. Another factor may be ill health: see *R v VZ* at 698. *R v VZ* has often been applied. See, for example, *R v Pope* (2000) 112 A Crim R 588 at 589; *R v Harkness & Ors* [2001] VSCA 87 at [1], [2] & [22]-[25]; *R v Barnes* [2003] VSCA 156 at [22]-[23], [25] & [31]-[35]; *R v Kotzmann* [1999] 2 VR 123 at 137; *R v Alparslan* [2007] VSCA 3 at [13]-[24]; *R v Wooden* [2006] VSCA 97 at [8]-[9]; *R v Detenamo* [2007] VSCA 160; *R v Bertrand* [2008] VSCA 182; *R v Merritt* [2008] VSCA 238 at [16]-[18].

See also *Power v The Queen* (1974) 131 CLR 623 (Barwick CJ, Menzies, Stephen and Mason JJ) at 627; *R v Morgan & Morgan* (1981-3) 7 A Crim R 146 (Kaye & Jenkinson JJ) at 154-155; *Romero v The Queen* [2011] VSCA 45 at [25]-[26]; *R v Milkins* [2011] VSCA 93 at [106]; *R v Davy* [2011] VSCA 98 at [26]-[28]; *R v Green* [2011] VSCA 236 at [11]-[18]; *R v Rintoull* [2011] VSCA 245 at [29]-[33]; *DPP v Underwood* [2011] VSCA 270; *Felicite v The Queen* [2011] VSCA 274 at [37]-[42] & [50]-[51]; *R v Borthwick* [2012] VSCA 180; *R v Yost* [2012] VSCA 181; *DPP v Kumova* [2012] VSCA 212; *R v MA* [2012] VSCA 214; *John Gordon v The Queen* [2013] VSCA 343 at [13]-[20]; *McLean v The Queen* [2018] VSCA 209; *DPP v Huby* [2019] VSCA 106 at [70]-[101] and the numerous cases cited therein.

In *DPP (Vic) v Wallace* [2012] VSCA 114 at [2] the Court of Appeal set out and discussed the four principles governing appellate review of a non-parole period.

In relation to the relevance to a non-parole period of the likelihood of the applicant's deportation after serving his sentence, see *R v Mann* [2011] VSCA 189 at [36]-[43] and the cases cited therein – *Guden v The Queen* [2010] VSCA 196, [15] & *R v Strestha* (1991) 173 CLR 48, 57 (Brennan & McHugh JJ). See also *R v Hutton* [2011] VSC 484 at [41]-[42].

In *DPP (Vic) v Yeomans* [2011] VSCA 277 the unsuccessful appellant was aged 18 at the time of the offending and 19 on the date of sentence and had 120 previous convictions from eight court appearances between 2001 and 2009. He was sentenced to IMP 6y7m/4y in relation to 19 separate incidents of burglary (including 2 aggravated burglaries), robbery (including 2 armed robberies) and theft. At [3] Ashley JA approved the lengthy parole period:

“The sentencing judge allowed for a substantial potential period of parole. I think that it will be of critical importance, if the appellant is to have any chance of escaping from a pattern of repeat offending and gaol, that he have substantial assistance from the parole service in whatever period of parole is granted to him. Such assistance may provide the only antidote to the potentially corroding influence of years spent by a young man in an adult prison.”

In his judgment in *R v Monardo* [2005] VSCA 115 Callaway JA observed at [4] that:

“It is well established that a head sentence must be assessed on the basis that the prisoner may have to serve every day of it. A head sentence that is too severe cannot be saved by a moderate, or even merciful, non-parole period.”

In *R v Boland* [2007] VSCA 242 at [13]-[14] Nettle JA, with whom Ashley & Dodds-Streeton JJA agreed, said:

“While it is true that one must approach the task of sentencing on the basis that the prisoner may be required to serve every day of the head sentence, the process of setting a non-parole period is in some respects not dissimilar to concluding that some part of a sentence should be suspended. As was said by the High Court in *Power v The Queen* (1974) 131 CLR 623, 628:

‘[C]onfinement in a prison serves the same purposes, whether before or after the expiration of a non-parole period, and throughout it is punishment, but punishment directed towards reformation. The only difference between the two periods is that during the former the prisoner cannot be released on the ground that the punishment has served its purpose sufficiently to warrant release from confinement, whereas in the latter he can. In a true sense, the non-parole period is the minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.’

“There is, of course, the difference between a partially suspended sentence and a non-parole period that, with the former, the prisoner may be certain that he will not be required to serve an immediate term any longer than is set. There may also be practical differences associated with the need to report and supervision.”

In *R v Wunan Yu* [2005] VSCA 18 Winneke P (with whom Charles & Buchanan JJA agreed), referring to the judgment of Marks J in *R v Binder and Langer* [1990] VR 563 at 569-570, to *Shrestha v The Queen* (1991) 173 CLR 48 and to s.5(2AA)(a) of the Sentencing Act 1991, held at [11] that the sentencing judge was wrong to take into account the possible effects of executive action or policy (namely the prospect of the appellant being deported to China) in determining not to set a non-parole period. Further, his Honour said, the circumstances of the case, including the youth and personal

characteristics of the appellant, his “otherwise good character” and his rehabilitation made it highly desirable to fix a minimum term following which he would become eligible for parole. See also *R v Arnold* [1998] VSCA 34; *R v Heazlewood* [1998] VSCA 33; *R v Glennon (No.3)* [2005] VSCA 262 at [40]; *Nguyen v The Queen* [2010] VSCA 244; *R v Adenopo* [2011] VSCA 269.

The Court of Appeal has made it clear in *R v Tin Yu Ng* and *R v Yik Lun Siu* [2009] VSCA 218 at [28] that-

“[T]here is no usual or standard non-parole period: *R v Tran* [2006] VSCA 222, [27]-[28]. Looking at the typical non-parole period imposed, Callaway JA in *R v Bolton & Barker* [1998] 1 VR 692 observed at 699:

‘As with the discount appropriate to a plea of guilty, there is no fixed ratio between a head sentence and a non-parole period. In the majority of cases the proportion is between two-thirds and three-quarters, but both shorter and longer periods are found.’”

Both *R v Bolton* and *R v Tran* were referred to with approval by the Court of Appeal in *R v Marino* [2011] VSCA 133 at [45]-[47].

In *Carter v The Queen* [2020] VSCA 13 the Court of Appeal refused to fix a non-parole period in a case where the applicant had already served almost the entirety of the 3y total effective sentence.

When sentencing a **CHILD** to a period of detention in a YRC or YJC, neither the Supreme Court, the County Court nor the Children’s Court has power to set a non-parole period, whatever the period of detention imposed. This is so whether the child is sentenced under ss.32-34 of the Sentencing Act or s.410 or s.412 of the CYFA. A decision to release a child on parole is an administrative decision taken pursuant to s.458(1) by the Youth Parole Board [see ss.442-452 & 462-463 of the CYFA] after a review of the case made by the Board. This structure was criticised by the Court of Appeal in *R v Hill* [1996] 2 VR 496 at 504-5 but it remains the law:

"[T]he...fact that the Youth Parole Board (which, unlike a court, is not obliged to make public its decisions) and not any court, decides when a young offender will be released, appears to provide but little support for the ideal of truth in sentencing."

Though every case depends on its individual circumstances, the Youth Parole Board often considers eligibility for parole of young persons who have been sentenced to YJC/YRC detention of 6 months or more. However, this is not a universal rule.

Section 458(4) provides that subject to any determination of the Youth Parole Board, a parole order is subject to-

- (a) the terms and conditions prescribed in reg.30 of the Children, Youth and Families Regulations 2017 [S.R.No.19/2017]; and
- (b) any conditions imposed under s.458A, the conditions referred to in s.458A(3) being mandatory on a parole order for a person detained in respect of category A or category B offences committed in certain circumstances unless the Board considers that the person has demonstrated a history of good behaviour and positive engagement with rehabilitation programs throughout the detention period for the offence in question.

Under s.459(2) of the CYFA, a person released on parole is regarded as still being under sentence and as not having served his or her period of detention.

Section 460(1) of the CYFA empowers the Board to cancel parole at any time before the end of the parole period. Section 460(4) empowers the Board to cancel a person's parole, whether or not the parole period may already have ended, if the person is sentenced to a term of imprisonment or period of detention of more than 3 months in respect of an offence committed during the parole period. Section 461 empowers the Board to release a detainee on parole more than once.

11.8.2 Remissions

Though, again, every case depends on its individual circumstances, a child who is serving a sentence of YJC or YRC detention of less than 6 months is sometimes given a remission for satisfactory behaviour. Remission for satisfactory behaviour in custody is regulated by reg.37 of Children, Youth and Families Regulations 2017 [S.R.No.19/2017].

11.9 Temporary leave from detention

In relation to a person detained in a remand centre, YRC or YJC, s.485(1) of the CYFA empowers the Secretary DJCS or the officer in charge to permit a detainee to take temporary leave of absence, with or without escort or supervision, for any purpose stated in the permit. Such purpose is not limited to but may include any of the following:

- (a) to engage in employment, whether with or without remuneration;
- (b) to attend an educational or training institution;
- (c) to visit his or her family, relatives or friends;
- (d) to participate in sport, recreation or entertainment in the community;
- (e) to attend a hospital or a medical, dental or psychiatric clinic or like place for receiving treatment or for examination;
- (f) to attend a funeral;
- (g) to accompany members of the police force for a specified purpose or for assisting in the administration of justice;
- (h) to seek employment;
- (i) to live in any other accommodation specified in the permit for any purpose specified in the permit.

Such permit may be subject to any conditions, limitations or restrictions that the Secretary thinks fit to impose: s.485(2). A detainee permitted temporary leave is deemed to continue to be in legal custody: s.485(3).

A permit under s.485(1) may be granted at any time, whether or not the non-parole or non-remission part of his or her sentence has been completed. This is because the underlying philosophy of both YRC and YJC detention is rehabilitation. The aim is to work intensively with each detainee and to provide him or her with supervision, support, education, training and rehabilitation programs to maximise any possibility of rehabilitation ["New Directions for Juvenile Justice: Melbourne Juvenile Justice Centre", Juvenile Justice Branch, Dept of Human Services, June 1995, Publication No.92/0121].

11.10 Transfers between custodial institutions

Administrative transfers between custodial institutions are authorized and regulated by s.484 and by the following provisions of the CYFA:

FROM YRC		FROM YJC		FROM PRISON	
TO YJC	ss.464-466	TO PRISON	ss.467-469 s.473 [transfer back]	TO YRC	s.472
TO PRISON	s.467-469 s.473 [transfer back]	TO YRC	s.470	TO YJC	s.471

Cases in which the Supreme Court or Court of Appeal has recommended to the Adult Parole Board that it consider transferring a young person from prison to a YJC pursuant to s.244 of the CYPA [now s.471 of the CYFA] include *DPP v Karipis* [2005] VSCA 119 at [18] & [23]; *DPP v Reynolds & Ors* [2004] VSC 533 at [34]; *R v PP* [2002] VSC 533 at [38]-[39] and on appeal [2003] VSCA 100 at [11]; *R v LMA* [2005] VSC 152 at [10]-[11]; *R v Ty* [2005] VSC 109 at [10]; *R v Speedie* [2005] VSC 194 at [38].

11.11 Further custodial sentence imposed on detainee

The following sections of the CYFA regulate the service of a subsequent custodial sentence imposed on a person who is already serving a custodial sentence.

CYFA	SUBJECT MATTER
474	Person in YRC sentenced to detention in YJC or to imprisonment
475	Person in YJC sentenced to imprisonment
476	Person in YJC sentenced to detention in YRC
477	Person in prison sentenced to detention in YJC

By and large these provisions confer powers on the Youth Parole Board and the Adult Parole Board. The only power conferred on the Court, albeit indirectly, is a power to direct that certain sentences be served cumulatively or part-concurrently. Provisions relevant to the Court are as follows:

CYFA	SUBJECT MATTER
475(2)	If a person has been sentenced to YJC and before the end of the sentence is sentenced to a cumulative term of imprisonment, service of the YJC detention is suspended until the person has served the sentence of imprisonment.
475(3)	Every sentence of imprisonment must, unless otherwise directed by the Court at the time, be served concurrently with any uncompleted sentence of YJC detention imposed either before or at the time the sentence of imprisonment was imposed.
477(1)	If a person has been sentenced to imprisonment and before the end of the sentence is sentenced to a cumulative term of YJC detention, service of the YJC detention is suspended until the person has served the sentence of imprisonment.
477(2)	Every sentence of YJC detention must, unless otherwise directed by the Court at the time, be served concurrently with any uncompleted sentence of imprisonment imposed either before or at the time the sentence of YJC detention was imposed.

For a brief judicial comment on ss.475(2) & 475(3) of the CYFA [formerly ss.246(2) & 246(3) of the CYPAs] see the judgment of O'Bryan AJA - with which Vincent JA & Smith AJA agreed - in *R v Caleb James O'Connor* [2004] VSCA 8.

11.12 Breach of sentencing orders made under the CYFA

11.12.1 "Generic" provisions governing commencement, hearing and transfer of breach proceedings

For a proceeding commenced on or after 01/07/2005 for breach of a sentencing order made under the CYPAs or the CYFA (regardless of which court made the sentencing order, when the offence to which the proceeding relates was committed, when the sentencing order was made or what was the defendant's age at the time of the breach), s.423 of the CYFA [previously s.196A of the CYPAs] provides a nearly "generic" procedure for the commencement, hearing and transfer of such proceeding. Breach of a CYFA sentencing order for this section includes default in the payment of a fine or of any instalment under an instalment order.

ALL CYFA BREACH PROCEEDINGS ARE COMMENCED IN THE CHILDREN'S COURT

Section 423(2) provides that a proceeding for breach of a CYFA sentencing order must be commenced in the Children's Court-

- (a) whether the sentencing order was made by the Children's Court or by the Supreme Court or County Court, whether on appeal or otherwise; and
- (b) whether the person against whom the proceeding is commenced is aged 19 or more.

The method of and time for commencement of a proceeding against a person for breach of a CYFA sentencing order / revocation of a YCO is as follows-

ACCOUNTABLE UNDERTAKING: Commenced by notice served by the Court on the person and if the person is under 15 years of age his or her parent [s.366(1)]. If the person fails to appear in response to served notice, the Court may issue a warrant to arrest [s.366(2)]. No time limits specified.

GOOD BEHAVIOUR BOND: Commenced by notice served by the Court on the person and if the person is under 15 years of age his or her parent [s.371(1)]. If the person fails to appear in response to served notice and the Court is satisfied the notice has come to the attention of the person, the Court may issue a warrant to arrest [s.371(2)(a)] or proceed in the person's absence [s.371(2)(b)]. Proceeding must be commenced-

- not later than 3 months after a finding of guilt in respect of a breaching charge [s.372(a)]; or
- not later than 3 months after any other alleged breach and before the expiry of the bond [s.372(b)].

PROBATION: Commenced by notice served by the Secretary to the Department of Justice and Community Safety ['Secretary DJCS'] or by the Court [s.384(1)] or by warrant to arrest if service of a notice cannot be effected [s.384(2)(b)]. If the person fails to appear in response to served notice and the Court is satisfied the notice has come to the attention of the person, the Court may issue a warrant to arrest [s.384(2)(a)] Proceeding must be commenced-

- not later than 3 months after a finding of guilt in respect of a breaching charge [s.386(a)]; or
- not later than 14 working days after any other alleged breach [s.386(b)].

YOUTH SUPERVISION ORDER: Commenced by notice served by the Secretary DJCS or by the Court [s.392(1)] or by warrant to arrest if service of a notice cannot be effected [s.392(2)(b)]. If the person fails to appear in response to served notice and the Court is satisfied the notice has come to the attention of the person, the Court may issue a warrant to arrest [s.392(2)(a)]. Proceeding must be commenced-

- not later than 3 months after a finding of guilt in respect of a breaching charge [s.395(a)]; or
- not later than 14 working days after any other alleged breach [s.395(b)].

YOUTH ATTENDANCE ORDER: Commenced by notice served by the Secretary DJCS [s.408(4)] or warrant to arrest if service of a notice cannot be effected [s.408(6)(b)]. If person fails to appear in response to served notice and the Court is satisfied the notice has come to the attention of the person, the Court may issue a warrant to arrest [s.406(6)(a)]. Proceeding must be commenced-

- not later than 3 months after a finding of guilt in respect of a breaching charge [s.408(3)(a)]; or
- not later than 14 working days after any other alleged breach [s.408(3)(b)].

YOUTH CONTROL ORDER: Unlike the other sentencing orders, the provisions relating to breach of a YCO are contained in sections referring to “revocation” of a YCO [ss.409Q & 409R]. There are no stand-alone breach proceedings. Proceedings for revocation are commenced by application filed by-

- (a) the child or, if the child is under 15 years of age, his or her parent [s.409Q(2)(a)];
- (b) the Secretary DJCS if it appears to the Secretary that the child has breached the YCO for any reason [s.409Q(2)(b)]; or
- (c) a police officer if the child has been convicted of an offence punishable on first conviction with imprisonment for life or for a term of 5 years or more during the period that the YCO is in force [s.409Q(2)(c)].

Notice of the hearing of the application must be served by the Court on the child and, if the child is aged under 15 years, his or her parent and on the applicant. The Court may order that a warrant to arrest be issued against the child if he or she does not attend for the hearing [s.409Q(6)]. Proceeding must be commenced-

- not later than 3 months after a finding of guilt in respect of a breaching charge [s.409Q(3)(a)]; or
- not later than 14 working days after any other alleged breach [s.409Q(3)(b)].

It is not clear from the brief reference to s.423 in s.409K(c) whether it is the intention of Parliament that proceedings for revocation of a YCO made by a higher Court must also be commenced in the Children’s Court if the proceedings do not actually originate from a “breach” of the YCO (for example if the application was filed by the child under s.409Q(2)(a) or by a police officer under s.409Q(2)(c) in relation to a conviction for an offence which pre-dated the making of the YCO).

HEARING OF A CYFA BREACH PROCEEDING WHERE CHILD IS UNDER AGE 19

Section 423(3) provides that if the proceeding for breach of a CYFA sentencing order is against a child who is under the age of 19 years when the breach proceeding is commenced, the Children’s Court must hear and determine the proceeding unless-

- (a) the sentencing order was made by the Supreme Court or the County Court and the child does not consent to the Children’s Court hearing the breach proceeding; or
- (b) the Children’s Court considers that in all the circumstances of the case it is appropriate to transfer the proceeding to the court that made the sentencing order.

HEARING OF A CYFA BREACH PROCEEDING WHERE CHILD IS AGED 19 OR MORE

Sections 423(4) & 423(5) provide that if the proceeding for breach of a CYFA sentencing order is against a person who is aged 19 years or more when the breach proceeding is commenced, the Children’s Court must transfer the proceeding (other than a proceeding for breach of an accountable undertaking) to the Magistrates’ Court or to the court that made the sentencing order unless the Children’s Court considers that in all the circumstances of the case it is appropriate for the Children’s Court to hear and determine the proceeding, having regard to the following matters-

- (a) the age of the person;
- (b) the nature and circumstances of the alleged breach;
- (c) the stage of the breach proceeding;
- (d) whether the person is the subject of another proceeding in any other court;
- (e) the availability of appropriate sentencing orders in the other court if the breach were proved;
- (f) whether the person prefers to be dealt with in the Children’s Court or any other court;
- (g) any other matter that the Court considers relevant.

An exception has been made in s.423(4) for proceedings for breach of an accountable undertaking. These may not be transferred to a higher court in any circumstances. Presumably the reason for this

exception is that s.366(5) provides that if the court revokes the order dismissing the charge the maximum penalty it may impose is a fine of no more than 1 penalty unit.

Section 423(6) provides that a CYFA breach proceeding must not be transferred on the sole ground that the sentencing order was made by another court.

POWER TO DISCONTINUE CYFA BREACH PROCEEDING & TRANSFER TO ANOTHER COURT

Section 423(7) provides that-

- if the person does not consent to the Children’s Court hearing the proceeding for breach of a CYFA sentencing order made by the Supreme Court or County Court; or
- if the Children’s Court considers that the breach proceeding should be transferred- it must discontinue the proceeding and order that it be transferred to the relevant other court and in the meantime may-
 - (a) permit the person to go at large; or
 - (b) grant the person bail; or
 - (c) remand the person in custody or in accordance with s.49 Magistrates’ Court Act.

Section 423(8) gives the Magistrates’ Court power to re-sentence the person as if it had just been satisfied of the person’s guilt, whether or not the Magistrates’ Court would otherwise have had jurisdiction to deal with the offence.

CONSTITUTION OF CHILDREN’S COURT HEARING A CYFA BREACH PROCEEDING

Proceedings for breach of the following sentencing orders must be heard by the judicial officer who made the original sentencing order if he or she still holds office unless the child consents to another judicial officer hearing the breach-

- accountable undertaking [ss.366(3) & 366(4)];
- good behaviour bond [ss.371(3) & 371(4)].

Proceedings for breach of the following sentencing orders must be heard by the judicial officer who sentenced the person if he or she still holds office unless the child consents to another judicial officer hearing the breach or it is otherwise impracticable for the original judicial officer to hear the breach-

- probation [s.384(3)];
- youth supervision order [s.392(3)]; and
- youth attendance order [s.408(7)].

These provisions refer only to “magistrate” and not to “judge or magistrate”. Section 508(8) of the CYFA is relied on to extend these breach provisions to the President of the Children’s Court.

11.12.2 Powers upon proof of breach of CYFA sentencing order (other than YCO & fine default)

(1) [AUT] ACCOUNTABLE UNDERTAKING

Under s.366(5), the Court may-

- (a) cancel the undertaking; or
- (b) continue or vary the undertaking but must not extend the period; or
- (c) revoke the order dismissing the charge and impose a fine not exceeding 1 penalty unit.

(2) [GBB] GOOD BEHAVIOUR BOND

Under s.371(5), the Court may-

- (c) declare the bond to be forfeited and impose no penalty; or
- (d) proceed with the further hearing and determination of the case and deal with the child in any way in which the child could have been dealt with before the adjournment was granted.

(3) [PRO] PROBATION

Under s.384(5) the Court may-

- (d) confirm the probation order; or
- (e) vary, add or substitute any special condition but must not extend the period of the order; or
- (f) revoke the probation order and impose any other sentencing order the Court thinks just; or
- (g) if the probation order has expired, impose any sentencing order the Court thinks just.

(4) [YSO] YOUTH SUPERVISION ORDER

Under s.393 the Court may-

- (d) vary the YSO but not extend its term; or
- (e) confirm the YSO and direct the person to comply with it; or
- (f) revoke the YSO and impose any sentencing order the Court thinks just; or
- (g) if the YSO has expired, impose any sentencing order the Court thinks just.

(5) [YAO] YOUTH ATTENDANCE ORDER

Under s.408(2) the Court may-

- (a) vary the YAO but not extend its term; or
- (b) confirm the YAO and direct the person to comply with it; or
- (c) revoke the YAO and impose any sentencing order than the Court thinks just but not make an order for the person to be kept in custody for a period longer than that of the breached YAO; or
- (d) if the YAO has expired, impose any sentencing order that the Court thinks just but not make an order for the person to be kept in custody for a period longer than that of the breached YAO.

It is clear that it is the intention of s.423 that there be no age restriction on the jurisdiction of the Children's Court to deal with breaches of any sentencing order made under the CYFA, irrespective of how old the person was at the time the alleged breach was committed or the breach proceeding was commenced.

11.12.3 Revocation of YCO and consequences thereof

Under s.409Q(1) of the CYFA the Court must revoke a YCO in respect of a child if an application for revocation has been made and-

- (a) the Court is satisfied that the child has breached the order, by failing to comply with the order to such an extent that he or she is no longer suitable for the order; or
- (b) the child commits an offence punishable on first conviction with imprisonment for life or for a term of 5 years or more during the period that the YCO is in force.

Under s.409R of the CYFA if the Court revokes a YCO in respect of a child, the Court must impose a sentence of detention on the child unless the Court considers that detention is not appropriate because exceptional circumstances exist. The sentence of detention must not be for a period longer than the remaining period of the YCO. In sentencing the child, the Court must have regard to the period for which the YCO has been in force and the extent of the child's compliance with the order.

11.12.4 Fine defaults

In earlier years a significant proportion of sentencing orders were fines: 42% in 2003/04. That reflected the very high proportion of *ex parte* hearings in relation to offences like travelling on public transport without a valid ticket or riding a bicycle without wearing a properly fitted helmet. In more recent times the proportion of fines has continued to decline and reached a low of 14% in 2015/16. It increased slightly to 19.5% in 2016/17. The reason for the decline is that the majority of the offences for which fines were imposed in the past are now processed through the Children and Young Persons Infringement Notice System [CAYPINS], as to which see Chapter 7.7.

Because children and young people frequently have no source of income other than their parents, a very significant proportion of fines are not paid. There is no power to enforce the payment of unpaid fines against a parent. Nor, unlike the situation with an adult, is there any power to order a child to perform unpaid community service in default of payment of a fine (cf. s.62(10)(a) of the Sentencing Act 1991 [as amended]). By amending Act No.69/1992, s.155(1)(d) - the option for a YSO or YAO - was to be replaced with a 'community service order' made pursuant to a new s.155B of the CYPA. However, those provisions never came into operation. Section 378(1)(f) of the CYFA now makes probation or YSO for a period not exceeding 3 months an option in fine default proceedings.

If for a period of more than one month a person defaults in payment of a fine or any instalment under an instalment order, the person may be served, by post or otherwise, with a notice to appear before the Court in respect of the default: s.378(2) of the CYFA. If the person fails to appear or service of the notice cannot be effected, the Court may order that a warrant to arrest the person be issued.

Section 378(1) of the CYFA gives the Court power in relation to a "person" who has been served with a notice under s.378(2) or has been arrested on a warrant issued under s.378(3). This is a recent amendment. The fine default provisions previously referred to a "child" defaulting in the payment of a fine. The amendment is clearly intended to enable persons who were fined as children and who have not paid the fine to be subject to the fine default provisions whether or not they are no longer children.

A court's powers under s.378(1) of the CYFA are-

(a)	WAIVE PAYMENT	to determine that payment of the amount of the fine that remains unpaid not be enforced;
(b)	ADJOURN	to adjourn the hearing or further hearing of the matter for up to 6 months on any terms the Court thinks fit;
(c)	VARY	to order that the fine be varied in a specified way;
(d)	VARY INSTALMENT ORDER	if the default is in payment under an instalment order [s.375], to order that the instalment order be varied;
(e)	WARRANT TO SEIZE PROPERTY	to order that the fine then unpaid be levied by a warrant to seize property;
(f)	PROBATION or YSO	to release the child on probation or a YSO for a period not exceeding 3 months but in no case extending beyond the child's 21 st birthday;

Since 01/07/2005 all previous powers to order that a child in default of payment of fine be detained in YRC or YJC on weekend detention have been repealed.

It has been uncommon at most courts for a child to be placed on a YSO or YAO in default of payment of a fine. At Melbourne Children's Court, most orders made in default of payment of a fine were warrants to seize property under s.378(1)(e) of the CYFA [previously s.155(1)(c) of the CYP A]. Most warrants so issued are returned to Court marked '*nulla bona*' (no goods to seize). This process falls well short of the sentencing ideal, set out in s.362(1)(f) of the CYFA, of requiring a child to be accountable for his or her offending behaviour.

11.13 Sunset provision for Children's Court priors

Children's Court prior criminal orders effectively expire after 10 years. So far as it is relevant to criminal charges and orders, s.584 of the CYFA provides:

- (1) If a person has appeared before the Court charged with an offence, the fact of the charge or of any order made in respect of the charge must not be given in evidence against the person in any legal proceeding within the meaning of s.3 of the Evidence Act 1958 (other than a proceeding in the Children's Court) after the end of 3 years from the date of the charge.
- (2) Sub-section (1) does not apply if that fact is relevant to the facts in issue in the proceeding or to matters necessary to be known in order to determine whether or not those facts existed.
- (3) Despite sub-section (1), if a person is found guilty by a court of an offence, evidence may be given to the court of an order of the Criminal Division in relation to an offence committed by the person, if the order was made not more than 10 years before the hearing at which it is sought to be proved.

Section 376(1) of the Crimes Act 1958 reinforces s.584 of the CYFA. It provides that in an indictment or presentment for an indictable offence it shall be lawful to add to the presentment an averment that the offender had one or more **previous convictions**. Prior conviction is broadly defined in s.376(4) as:

"a prior conviction or finding of guilt by a court (whether in or out of Victoria), including a conviction or finding of guilt consequent on which is made-

- (a) an order of a court releasing a person on an adjournment without recording a conviction; or
- (b) a community-based order-

but 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 prior to the hearing at which it is sought to be proved."

11.14 The MAPPS Program

In *R v P & Ors* [2007] VChC 3 the President of the Children's Court, Judge Grant, imposed youth supervision orders or probation on eight young co-offenders. Each had pleaded guilty to:

- representative counts of procuring by intimidation a young woman FS described as "mildly delayed in her intellectual development" to take part in an act of sexual penetration with two of them;
- assault of FS; and
- making child pornography, namely a film depicting FS engaging in sexual activity.

Each of the co-offenders having been assessed as suitable to participate in the MAPPS program, his Honour placed a special condition on each of the orders that the offender participate in the MAPPS

program as directed by Youth Justice in consultation with MAPPS. At [24]-[25] Judge Grant said to the offenders:

“MAPPS is the Male Adolescent Program for Positive Sexuality. It is based within the Adolescent Forensic Health Service of the Royal Children’s Hospital. It is a program that is run for young males aged 10-21 who have been found guilty of a sexual offence. The program ‘places emphasis on the young person accepting responsibility for his offending behaviour and for making the necessary changes so that he can lead a life that doesn’t include offending.’ The program is held in high regard. Independent evaluation has shown it to be very successful in protecting the community by ensuring young men cease offending and change their attitudes and behaviours. It is no an easy option. You and your family will be engaged in various aspects of treatment. The treatment will be tailored to your individual needs as assessed by MAPPS. The average period of treatment is nine months.

In a general letter to the Court (accompanying the individual assessment reports) Ms L, a clinical consultant at MAPPS stated, ‘The offences, involving the sexual and physical assault, exploitation and degradation of a vulnerable female, committed by these young men are viewed as very serious. All of the young men require rehabilitative interventions to address their offending and reduce the risk of further anti-social behaviour.’ I agree with those comments.”

See also *R v M & Ors* [2008] VChC 4 at [24]-[27].

11.15 Sentencing of adults for child abuse

11.15.1 Sexual abuse

In *R v PFG* [2006] VSCA 130 at [61] the Court of Appeal said:

“Children must be protected from sexual abuse by adults who are entrusted with their care. Incest often permanently scars its victims emotionally and psychologically. The offence also corrodes human relations. It is an attack upon the family and thus upon a singularly important social institution.”

In *DPP v HRA* [2012] VSCA 88 at [23] Maxwell P said:

“Questions of general deterrence and denunciation are overwhelmingly important, as this Court has so often said, where child sex offending is concerned. Such is the continuing frequency of serious child sex offending by persons, like this applicant, who hold positions of trust that there is a continuing need for stern sentences.”

However in *R v RGG* [2008] VSCA 94 at [3] Ashley JA sounded a note of caution in sentencing for child sexual offences:

“There is an ever-present danger, I think, when a person is to be sentenced for child sexual offences, that lip service and nothing more will be paid to matters going in mitigation. In this case, there were substantial mitigatory circumstances.

And in *R v CLP* [2008] VSCA 113 at [24] Neave JA noted:

“Weight should also be given to an admission of sexual offences because it may help the victims to recover from the harm caused to them, particularly where, as in this case, the abuse occurred within a family and was kept secret by each of the daughters for many years.”

In *R v Dibbs* [2012] VSCA 224 at [2] Harper JA said:

“The fair, even-handed and compassionate administration of criminal justice according to law is as difficult as any aspect of civilised governance. And, of all the myriad forms of wrongdoing of which humankind is capable, sexual misconduct presents difficulties in its detection, punishment and restorative aspects which are as problematic as any that confront the criminal courts. This case, although by no means as complicated as some, illustrates the point.”

In his joint judgment with Beach AJA in *PG v The Queen* [2013] VSCA 9 at [3]-[5] & [8]-[9], Harper JA expanded on this theme:

[3] “Allegations of sexual misconduct, especially if the accused is a close family member, are...in a class of their own. They not only often contain at least the seeds of tragedy, but also commonly pose problems of almost impossible difficulty. Frequent among these are multiple allegations of serious offending over many years – offending which is often said to have occurred not only long ago, but also when the victim was too young or too traumatised to remember specifics such as dates and places. Even where neither youth, nor a mind affected by trauma, nor any like factor, adversely affects the memory, details may be hard to recall. The more frequently offending occurred, the more will one episode tend in the mind of the victim to blur into another; but this circumstance could also be exploited by the unscrupulously mendacious complainant to serve as a smokescreen for an inability to provide detail which, because (on this hypothesis) the allegations are false, does not exist. And not only do delays in disclosure cause problems in themselves for both prosecution and defence (and therefore also for the courts), but the victims not unusually have difficulty in explaining not so much the initial failure to report offending shortly after it is alleged to have occurred, but why allegations are made when they are made.

[4] It is facile and quite wrong, but all too easy, to approach these allegations with preconceptions, such as (for example) that embodied in the nostrum that accusations of sexual misconduct are easy to make but difficult to defend. On the contrary, their making must frequently involve an extraordinary resolve born of considerable courage, or desperation, or both. Sometimes, on the other hand, false allegations spring from malicious dishonesty.

[5] When the allegations are true, the sexual assaults which gave rise to them will be likely to have caused severe, perhaps irreparable, damage to the life of the victim. Where they are untrue, an innocent accused may suffer the unimaginable distress of being convicted of a crime or crimes the mere thought of which the particular accused may find abhorrent. And there is often no easy means for the impartial fact-finder to distinguish between the two possibilities, even though (or sometimes because) guilt must be proved beyond reasonable doubt...

[8] Regardless of the result of the legal process, the allegations once made have necessarily had a profound effect on all involved. When sentencing the appellant following his conviction, the trial judge described, with undoubted accuracy, the effect on the appellant's family (of which, of course, the appellant himself was once an integral part). It was, as her Honour said, ‘devastating’. For the appellant, this manifested itself in the severance of former family bonds and the prospect of many years in prison. For his daughters and wife, if their victim impact statements be accepted, the consequence has been and will doubtless continue to be years if not a lifetime of anguish. Some of the damage is irreparable, no matter what the ultimate result of the proceedings in court.

[9] The fundamental importance of the courts doing everything possible to reach the correct result nevertheless remains. When the positions taken by the protagonists are diametrically opposed, however, the certain identification of the truth is sometimes unattainable. In the circumstances presented by cases of this kind, it is beyond the capacity of any human institution to get it right every time.

11.15.1.1 Sexual abuse in a family setting

In *R v MKG* [2006] VSCA 131 Chernov JA said at [10]:

“The crime of incest is abhorred by the community. As Batt JA said in *R v VZ* [1998] 7 VR 693 at 699, it is a repugnant offence that strikes at the core of the family relationship and involves the breach of trust and the dereliction of protective duties. Furthermore, in this case, the young complainant had to endure the appellant's unnatural conduct towards her for almost 15 months. And the fact that the three counts were representative counts constitutes an aggravating factor, as was recognised in *R. v. SBL* [1999] 1 VR 706. That the appellant abused his parental position of moral superiority and trust in relation to the complainant cannot be sufficiently emphasised. Instead of protecting his young daughter, he did her serious harm. Moreover, the sentencing principles of general deterrence, denunciation and just punishment assumed considerable importance in this case.”

In *R v GMT* [2006] VSCA 13 the offender had maintained a sexual relationship with his daughter which commenced in 1989 when the daughter was 3 years old. In holding that a sentence of 9 years with a non-parole period of 6 years was not manifestly excessive, Charles JA, with whom Vincent JA & Mandie AJA agreed, said at [20]:

“The appellant’s offending occurred over a lengthy period, the count alleging almost seven years. It was submitted by Ms Cannon for the Crown, quite rightly, that the appellant’s acts were persistent, repulsive and unnatural; that he exploited the victim, who was his natural daughter; that he subordinated her, both physically and psychologically, to his demands and acts; and that she suffered, and continues to suffer, from the consequences of his offending. By his actions the appellant breached the trust placed in him as the father of a young girl, and his offending was very serious and merited condign punishment. In this case, factors of particular importance in sentencing included general deterrence, denunciation, and punishment and retribution. As Hedigan AJA said in *R v Ware* [1997] 1 VR 647 at 653 with the agreement of Winneke P and Hayne JA:

‘The courts have had occasion more often than they would care to remember, particularly in the last decade, to consider matters raised by these cases involving both the interests of young persons and societal interests in protecting them by the detection and punishment of this type of crime, which strikes at the familial roots of civilised society.’ “

In *DPP v EB* [2008] VSCA 127 the victim was the respondent’s natural daughter who was aged between five and seven at the time of the offences. The Court of Appeal replaced a sentence of 9½y on 8 counts of incest with a sentence of 11y but did not alter the non-parole period of 7y. Nettle JA (with whom Buchanan & Redlich JJA agreed) said at [16]:

“The risk of re-offending was, therefore, not insignificant, and, as McHugh J put it in *R v Ryan* (2001) 206 CLR 267, 304 [126]–[128] {*in diss* but not on this point}, the persistently punitive attitude of the community towards sexually deviant crimes mandates that, even if long sentences do not deter paraphilic offenders or others with similar inclinations, they may at least have the effect of putting them in a place where they cannot harm others for the time being.”

In *DPP v CPD* (2009) 22 VR 533; [2009] VSCA 114 the accused had pleaded guilty to two counts of sexual penetration of a 3 year old girl and two counts of sexual penetration of a 1 year old girl. One of each of the counts was a representative count. He also pleaded guilty to a representative count of committing an indecent act with a 6 year old girl (making her touch his penis) and a representative count of committing an indecent act with the 3 year old girl (touching her vagina). He was 38 at the time of the offending, 42 at the time of sentence. He had met the girls’ parents at parenting classes in 1996 and they had become good fiends. On occasions, CPD would baby-sit the children of the family. He had been sentenced to IMP2y6m/15m. On DPP appeal this was held to be manifestly inadequate and he was sentenced to IMP6y/4y. At [18] Maxwell P, Redlich JA & Robson AJA said:

“It is indeed deeply disturbing that children so young should have already had to endure such suffering and should have had their emotional development so seriously compromised. The effect on the victim, particularly in offences of this kind, is recognised as a significant sentencing consideration. In *DPP v DJK* [2003] VSCA 109 [17]–[18], which concerned sexual offences against a child, Vincent JA spoke of the important part played by victim impact statements in achieving

‘what might be termed social and individual rehabilitation ... of those persons who have sustained loss and damage by reason of the commission of an offence. ...

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 commission of the crime may well aggravate the situation.’

Eames JA agreed at [30] that, in sentencing, the interests of the victims and the consequences to them of the criminal conduct were matters of particular importance.”

Table C to the judgment in *DPP v CPD* summarises 26 appeals against sentence for sexual penetration of a child under 10. The highest sentence for a single count is 8y: *R v SSG* [1998] VSCA 94. Table D summarises 9 appeals against sentence for incest. It was the view of the Court of Appeal that “the offence of incest may be viewed for present purposes as being cognate with the offence of sexual penetration of a child under 16, at least where the offender holds a position of trust and has responsibility for looking after the victim(s).”

In *R v OAA* [2010] VSCA 155 the applicant had pleaded guilty to five counts of incest. He was sentenced to IMP9y6m/7y on the basis that certain counts were representative in nature. The Crown conceded that one of the counts was not truly representative. The applicant was re-sentenced to IMP9y/6y6m. Maxwell P & Weinberg JA said at [37]:

“Insofar as current sentencing practices for offences of this kind are concerned, these are usefully dealt with in Sentencing Snapshot Number 43 [produced by the] Sentencing Advisory Council. The median total effective term of imprisonment for the offence of incest during the period 2002-3 to 2006-7 seems to have been of the order of six years, with a non-parole period of four years. Individual counts of incest have tended to draw sentences of about four years. The single heaviest total effective sentence for incest recorded in this Snapshot was 15 years’ imprisonment, with a non-parole period of 11 years.”

Their Honours said at [42]:

“The principles which govern sentencing for crimes of this nature committed against a child are well established. Such offending is viewed most seriously. The reason for that approach was explained by Hedigan AJA in *R v Ware* [1997] 1 VR 647 at 653, where his Honour said {in a passage cited with approval in *R v Bellerby* [2009] VSCA 59 at [41]}:

‘A society which fails to protect its children from sexual abuse by adults, particularly by those entrusted with their care, is degenerate. The offence of incest is particularly erosive of human relations and casts doubt on the assumption that parents are natural trustees of the welfare of their children. It ought to be unnecessary to recount the morbid features of incest, the most prominent of which include the exploitation by the stronger will of the adult of the weaker will of the child, the physical and psychological subordination of the child to the perverted indulgences of the adult, the gross breach of trust placed in the offender by the victim and the community, and the irreparable damage to the victim.’”

In *R v PDA* [2010] VSCA 94 the Court of Appeal found no error in a sentence of 7y3m with a non-parole period of 3y10m on six ‘rolled-up’ counts of sexual acts against a 15 year old girl which occurred during one or more of seven episodes in the period October 2006 to April 2007. At [19]-[20] Maxwell P (with whom Buchanan JA agreed) said:

“As this Court said in *DPP v DDJ* [2009] VSCA 115, [51], it is a very serious matter when an older man takes advantage, as this appellant did, of a vulnerable younger girl who is crying out for help. It is close to unthinkable, in my view, that a man of 37 with daughters of his own could convince himself that the right way to respond to a plea for help from a girl threatening suicide was to have sex with her. The repetition of sexual abuse only made it worse. This was a man who, by his own admission, knew that what he was doing was wrong. Yet he kept going back for more sexual encounters. When interviewed, he seemed wholly unable to acknowledge that it was his own sexual interest which made him keep returning.”

In *R v FD* [2011] VSCA 8 the appellant had pleaded guilty to eight counts of incest, one count of attempted incest and two counts of false imprisonment involving biological daughters. He was sentenced as a serious sexual offender to IMP16y/13y. The Court of Appeal agreed with the sentencing judge that the abuse was “appalling”. At [5] Redlich & Weinberg JJA continued:

“It was aggravated by the breach of trust involved, the age of the complainants, and the fact that the offending took place in the presence of both of them. The impact upon the victims had been profound, and was potentially immeasurable. The children had each filed victim impact statements accompanied by assessments by specialist sexual assault

counsellors. In A's case, she was demonstrating behavioural problems described as withdrawal, anxiety and sleep disturbance. In B's case, there were indications of similar unsettled behaviour, including sleep disturbance, fear and aggression."

However the Court of Appeal held that the individual sentences and the total effective sentence were "significantly out of kilter with current sentencing practice in this State". Hence the sentence was manifestly excessive. The appeal was allowed and the appellant was re-sentenced to IMP12y/9y.

Annexure B to the judgment in *R v DJ* [2011] VSCA 250 contains a table of 36 cases heard by the Court of Appeal between 1983 & 2011 that involved sentences for incest. Table B includes for each case the individual sentences, the total effective sentence and non-parole period, the age of the offender, the duration of the offending and a summary of mitigating and aggravating factors. Annexure C includes a table of 17 cases heard by the Court of Appeal between 2002 & 2011 that involved sentences for incest where force, violence or threats were involved or where there was pain or lack of consent but no violence. In *R v DJ* at [5]-[6] Maxwell P (with whom Weinberg & Harper JJA agreed) said:

"[T]he judge spoke in the strongest terms about the gravity of this offending... I respectfully agree. This Court has repeatedly emphasised the seriousness of the crime of incest: see *DPP v CPD* (2009) 22 VR 533, 546-7 [54]-[56] and the cases there cited. This case was undoubtedly made the more serious by the respondent's use of force in the 'primary incident' under count 2, and by his having acted 'in spite', that is, to punish his daughter for what he judged to be her refusal to participate in family events."

And at [26] the Court of Appeal concluded:

"Although this appeal by the Director failed, it does provide this Court with the opportunity to restate – emphatically – that in a case of incest (or other sexual offending against a child), the use of threats or coercion or actual force, and any punitive feature of the offender's motivation, should be regarded as very significantly increasing the offender's culpability for what is in any case a very serious crime. Such aggravating factors should be clearly reflected in the sentence imposed."

In *R v PDI* [2011] VSCA 446 at [83]-[84] the Crown conceded that a sentence of IMP 18y6m/15y ordered on a number of counts of incest and other sexual offences committed against the applicant's eldest daughter from the age of 8 or 9 to 17 was "quite inconsistent with current sentencing practice for multiple offences of incest, even allowing for the fact that the matter was contested and the appalling features of the applicant's wrongdoing". The Court of Appeal said: "This case fell within the worst category of offending for the offence of incest." Nevertheless, having regard to *FD v The Queen* [2011] VSCA 8, [19]-[29], *DPP v HPW* [2011] VSCA 88, *MP v The Queen* [2011] VSCA 78, *DPP v OJA & Ors* (2007) 172 A Crim R 181, 195 [29] (Nettle JA), *DPP v BJD* [2009] VSCA 298, *NJD v DPP* [2010] VSCA 84, *OAA v The Queen* [2010] VSCA 155 & *DPP v CPD* (2009) 22 VR 533, the Court of Appeal reduced the applicant's sentence to 15y/10y6m.

In *R v ED* [2011] VSCA 397 Robson AJA (with whom Redlich & Harper JJA agreed) said at [86]:

"This Court has consistently held that sexual offending against children is a matter of utmost seriousness: *DPP v DDJ* [2009] VSCA 115, [36] (Maxwell P, Vincent and Neave JJA); *DPP v DJ* [2011] VSCA 250. The maximum penalty of 25 years for the offence of maintaining a sexual relationship with a child under the age of 16 years reflects the gravity with which the community views sexual crimes against children: *R v Macfie* [2000] VSCA 173, [49] (Winneke P and Chernov JA with whom Brooking JA agreed); *DPP v DDJ* [2009] VSCA 115, [36] (Maxwell P, Vincent and Neave JJA)."

After quoting from *DPP v DDJ* at [37]-[38] Robson AJA continued at [88]: "In *DPP v VH* (2004) 10 VR 234, 237-238 {see also *DPP v DAK* [2004] VSCA 175, [33]-[35]} Callaway JA (with whom Buchanan and Eames JJA agreed) said that 'the sexual abuse of children by persons in a position of trust is intolerable.'" See also *DPP v Stalio* [2012] VSCA 120 where the Court of Appeal upheld a sentence of IMP 5y4m/3y8m in respect of 10 charges of sexual assault involving five girls under the age of 16 between February 1974 and late 1983 by an accused described as "a trusted neighbour and, in some cases, a trusted work colleague of the father of the victim".

In *R v RSJ* [2012] VSCA 148 the offences of incest were committed over a period of 28 years against the one complainant M who is the appellant's eldest daughter. The offending commenced in 1977 when M was aged 13 and the appellant was 34 and concluded in 2005 when M was aged 40 and the appellant was 62. The offending was sustained, repeated, accompanied by violence and threats and occurred despite M's ongoing disclosures and pleas to social workers and others. As a result, M bore

four children to the appellant, in 1990, 1998, 2000 and 2001. The youngest child died in infancy. The eldest two children suffer from intellectual disabilities, while the third child receives ongoing speech therapy and has difficulty with social interaction. Although he was aged 69 at the time of sentence, the trial judge imposed a sentence of IMP 22y5m/18y. Dismissing the appeal, the Court of Appeal said: "The facts and circumstances of the offending are of such a despicable and deplorable nature that the case falls in the worst category of such cases."

In *PG v The Queen* [2013] VSCA 9 the accused had been found guilty of 9 counts of indecent assault and 4 counts of sexual penetration of a child under 10. The complainants were the two eldest of his 3 daughters who alleged that he had sexually molested them in their early childhood. In upholding a sentence of 8y/6y2m, Harper JA & Beach AJA (with whom Maxwell P agreed) said at [102]-[103]:

"There are many obligations of parenthood. Those persons who have relevant expertise will also have a greater claim than judges to give detailed consideration to these; but about one obligation there can be no doubt. Parents must refrain from the knowing infliction of unnecessary harm upon their children. The appellant was criminally in breach of this fundamental duty. The gravity of his offending is of particular importance in deciding upon the appropriate sentence.

This is not the occasion to attempt to allocate degrees of seriousness to the crimes a parent might commit against his or her child. It is enough to observe that the sexual penetration by the parent of that child is a total repudiation of not only the high obligation of trust which ought necessarily to adhere to the relationship between the two, but also of the respect which every person, but especially a parent, owes to the psychological integrity of everyone else, especially his or her children."

In *Ling Seng Soo v The Queen* [2014] VSCA 304 the appellant had pleaded guilty to 2 counts of committing an indecent act with a child under 16 and 2 counts of producing child pornography. He was sentenced to IMP5y/3y. The appellant was aged 58 at the time of the offending, and 60 when sentenced. The complainant was a girl aged six when the offences occurred. The appellant and his wife knew the complainant and her parents through a local community group and for a period of about 18 months prior to the offending had looked after the complainant on Sundays while her parents worked. The appeal was dismissed. At [30]-[32] Santamaria JA (with whom Weinberg & Whelan JJA agreed) said:

"In an appendix to these reasons, there is an analysis of the cases which the appellant submitted are 'comparable' to the present case.

As will become evident, the fact that each of those cases may have involved an act which was physically similar to the act forming the basis of Charge 3 does not make those cases relevantly 'comparable' as explained in *Hudson* (2010) 30 VR 610.

There is a further consideration which must be taken into account. In some cases, a judge may have determined a separate sentence in respect of each count or charge before addressing questions of cumulation and totality: *DPP (Vic) v Grabovac* [1998] 1 VR 664, 680 (Ormiston JA with whom Winneke P and Hedigan AJA agreed). In other cases, where there has been sentencing for multiple offences, the 'moderate and cumulate' approach has been followed: *R v Izzard* (2003) 7 VR 480, 484-6 (Callaway JA with whom Winneke P and Vincent JA agreed). Neither approach is mandated: See the discussion in *DHC v The Queen* [2012] VSCA 52 (Weinberg JA with whom Maxwell P and Buchanan JA agreed). But, the possibility that one approach has been used rather than the other is a further reason for questioning whether two sentences for an indecent act with a child under 16 are truly comparable."

The cases in the appendix to which Santamaria JA referred are: *R v McDonald* [2004] VSCA 196; *IRJ v The Queen* [2011] VSCA 376; *HRJ v The Queen* [2011] VSCA 217; *Bavage v The Queen* [2012] VSCA 149; *JBM v The Queen* [2013] VSCA 69; *O'Brien (a pseudonym) v The Queen* [2014] VSCA 94; *SLJ v The Queen* [2013] VSCA 193; *CMG v The Queen* [2013] VSCA 243; *SD v The Queen* (2013) 229 A Crim R 580.

In *DPP v Charlie Dalgleish (a pseudonym)* [2016] VSCA 148 the accused had pleaded guilty to charges of incest and sexual penetration of the daughters of his de facto partner. One of the daughters aged 13 had fallen pregnant as a result and the pregnancy had subsequently been terminated. The total effective sentence imposed was IMP5y6m/3y6m. Analysing a large number of comparable cases the Court of Appeal (Maxwell ACJ, Redlich & Beach JJA) held-

- that the ensuing pregnancy was a highly aggravating factor; but
- in light of current sentencing practice for comparable offending the sentence, although lenient, was not outside range.

Accordingly the DPP appeal was dismissed. However the Court of Appeal said:

[43] Society, the legislature and the courts are at one regarding the objective seriousness of sexual offending against children, and of incest in particular. Reflecting community views, courts have condemned in the strongest terms sexual offending against children by those responsible for their welfare. In *Ryan v The Queen* (2001) 206 CLR 267 at 302 Kirby J said:

‘Courts must uphold the law which treats sexual offences against children and young persons as extremely serious crimes, particularly where (as is often the case) such offences involve breaches of trust and responsibility on the part of those who had such young persons in their care.’

[44] On 4 May 2012, the Sentencing Advisory Council published a paper entitled ‘Community Attitudes to Offence Seriousness’. One of the key findings [at p.109] was that sexual offences against young children were viewed by the community as among the ‘most serious’. The report found that the age of the victim, the relationship of trust, the physical aspects of the offending and the broad harm done to child victims of sexual offending were relevant factors which underpinned the seriousness of such offending.

[45] We must at this point address CD’s submission that ‘there was no violence accompanying the offence’ and that this constituted a mitigatory circumstance. Arguments of this kind are often advanced in pleas in mitigation for such offending. They must be emphatically rejected, as must the associated implication that no harm was really done to the victim.

[46] Such arguments rest on a serious misconception about the nature of sexual abuse of a child. The crime of incest involves sexual penetration of a child which is, by its very nature, an act of violence. The Sentencing Advisory Council made this point strongly in its report [dated 10 June 2016] on Sentencing of Offenders for Sexual Penetration with a Child under 12:

‘[I]t is concerning that the courts do not sufficiently recognise, or articulate, the inherent violence involved in the sexual penetration of a young child, regardless of whether such acts are accompanied by additional non-sexual violence.’ [p.63]

...
 ‘This characterisation of ‘violence’ as encompassing only non-sexual violence has the consequence of diminishing the equally destructive and terrifying violence inherent in sexual offending against children, which more often takes the form of physical or emotional coercion, or the simple act of being overpowered. It can also have the effect of rendering invisible and irrelevant the extreme physical pain inherent in the act of an adult forcibly penetrating the genitals and anus of a child. Many of the sexual penetration cases simply did not mention, in the relevant description of the offending the terror and/or extreme physical pain that objectively would have been caused by the offence. The reason for this is unclear, but it has the effect of diminishing harm.’ [p.23]

[47] Moreover, as this Court explained in *Clarkson v The Queen* (2011) 32 VR 361, 364 the absolute prohibition on sexual activity with a child is ‘founded on a presumption of harm’. The significance of the violence and harm which such conduct entails cannot be overstated.”

In the light of these principles the Court of Appeal held that current sentencing practice for incest involving a dependent child was inadequate. It did not reflect objective gravity and moral culpability. Nor was it consistent with the maximum penalty provided: see *Makarian v The Queen* (2005) 228 CLR 357 at 372-3; *R v AB (No 2)* (2008) 18 VR 391, 405-6; *Hogarth v The Queen* (2012) 37 VR 658; *Ashdown v The Queen* (2011) 37 VR 341, 403. Accordingly there was a need for higher sentences for such offending. Referring to *R H McL v The Queen* (2000) 203 CLR 452 and *Gordon v The Queen* [2013] VSCA 343 the Court of Appeal at [59]-[60] observed that although the scope for applying the totality principle must be more limited when the offender was a ‘serious sexual offender’ the cumulation in this case, while very lenient, did not produce a manifestly inadequate total sentence.

In *Jesse Deacon (a pseudonym) v The Queen* [2018] VSCA 257 at [162] Kaye & T Forrest JJA & Taylor AJA spoke sternly in relation to the applicant who had been found guilty after a trial of multiple

charges of sexual penetration under 16 and indecent assault committed against his niece who was 5 years old at the time of some of the offending:

“[T]he High Court has reminded us of the profound and destructive consequences to the victims of this type of offending: *DPP v Dalgliesh (a pseudonym)* (2017) 349 ALR 37 [57] (Kiefel CJ, Bell and Keane JJ). The consequences to this particular complainant comfortably meet that characterisation and include suicide attempts, drug and alcohol abuse, homelessness, eating disorders, insomnia and social anxiety. The applicant’s offending is grave and a stern sentence must be imposed.”

The Court made a similar comment in relation to a cooffender: see *Jenni Smith v The Queen* [2018] VSCA 258 at [91] where is said: “Not all of these consequences can be attributed to the applicant but nor can she be totally absolved. Her conduct, like that of her co-offender, was reprehensible. To borrow the sentencing judge’s word, it was ‘despicable’.”

In *Oliver Harlow (a pseudonym) v The Queen* [2018] VSCA 234 the accused had been convicted after a trial of multiple charges of incest and committing an indecent act with a child under 16. The victims were his step-children. In sentencing him to IMP 21y/15y the trial judge said:

“The offending took place essentially over a decade. I can safely say that in my 30-odd years’ experience as a criminal lawyer I do not believe I have come across such a serious example of this sort of offending.”

In refusing leave to appeal *Beach & Weinberg JJA* said at [95]-[96]:

“Having reviewed the authorities and sentencing decisions relied upon by the applicant, we are not persuaded that any of the sentences or order for cumulation made in this case were excessive. Indeed, to the contrary, the various sentences and orders for cumulation appear to us to be moderate.

If there is any issue about the applicant’s sentence, it relates to whether the orders for cumulation have resulted in a total effective sentence that infringes totality principles. Given the length of the applicant’s TES, it seems to us that this issue is at least arguable. That said, for the reasons already given, we are not persuaded that the sentence ultimately imposed upon the applicant infringes totality principles...[T]he applicant’s offending constituted very serious examples of very serious offences and was seriously aggravated by the matters to which we have already referred. Moreover, in respect of the bulk of his offending, the applicant pleaded not guilty and thus did not have the benefit of the substantial mitigatory effect that a plea of guilty may have carried. The sentence imposed upon the applicant was very high, but that is merely a reflection of the totality of the criminality involved in his offending in all the circumstances.”

In dissent, Priest JA would have granted leave to appeal against sentence and would have reduced the sentence to IMP 17y/13y. After an extensive discussion of sentences imposed in other cases, his Honour held at [21] & [23] that the TES and the non-parole period were manifestly excessive.

In *DPP v Jason Amaral (a pseudonym)* [2020] VSCA 290 the Court of Appeal allowed a Director’s appeal against a total effective sentence of IMP8y10m/5y8m and substituted a sentence of IMP10y6m/7y6m. The respondent A had pleaded guilty to three charges of sexual penetration of a child under 16. The victim of the offending was his niece T who was aged between 12 and 15 during the period of the offending. At [33]-[34] Maxwell P, T Forrest & Weinberg JJA said:

“As this Court has often said, sexual abuse of children by those in positions of trust or responsibility with respect to them calls for severe punishment. As T’s uncle, A was in breach of the trust reposed in him by T and by her mother (his sister). Given A’s role in caring for T, what the Court has said about sentencing for incest is apt:

‘Incest involving a child is an appalling crime. It involves a breach of trust of the most fundamental kind, and an inexplicable abdication of parental responsibility: see, eg, *R v Ware* [1997] 1 VR 647, 653 (Hedigan AJA) and *DPP v G* [2002] VSCA 6, [9]-[10] (Winneke P). Just as seriously, it involves a cynical exploitation by the parent of the opportunity for sexual contact which being in that position of trust presents: *Sutton (a pseudonym) v The Queen* (2015) 47 VR 496, 505 [28]; [2015] VSCA 251 (Maxwell P and Redlich JA).

Incest involving a child is, moreover, a crime of violence. As the Sentencing Advisory Council has pointed out, sexual penetration of a child is inherently violent, whether or not it is accompanied by additional non-sexual violence: *Dalgiush [No 1]* [2016] VSCA 148, [46] (Maxwell ACJ, Redlich & Beach JJA); see also Sentencing Advisory Council, *Sentencing of Offenders: Sexual*

Penetration with a Child under 12 (10 June 2016) 63. Often, as in the present case, the act of sexual penetration causes the child actual physical pain: *DPP v Walsh* [2018] VSCA 172, [1]–[2] (Maxwell P and McLeish JA).’

In the present case, A exploited for his own sexual gratification the position of trust in which he was placed. These were crimes of violence by their very nature: *Dalgliesh [No 1]* [2016] VSCA 148.¹ In addition, the first occasion involved the actual infliction of pain. Although A had the opportunity to pause and reflect after that first offence, he persisted. It was truly appalling conduct.

As the Director submitted, the fact that the unprotected sex the subject of charge 2 resulted in T becoming pregnant makes that offence very much more serious. It is difficult to imagine a more profound lifelong impact on the victim of a sexual crime. The sentence imposed needed to reflect those consequences.”

Other cases involving child sexual abuse in a family setting include *R v VN* [2006] VSCA 111; *R v Lewis* [2006] VSCA 272; *DPP v DL*; *DPP v CB* [2006] VSCA 280; *R v BGJ* [2007] VSCA 64; *R v DP* [2007] VSCA 219; *R v DD (No 2)* [2008] VSCA 15 per Neave JA at [14]-[15] & [21]-[24]; *R v Bowen* [2008] VSCA 33; *R v GLH* [2008] VSCA 88; *DPP v RAL* [2008] VSCA 140 esp at [25]-[27]; *R v JF* [2008] VSCA 243; *R v RLP* [2008] VSC 381 at [22]-[26]; *R v NJD* [2010] VSCA 84; *R v MG* [2010] VSCA 97 at [93]; *R v Barry Hall* [2010] VSCA 349 with reference to *Ibbs v The Queen* (1987) 163 CLR 447; *R v Davy* [2011] VSCA 98; *R v TC* [2011] VSCA 190; *R v RBN* [2011] VSCA 261; *R v LQ* [2011] VSCA 135; *PRW v The Queen* [2011] VSCA 381; *DLJ v The Queen* [2011] VSCA 389; *DPP v DPC* [2011] VSCA 395; *R v FC* [2012] VSCA 22; *R v CGT* [2012] VSCA 23; *R v AWP* [2012] VSCA 41; *R v MA* [2012] VSCA 214; *R v DM* [2012] VSCA 227; *DPP v SJ* [2012] VSCA 237; *DPP v DRS* [2012] VSCA 276; *R v ISJ* [2012] VSCA 321; *BM v R* [2013] VSCA 3; *DPP v CJA* [2013] VSCA 18; *Martin v The Queen* [2013] VSCA 377 esp at [111]; *Wallace Cummins (a pseudonym) v The Queen* [2014] VSCA 352; *McDonald v The Queen* [2014] VSCA 80 at [81]-[83]; *Christopher Avery (a pseudonym) v The Queen* [2014] VSCA 86 at [118]-[120]; *Morgan v The Queen* [2014] VSCA 303; *George Bussell (a pseudonym) v The Queen* [2014] VSCA 310; *DPP v Max Walsh (a pseudonym)* [2018] VSCA 172; *Alexander Holland (a pseudonym) v The Queen* [2018] VSCA 241; *Ryan Shawcross (a pseudonym) v The Queen* [2018] VSCA 295; *DPP v Shearer (a pseudonym)* [2019] VSCA 47; *DPP v Michaela Snow (a pseudonym)* [2020] VSCA 67; *Lachlan Pitt (a pseudonym) v The Queen* [2020] VSCA 73; *Dean Harmer (a pseudonym) v The Queen* [2020] VSCA 310.

11.15.1.2 Sexual abuse by a person in authority

In *DPP v Toomey* [2006] VSCA 90 the Court of Appeal drew no distinction between cases of incest and those involving sexual abuse by persons in authority. In that case the respondent brother aged 56 had pleaded guilty to 10 counts of indecent assault, of which 5 were representative counts, committed 30 years ago against boys under the age of 16 years. The Court of Appeal allowed a Crown appeal against a total effective sentence of 27 months of which 21 months was suspended, increasing it to 4 years and 3 months with a non-parole period of 2 years and 6 months. Buchanan JA said at [10]:

“The offences were serious. They were committed by a person who was trusted to care for children and given authority over them. He betrayed that trust and abused that authority. The respondent exploited his position by using his power of corporal punishment to cow his victims and secure their acquiescence in his actions. There were multiple offences involving repeated acts over a period of two years. They were not isolated incidents which might be said to be out of character. The effect of the offences on the victims was described by the sentencing judge as "devastating". The early years of their secondary education were blighted, and their later lives affected. Most of the victims moved away from the Church and encountered difficulties in forming and maintaining personal relationships. Some have suffered diagnosed psychological problems. The courts have recognised that those who commit crimes against one of the most vulnerable groups in society, which almost invariably have long-term effects on their victims, should be severely punished. See *Ryan v. The Queen*.(2001) 206 CLR 267 at 283 per McHugh J.”

Vincent JA said at [18]-[19]:

“As Heidgan AJA, adopting an earlier statement of Marks J in *R v Sposito* [unreported, Court of Criminal Appeal, 08/06/1993, p.4], put it in *R v MJ* [2000] VSCA 66 at [17]:

¹

‘A society which fails to protect its children from sexual abuse by adults, particularly those entrusted with their care, is degenerate.’

Referring to the circumstances of the matter before him, he continued:

‘The offence of incest is particularly erosive of human relations and casts doubt on the assumption that parents are natural trustees of the welfare of their children. It ought to be unnecessary to recount the morbid features of incest, the most prominent of which include the exploitation by the stronger will of the adult of the weaker will of the child, the physical and psychological subordination of the child to the perverted indulgences of the adult, the gross breach of trust placed in the offender by the victim and the community, and the irreparable fundamental damage to the victim.’

Although his Honour's remarks were made in the context of a case concerning incest, they are clearly applicable to many other situations and relationships and certainly to those presently before the Court.”

Vincent JA continued at [21]-[22]:

“On occasions, when imposing sentence I have made mention of the notion of social rehabilitation. In *DPP v. DJK* [2003] VSCA 109 at [18], for example, I remarked:

‘This notion of social rehabilitation is one that I do not believe has been accorded anything approaching significant recognition as an identifiable underlying concern of the criminal justice system. It seems to me that the process of social and personal recovery which we attempt to achieve in order to ameliorate the consequences of a crime can be impeded or facilitated by the responses of the courts. 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 recognise the real significance of what has occurred in the life of that person as a consequence of the commission of the crime may well aggravate the situation.’

It is well to bear in mind that the rehabilitation of the victim of sexual abuse may often be more difficult to achieve than that of the perpetrator. Frequently the damage will be profound and a long time will pass before it can be addressed at all. In the meantime, childhood will be destroyed, self esteem damaged, educational and career opportunities lost and the capacity to form and maintain relationships seriously impaired. The notion to which I have adverted underpins, I believe, such concepts as restorative justice, just punishment, the vindication of rights and the attribution of responsibility based on moral culpability. The vindication of the victim in cases of this kind, in particular, is profoundly important if the criminal justice system is to perform its role properly.”

Nettle JA said at [26]:

“I agree with the learned presiding judge and with Vincent JA that cases such as this case can no longer be regarded as exceptional by reason only that the offending occurred a long time ago and that the offender may since have gone a considerable way towards rehabilitation. Regrettably, such cases occur all too frequently.”

In *R v DCP* [2006] VSCA 2 at [24]-[25] the appellant school teacher had been sentenced to 7 years imprisonment with a non-parole period of 5 years for indecent acts and acts of sexual penetration of a child under 16 and a child aged 16 who were under his care, supervision or authority. In holding that the sentence was not manifestly excessive, Chernov JA, with whom Callaway & Vincent JJA agreed, said at [24]-[25]:

“The offences in this case were of a very serious kind. As Callaway JA has explained in *R v Ellis* (2005) 153 A Crim R 340 at 341, Parliament has made it clear that the essential purpose of the applicable statutory provisions is to protect children and young persons from sexual exploitation, particularly by those who are in positions of care, supervision and authority in relation to them. See also *R. v. Howes* (2000) 2 VR 141 at [4] per Winneke P and at [29] per Brooking JA and *R. v. Coffey* (2003) 6 VR 543 at 547 per CallawayJA.

But not only were the offences here very serious, the appellant's offending conduct was abhorrent. The appellant was not only in a position of trust and moral and intellectual superiority in relation to the two young complainants, but he was charged with the obligation of protecting them or at least furthering their interests. As a much older person and as their teacher, he appreciated, as her Honour said, that he had considerable influence over the impressionable and vulnerable young girls. X, in particular, must have been vulnerable given that, for some months before the offending conduct, he was her counsellor in relation to her behavioural problems. The appellant callously exploited this position over a considerable period for the purposes of satisfying his sexual appetite and in the course of so doing he effectively debauched the two girls...Instead of protecting the complainants' interests as he should have done, he effectively destroyed their sexual integrity. Not surprisingly, the offending had a significantly detrimental effect on them and their families that is likely to continue for some time. As her Honour pointed out, none of the offending conduct was committed on the spur of the moment but involved, over some months, deliberate and premeditated encouragement of the complainants to satisfy his sexual appetite with the knowledge that they would be compliant with his wishes. In the circumstances, the principle of general deterrence and the need for the court to express denunciation of this offending conduct assumed considerable importance in the sentencing disposition. Thus, notwithstanding that below the Crown may have adopted the position that the offences fell in the middle range of offences of this kind, I think that in the circumstances the sentencing judge was entitled to treat the offending conduct as being very serious [see, for example, *R v Bell* [1999] VSCA 223 at [16] per Batt JA] and to regard general deterrence and the need for the court to express its denunciation of the offending conduct as being of considerable importance in the sentencing disposition and thus take the view that the conduct called for condign punishment.”

In *DPP v Klep* [2006] VSCA 98 the respondent priest aged 62 had pleaded guilty to 14 counts of indecent assault against adolescent boys committed 30 years ago when he was in charge of a school infirmary. In allowing a Crown appeal against a sentence of 36 months imprisonment of which 24 months was suspended and increasing it to 5 years 10 months imprisonment with a non-parole period of 3 years and 6 months, Buchanan JA, with whom Vincent & Nettle JJA agreed, said at [13]:

“There can be no doubt as to the gravity of the offences, which were repeated over a period in excess of five years. The respondent exploited his authority and abused the trust placed in him by the community and the families of his victims. Victim impact statements give a glimpse of the long-term emotional trauma caused by the respondent's actions to youths at a most vulnerable period in their lives. It is important that young persons like them should be protected by the law. The objective of general deterrence ought to have been a significant factor in sentencing the respondent. It is also important that the courts clearly denounce crimes such as those committed by the respondent.”

Nettle JA added at [18]:

“[M]uch of the sentencing judge's analysis appears to me to be informed by the notion that the respondent has already been substantially punished by reason that he has been denied the faculties of a priest and is now likely to be defrocked...No doubt it is a relevant consideration that a prisoner may have suffered loss of office or profession or trade as a result of his or her offending: that is one of the factors to be borne in mind in determining the level of punishment to be imposed. Equally there can be no doubt that such a loss of office cannot be treated as a substitute for the punishment which the law requires”.

In *R v FAJ* [2011] VSCA 137 the respondent store manager, aged 33 at the time of offending nine years before, had pleaded guilty to 9 counts – some of which were representative – of committing an indecent act with a child under 16 and sexual penetration of a child aged between 10 & 16. The victims were students who were casual employees of the store and were aged 15 & 14. In dismissing his appeal against a sentence of IMP 6y6m/3y, the Court of Appeal said at [7]:

“[T]he provision to children of potentially addictive substances in return for sex, with no regard for the adverse consequences, constitutes very serious offending. It can, and often does, result in lifelong damage to those subjected to it. It is selfish and exploitative in the extreme.”

In *Fichtner v The Queen* [2019] VSCA 297 the 70 year old applicant had pleaded guilty to 3 charges of indecent assault, one charge of gross indecency and two representative charges of carnal knowledge committed over a period of 6 years commencing in 1976. In addition he pleaded guilty to a charge of common law assault against his first wife. The 3 child complainants, one of whom had been receiving guitar lessons from the respondent, were aged between 8 and 16. In dismissing the appeal against a sentence of IMP17y4m/13y, the Court of Appeal referred to the applicant's breaches of trust and very high culpability, noting the the offending had caused severe and permanent harm to the child victims and holding that there was limited mitigation apart from the applicant's age and there was limited relevance of his prior good character. At [67]-[69] Maxwell P & Kaye JA said:

“The conduct of the applicant was inherently evil and depraved. It violated the most basic norms of civilised behaviour, and struck at the heart of the value which our society places on the lives and wellbeing of each of its young persons. The applicant's conduct is properly described as disgusting, degraded and perverted. His actions, in using his sense of power over the young victims, and in threatening and using force in relation to them, were as cowardly as they were cruel. The moral culpability of the applicant, in respect of each offence, can properly be described as being of a very high level.

In cases such as this, the law recognises that the sentencing purposes of denunciation and general deterrence must be given prominence. It is important that the sentences imposed on offenders be adequate to express the condemnation of the court, and of society, and to make it plain that conduct of the kind undertaken by the applicant strikes at the fundamental moral values of our decent and civilised society.

Equally, the principle of general deterrence is of particular significance in cases such as this. It is important that the courts, by the sentences imposed in such cases, make it clear to any person who may be minded to engage in such conduct, that that person will, when apprehended, lose his or her right to be at liberty within our community for a long period of time. Only by the imposition of sufficiently stern sentences in cases such as this can the courts, and the justice system, play their part in protecting vulnerable members of the community from such degraded and predatory conduct.”

Other cases involving child sexual abuse by persons in authority include:

- *R v Jobling-Mann* [2000] VSCA 3 [mature female/2 boys aged between 10 & 16];
- *R v Cleary* [2004] VSCA 14 [captain of life-saving club/14 year old female member];
- *DPP v Ellis* (2005) 11 VR 287; [2005] VSCA 105 [female teacher/15 year old male student];
- *R v O'Neill* [2005] VSCA 248 [junior football & basketball coach/team members];
- *R v Parfitt* [2006] VSCA 91 [teaching aide/14 year old female student];
- *R v JMA* [2007] VSCA 105 [friend & carer/4-5 year old female];
- *R v Howell* [2007] VSCA 119 [female teacher/15 year old male student];
- *R v Franklin* [2008] VSCA 249 [scout leader/7 male scouts];
- *R v Ash* [2011] VSCA 112 at [82]-[94];
- *R v Onur Yildirim* [2011] VSCA 219 [security guard/16 year old female shoplifter];
- *R v DHC* [2012] VSCA 52 [teacher giving private music lessons to multiple students];
- *R v Szeto* [2012] VSCA 155 [48 year old part-owner of restaurant/16-17year old employee];
- *Ha v The Queen* [2014] VSCA 335 [50 year old pharmacist found guilty of 8 charges of indecent assault of 14 year old employee-prior offending of similar character-breach of trust-IMP 4y/2y]
- *Gill v The Queen* [2019] VSCA 92.
- *Zampatti v The Queen* [2020] VSCA 285.
- *DPP v Allen* [2020] VSCA 292.

11.15.2 Use of the internet to procure sex

In *DPP(Cth) v Hizhnikov* [2008] VSCA 269 at [23]-[25] & [27] the Court of Appeal (Maxwell P, Nettle & Weinberg JJA) said of the offence of use of the internet to procure sex:

“There is as yet not very much appellate authority regarding sentencing for this Commonwealth offence. There are, however, State analogues. In *R v Burdon; ex parte Attorney-General (Qld)* (2005) 153 A Crim R 104 at 108-109, the Queensland Court of Appeal said of the equivalent Queensland provision:

‘...people who are considering using the internet ... to attempt to make contact with young people with a view to corrupting or sexually exploiting them must now be on notice that such behaviour will be likely to result in a salutary penalty generally involving terms of actual imprisonment, even where indecent physical conduct does not and could not eventuate.’

This passage was cited with approval by de Jersey CJ in *R v Hays* (2006) 160 A Crim R 45.

Recently, in *Western Australia v Collier* (2007) 178 A Crim R 310, a Crown appeal against sentence, the Western Australian Court of Appeal had something similar to say regarding the Western Australian equivalent to s 474.26. There Steytler P, who delivered the judgment of the Court, made it clear that offences of this kind were regarded by the legislature as serious. His Honour said that paedophiles were increasingly making use of the internet to access children and groom them for subsequent sexual offending. He regarded an offender’s conduct as being no less morally reprehensible if that person was communicating with someone believed to be a child, although not actually so, than if communicating with a person who was in fact a child. An offence of this kind would ordinarily, though not invariably, result in a term of immediate imprisonment. The fact that an offender was of previous good character did not mean that a term of immediate imprisonment should not be imposed.

Steytler P then summed up reasons why the Crown appeal should be allowed, and the respondent required to serve an actual term of imprisonment. His Honour said at [43]:

‘It seems to me that, even taking into account the matters favourable to the respondent, the sentence imposed was so manifestly inadequate as to demand the intervention of this court, notwithstanding the constraints inherent in a State appeal. This was a very serious example of this kind of offending, for the reasons that I have mentioned. In those circumstances there was, in my respectful opinion, no basis for the imposition of a sentence of suspended imprisonment, whether conditional or otherwise. Anything less than an immediate term of imprisonment does not take sufficient account of the seriousness of the respondent’s offending behaviour or of the need to deter him, and others, from committing offences of this kind in the future. It is important to say, as clearly as one can, that adult persons who make use of the internet to locate, and make contact with, children so as to procure them to engage in sexual activity can ordinarily expect to receive a term of immediate imprisonment. As with offences concerning possession of child pornography ... there is a paramount public interest in protecting children from sexual abuse.’

...

As we said in *R v Gajjar* [2008] VSCA 268, *Collier* states correctly the principles that govern sentencing of offenders for offences of this nature. There is nothing untoward about the notion that a person who uses the internet in an attempt to procure a child to have sexual contact with him will ordinarily expect to receive a term of immediate imprisonment. This is simply a reflection of the seriousness with which the courts must view such conduct. Deterrence, both general and specific, will be the paramount consideration when sentencing an offender for an offence of this type.”

In *Campbell v The Queen* [2019] VSCA 158 the appellant had pleaded guilty to grooming a child under 16 for sexual conduct (3 charges), using carriage service to transmit indecent communication to a person under 16, failing to comply with reporting obligations under Sex Offenders Registration Act (2 charges), possessing child abuse material and committing indictable offence while on bail. He was sentenced to IMP5y9m/4y3m. In refusing his application for leave to appeal, the Court of Appeal (Priest & Beach JJA) said at [52]:

“This Court has said many times that for sexual offending involving children, denunciation, general deterrence and just punishment are primary sentencing considerations. In the present case, having regard to the applicant’s history, protection of the community and specific deterrence were also primary sentencing objectives. The sentences imposed on the applicant in the past have plainly not deterred him. And on the evidence given on the plea, the judge was clearly entitled to conclude that the applicant is a high risk of reoffending against boys under 16.”

See also *R v Bryan Cooper* [2012] VSCA 32 per Neave, Mandie & Harper JJA and the cases cited in the Schedule to that judgment; *DPP v Chatterton* [2014] VSCA 1.

11.15.3 Possession/production/transmission of child pornography

In *R v Fulop* [2009] VSCA 296 the Court of Appeal allowed an appeal against a total effective sentence of 4 years imprisonment with a minimum sentence of 3 years on charges of using a carriage service to access child pornography contrary to the Criminal Code (Cth) and possession of child pornography contrary to the Crimes Act 1958 (Vic) and imposed in lieu a total effective sentence of 3 years with a minimum sentence of 2 years. At [20] Buchanan JA (with whom Nettle JA agreed) said:

“The evil at which the provisions contravened by the appellant is aimed is the production of the images by subjecting children and young persons to degrading exploitation. That exploitation exists to serve the demand created by those who gain access to and collect the images. The legislation aims to deter persons such as the appellant and thereby remove the demand which child pornographers supply. The appellant was to be punished not simply for his predilection to the material but rather for his pursuit of it. In this connection, I regard the length of time and the frequency with which the appellant obtained access to the images and the quantity of images which he collected, sorted and stored as the most significant aspects of his offending.”

In *R v SLJ (No.2)* [2010] VSCA 32 the Court of Appeal fixed a sentence of 10 months imprisonment of which 5 months was suspended for a period of 12 months in relation to an offence of possession of child pornography committed by a 60 year old man with no prior convictions. At [4] the Court of Appeal gratefully adopted the references by the sentencing judge to dicta of-

- the English Court of Appeal in its guideline judgment in *R v Oliver and Ors* [2003] 1 Cr App R 28, [11];
- Malcolm CJ in the Western Australian appeal of *Assheton v R* [2002] WASCA 209 that “The capacity of child pornography to deprave and corrupt individuals is an accepted result of such [possession]”;
- Vincent JA (with whom the other judges of the Court of Appeal agreed) in *R v Curtain* [2001] VSCA 156, [25] that “the offence is designed to address one aspect of the sexual exploitation of children, namely the distribution in the community of descriptions, pictures, or images of violation”; and
- Callaway JA, speaking for the Court of Appeal in *R v Coffey* [2003] VSCA 155, [30] (cited with approval by Batt JA in *R v Jongasma* [2004] VSCA 218, [31]), who emphasised that child pornography involves the corruption and violation of children and creates a market which encourages the further exploitation of children. His Honour added that the maximum penalty for the offence is intended, among other things, “to deter prospective purchasers and collectors of child pornography in the hope that adverse economic consequences will ensue for those who produce it”.

In *R v Rivo* [2012] VSCA 117 the 47 year old applicant had pleaded guilty to a rolled-up charges of causing child pornography material to be transmitted to himself and of engaging in conduct to procure children under the age of 16 to engage in sexual activity outside Australia. The charges related to the procuring by internet of child pornography constituted by live sex shows in the Philippines involving girls as young as 8 years of age. He was sentenced to IMP 7y/5y. The Court of Appeal held that it was not reasonably arguable that the sentence was manifestly excessive and dismissed his application. At [31] Neave & Osborne JJA and King AJA said:

“The young age of the children involved, the fact that both adults and children were involved, the likely psychological consequences to the children and the lack of insight on the applicant's part into the impact on the welfare of the children all bore on aspects of the offending which required a penalty reflecting adequate denunciation and general deterrence of like offending. Again, the ongoing lack of insight involved bore on the need for specific deterrence.”

In *DPP (Cth) v D'Alessandro* [2010] VSCA 60 the 25 year old respondent, who had no prior convictions, had pleaded guilty to six counts of accessing, possessing and transmitting images of child pornography and child abuse. He had been sentenced to a total effective sentence of 2 years imprisonment but was granted immediate release upon him entering into a recognizance release order to be of good behaviour for a period of 3 years. The Court of Appeal, by majority, allowed a Director's appeal and re-sentenced the respondent to a total effective sentence of 3 years imprisonment and

required him to serve 2 years imprisonment before being eligible for release. At [22]-[23] Harper JA, with whom Williams AJA agreed, said:

[22] “When construing and applying Commonwealth legislation, this Court follows principles of comity in according respect to the decisions of intermediate appellate courts of other jurisdictions concerning the same legislation. It is therefore worth recording that there seems to be unanimous support across the jurisdictions for a number of propositions. First, that the problem of child pornography is an international one: *R v Jones* (1999) 108 A Crim R 50, 51 (Kennedy J). Secondly, that the prevalence and ready availability of pornographic material involving children, particularly on the internet, demands that general deterrence must be a paramount consideration: *Assheton v The Queen* (2002) 132 A Crim R 237, [35]–[36] (Malcolm CJ, Murray and Steytler JJ agreeing). Thirdly, that those inclined to exploit children by involving them in the production of child pornography are encouraged by the fact that there is a market for it: *R v C* [2004] QCA 469, [21] (McMurdo P). Fourthly, that those who make up that market cannot escape responsibility for such exploitation: *R v Gent* [2005] NSWCCA 370, [43] (Johnson J, McClennan CJ at CL and Adams J concurring). Fifthly, that limited weight must be given to an offender’s prior good character: *Ibid.* [65]. Sixthly, that a range of factors bear upon the objective seriousness of the offences to which the respondent in this case pleaded guilty: *Ibid.* [99]. They include:

- (a) the nature and content of the pornographic material – including the age of the children and the gravity of the sexual activity portrayed;
- (b) the number of images or items of material possessed by the offender;
- (c) whether the possession or importation is for the purpose of sale or further distribution;
- (d) whether the offender will profit from the offence.

[23] For reasons which to the ordinary lay mind are very hard to comprehend, there are those who have such lack of empathy that they cannot assimilate a simple truth: that what they see is not merely a titillating picture, but the degradation of human beings too young to avoid the exploitation to which they are being subjected. One must conclude that the respondent himself demonstrated this lack of empathy, given that the sentencing judge described the offending images as ‘certainly ... the worst that I have seen ... because of the level of exploitation of the defenceless that is involved’. And there is indeed something deeply inhuman in treating another human as the mere object by which one’s crudest and most selfish cravings are satisfied. The sentencing judge appreciated this when he added:

‘No matter where it occurs and no matter to whom it occurs, child sexual abuse cannot be tolerated. Australian courts must do their part to eliminate this horrendous activity ...

It was this attitude that resulted in the creation of these offences and has motivated the courts to enforce the attitude to the extent that they can. For this reason, a very significant sentencing factor in this instance is what is known as general deterrence; that is, the desire to point out to the community that accessing or processing or using child pornography in any way is simply beyond the pale. It will not be tolerated.’”

In *DPP v Smith* [2010] VSCA 215 the Court of Appeal dismissed a Director’s appeal against a wholly suspended 18 months sentence of imprisonment and a community-based order with 150 hours of community work and psychiatric treatment following a plea of guilty to one count of using a carriage service to access child pornography and one count of possession of a high volume of child pornography, the gravity of some of which was at the upper end of the spectrum. The respondent was a 28 year old single man with no prior convictions who had been raised in a ‘strict Christian household with limited information about sexual matters’, living with his parents in a ‘sheltered existence focussing on home life and his computer’. He had an excellent work ethic, he supported his family and had previously led a blameless life putting in and assisting others within the community. Nettle JA (with whom Harper & Hansen JJA agreed) said:

At [23]: “The precepts which apply to the sentencing of offenders for offences of possessing child pornography are tolerably clear.

- 1) First, the nature and gravity of the offending ordinarily falls to be determined by reference to the four criteria adumbrated by Johnson J in *R v Gent* [2005] NSWCCA 370 [99] (Johnson, McLelland CJ at CL and Adams J agreeing):
 - (a) The nature and content of the material, in particular the age of the children and the gravity of the sexual activity depicted.
 - (b) The number of images or items possessed.

- (c) Whether the material is for the purpose of sale or further distribution.
- (d) Whether the offender will profit from the offence.

In the case of child pornography for personal use, the number of children depicted and thereby victims is also regarded as a relevant consideration.

- 2) Secondly, general deterrence is regarded as the paramount sentencing consideration - because of the public interest in stifling the provision and use of child pornography; and less or limited weight is given to an offender's prior good character because it has been the experience of the courts that such offences are committed frequently by persons otherwise of good character. See *DPP v D'Allesandro* [2010] VSCA 60 [21] (Harper JA), where the cases are considered.
- 3) Thirdly, a sentence of immediate imprisonment would ordinarily be warranted {see *R v Jongsma* (2004) 150 A Crim R 386, 395; *Hill v The State of Western Australia* Unreported, WACA, 1 December 2008, [28] and the cases there cited; *R v Booth* [2009] NSWCCA 89, [48] (Simpson J); *R v Sykes* [2009] QCA 267; *DPP v Groube* [2010] VSCA 150, [24]} but it is recognised that there are cases where a sentence which does not involve a period of actual custody is not precluded: *R v Gordon ex parte DPP (C'th)* [2009] QCA 209, [43]; *R v Sykes* [2009] QCA 267, [24]."

At [28]: "I do not overlook that specific deterrence is also an important consideration. In many cases of this kind, it would be enough in itself to demand some time in prison. But I am not convinced that the judge was wrong not to think it so on this occasion. As his Honour observed, the respondent was genuinely remorseful and had genuine prospects of rehabilitation. They included the chance that, with time and appropriate care, he could be restored to a proper sexual orientation. Contrastingly, according to the uncontradicted expert evidence, his low chance of recidivism was likely to be exacerbated by any time in gaol. It seems to me, therefore, that the judge strove to fashion a sentence calculated to maximise the possibility of rehabilitation, and so, in the end, to minimise the risks of re-offending and thus maximise community protection."

Although concurring, Harper JA did so only after "anxious thought". At [32] he said:

"Taken by themselves the nature and content of the material found in the respondent's possession, in particular the age and number of the children and the gravity of the sexual activity depicted, indicate a term of immediate imprisonment of more than half the maximum sentence. It must never be forgotten that the children who are the pawns of those who create these images have for no better cause than selfishness and greed been treated as mere chattels. For these wholly unworthy ends lives have been ruined. The criminality involved in creating these images reflects the lowest depths of human depravity. The Courts must be every mindful of that fact, even when dealing with offenders who as is the present respondent merely consumers of the image makers' work."

In *Carter v The Queen* [2020] VSCA 13 the 46-year-old applicant had pleaded guilty to an indecent act with a child under 16, to the production and possession of child pornography and with failing to comply with reporting obligations under the Sex Offenders Registration Act 2004. He had been sentenced to IMP5y/3y. The applicant had been in a consensual sexual relationship with the first complainant who was aged 17 at the time of the offending. The second complainant was aged 15y11m at the time of the offending. The images and videos were taken with the assumed consent of the complainants. Holding that the sentences were manifestly excessive and that the offending was at a "relatively low level of objective gravity", the Court of Appeal allowed the appeal and re-sentenced the applicant to IMP3y, fixing no non-parole period because it was moot to do so. At [34]-[35] the Court commented:

"[T]here was some irony in the situation where the applicant was perfectly entitled, as a matter of law, to engage in sexual relations with Ms Pollock, given that she was over 16. Whatever might be thought of the morality of such conduct, there was no taint of illegality associated with it. That produced the paradoxical result that the applicant could have sex with Ms Pollock, but not photograph her in the course of doing so. It made no difference that she consented to being so photographed (assuming, as we must, that this was in fact so). It also made no difference that she was almost 18 when the photographs and videos were produced. Nonetheless, so it was submitted, this particular offending had to be viewed as, at the very least, 'lower end' conduct in terms of objective gravity."

See also *Legal Services Board v McGrath* [2010] VSC 332 per Warren CJ, in particular her Honour's reference to the observations of Simpson J, McClelland CJ at CL and Howie J concurring, in *R v Booth* [2009] NSWCCA 89; *R v EDM* [2010] VSCA 308; *DPP v SJ* [2012] VSCA 237; *R v Gibbs* [2012] VSCA 241; *Warren v The Queen* [2013] VSCA 372; *DPP v Guest* [2014] VSCA 29; *DPP (C'th) v Zarb* [2014]

VSCA 347; *Adrian Robert Finley v The Queen* [2018] VSCA 202; *Hawke v The Queen* [2018] VSCA 287; *DPP v Ramos* [2018] VSCA 290; *DPP v Watton* [2019] VSCA 10.

11.15.4 Other sexual offending against children

In *R v Richardson* [2008] VSCA 7 the appellant had pleaded guilty to six counts of sexual penetration of a child under 16. The offences had been committed in one 24 hour period against two 14 year old school girls whom the 31 year old appellant had met at a railway station. The Court of Appeal held that a sentence of 6y6m/5y was manifestly excessive and substituted a sentence of 3y6m/27m.

In *R v James & Witbeck* [2010] VSCA 341 the 45 year old applicant had pleaded guilty to two counts of committing an indecent act with or in the presence of a 16 year old child. The Court of Appeal held that a sentence of 21m of which 12m was suspended was not manifestly excessive.

In *R v Maurice* [2011] VSCA 197 the 31 year old applicant – who lived 50 metres away from the victim’s house – had entered the bedroom of a sleeping 10 year old child with the intention to commit indecent assault. He pleaded guilty to one count of aggravated burglary and one count of sexual penetration of a child under 16. He was sentenced to 7y imprisonment on the first count and 5y imprisonment, of which 2y was cumulative, on the second count. A non-parole period of 7y was set. The Court of Appeal held that the 9y/7y sentence was not manifestly excessive.

In *DPP v HRJ* [2011] VSCA 217 the 74 year old accused – who was a next-door neighbour of the 3 to 4 year old victim – was found guilty of two counts of committing an indecent act with a child under 16 years. He had rubbed the inner thigh of the victim and licked her vagina. He received a total effective sentence of IMP 3y2m/18m. Leave to appeal was refused. The sentence was not manifestly excessive and there was no error in the sentencing judge’s refusal to suspend the sentence.

In *R v Griffin* [2011] VSCA 304 the 34 year old accused was found guilty of two counts of sexual penetration of a child under 16. The victim was a 14 year old girl in school uniform who attended at the accused’s home, was given both alcohol and a pill and then agreed to have oral sex in exchange for cannabis. After that incident she began playing with a gaming device in the lounge room. Her evidence was that at that stage her intoxication was such that she could not even stand up whereupon the applicant proceeded to have sexual intercourse with her. He received a total effective sentence of IMP 5y6m/3y6m. Leave to appeal was refused.

In *Tuting v The Queen* [2018] VSCA 250 Tate JA refused leave to appeal against a sentence of IMP 3y/15m imposed on a 36YO man who had pleaded guilty to one count of grooming a 14YO girl for sexual conduct. He had sent hundreds of explicit messages and images to the girl, had made an arrangement to meet for sex and had attended the arranged meeting with condoms to carry out his intention. At [2018] VSCA 338 Priest & Beach JJA reconsidered the application on the papers and came to the same conclusion.

In *R v Kunsevitsky* [2020] VSC 41 Champion J sentenced the 53-year-old offender to IMP35y/28y on 59 charges, involving 43 child victims, of maintaining a sexual relationship with a child, producing child pornography, sexual intercourse/sexual conduct with a child outside Australia, inducing a child to engage in sexual intercourse with a third person outside Australia, persistent sexual abuse of a child outside Australia and producing child pornography material outside Australia. This very serious offending occurred over 15 years and spanned 4 different countries.

See also *R v NJ* [2012] VSCA 256; *DPP v Macfie* [2012] VSCA 314; *R v Chatterton* [2014] VSCA 1; *McPherson v The Queen* [2014] VSCA 59; *DPP v Clinton James Osborne* [2018] VSCA 160; *Schembri v The Queen* [2020] VSC 217; *Conor Meyer (a pseudonym) v The Queen [No.2]* [2020] VSCA 206.

11.15.5 Relevance of consent in sentencing for unlawful sexual activity with a child

In *R v Clarkson*; *R v EJA* [2011] VSCA 157 a 5-member Court of Appeal (Maxwell ACJ, Nettle, Neave, Redlich & Harper JJA) discussed the relevance of consent in sentencing for the offences of:

- sexual penetration of a child under the age of 16 [s.45 [Crimes Act 1958](#)];
- committing an indecent act with or in the presence of a child under 16 [s.47].

For neither of these charges is consent a defence.

Their Honours approved a number of judgments of the English Court of Appeal and various Australian courts, especially the Western Australian Court of Criminal Appeal. They noted at [54]-[62] that their approach was consistent with the course of decisions in the Victorian Court of Appeal, including *R v Nguyen* (2001) 124 A Crim R 477 at 481-2; *R v Magner* [2004] VSCA 202 and *R v Jongasma* (2004) 150 A Crim R 386. They concluded at [8] that “to ask whether consent is a mitigating factor is to ask the wrong question. It is only when the circumstances in which the consent was given are properly understood that the court can appropriately assess the offender’s conduct and, hence, determine the appropriate sentence.”

In reaching this conclusion, their Honours noted in their summary at [2]-[7]:

- The absolute prohibition on sexual activity with a child is intended to protect children from the harm presumed to be caused by sexual activity before the age when a child can give meaningful consent and to that end protect them from their own immaturity: *R v G* [2009] 1 AC 92; *R v Williams* (1990) 53 SASR 253, 254; *Marris v The Queen* [2003] WASCA 171 at [12]; *Simon v Western Australia* [2009] WASCA 10 at [23].
- ‘Consent’ for this purpose has its statutory meaning of ‘free agreement’, but is broad enough to include instigation and encouragement, as well as willing participation or co-operation: *R v Woods* (2009) 195 A Crim R 173 at 185. References to ‘consent’ in the judgment should be understood as having the connotation of ‘apparent’ or ‘ostensible’ consent.
- A child’s consent can never, of itself, be a mitigating factor. Proof that a child consented will not, of itself, differentiate the case for sentencing purposes from one where the child’s consent cannot be established. However, proven absence of consent significantly increases the seriousness of the offending and the culpability of the offender.
- Proof that the child consented is the beginning, rather than the end, of the sentencing court’s enquiry. In assessing the gravity of the offence and the offender’s culpability, the court’s attention will be directed not at consent as such but at the circumstances in which the consent came to be given.
- Typically, the giving of the consent will be a reflection of the relationship between the child and the offender: *Riggall v Western Australia* (2008) 37 WAR 211. In very many cases, the consent will be seen to reflect a significant age difference and/or power imbalance between offender and victim. In such cases – for example, the consent given by a pupil to her teacher, or by a daughter to her mother’s partner – the circumstances will usually reveal the offender’s abuse of a position of trust or authority, rendering the offence more grave and his culpability greater. At the other end of the scale, there are exceptional cases – for example, in a relationship between a 15-year-old girl and an 18-year-old boy – where the consent is, relatively speaking, freely given and genuine and a reflection of genuine affection between the two. In such circumstances, as the cases illustrate, the sentencing court is likely to view the offence as less grave and the offender’s culpability as reduced. In such a case, too, the offender may be able to establish, by appropriate evidence, that the victim is not likely to suffer the harm which the law presumes to flow from premature sexual activity.

The Court also noted at [52]-[53] that is open to an offender to seek to demonstrate, to the requisite standard of proof, as to which see *R v Storey* [1998] 1 VR 359, that the sexual activity in question did not have (or is unlikely to have) the harmful impact on the victim which the law presumes it to have. It added that independent expert evidence to that effect would ordinarily be essential and that rebuttal of the presumption is likely to succeed only in very limited circumstances.

Applying these principles, the Court of Appeal dismissed appeals against sentences of:

- IMP 7y/4y on Clarkson (aged 41 at the time of the offences) who had pleaded guilty to 4 counts of sexual penetration of a child under 16 and one count of committing an indecent act with the same child, a 15 year old who was a friend of his 2 step-daughters; and
- IMP 2y6m/1y6m on EJA (aged 31 at the time of the offences) who had been acquitted of 5 counts of incest but in respect of one incident had pleaded guilty to the statutory alternative of committing an indecent act in the presence of his 12 year old step-daughter.

In *A D A v Bruce & Anor* [2011] VSC 338 the 16 year old accused had pleaded guilty to three charges of sexual penetration of a 14 year old child. The prosecutor concluded the summary by stating that the accused says that he believed there was consent to the acts in issue but that was not accepted by the victim or the prosecution. Counsel for the defence submitted that applying the principles of *R v De Simoni* (1981) 147 CLR 383, the Court could not sentence on the basis of aggravating features which constituted evidence of the more serious offence of rape. Subsequently the prosecution filed two charges of rape in relation to the same incident. This occurred prior to the decision of the Court of Appeal in *R v Clarkson*. On the appeal, the accused and the informant accepted that the original

sexual penetration charges provide an adequate vehicle for the resolution of the Crown case against the accused if the principles articulated in *Clarkson* are applied to it and they agreed that the rape charges should be struck out upon completion of sentencing on the sexual penetration charges. At [16] Osborne J summarized the relevant evidentiary principles deriving from *R v Clarkson*. At [17] his Honour said:

“It follows from these principles that in the present case the further resolution of the sentence hearing will require either: (a) further and better agreement of the facts; or (b) evidence of aggravating circumstances from the Crown; or (c) acceptance by the Crown that in the absence of further evidence it cannot rely on aggravating circumstances which are in issue and have not been proved beyond reasonable doubt.”

In *Best v The Queen* [2019] VSCA 124 the applicant had been sentenced to IMP5y3m21d/3y after pleading guilty to 3 representative counts of sexual penetration of a child under 16 years. He was aged 17 & 18 at the time of the offending. There were 3 separate complainants who were aged 14, 13 & 14 respectively. The 13 year old had fallen pregnant and ultimately gave birth to a baby boy whom she raised with the assistance of her mother. At [40] & [42] Beach, Kyrou & Kaye JJA said:

“In *Clarkson* (2011) 32 VR 361 at 364, the Court gave consideration to the question whether, in respect of such offences, consent given by the complainant who is under the age of 16, may be a mitigating factor. In essence, the Court considered that, of itself and without more, consent can never be a mitigating factor in the sentencing synthesis...”

In *Clarkson* at 375, the Court noted that, even where the offender is youthful and the age difference relatively small, the sentencing court should be astute to observe the legislative policy that children are to be protected against the harms associated with premature sexual activity.”

However, the Court ultimately allowed the appeal, holding that in light of the applicant’s age, early guilty plea, remorse, low risk of recidivism, family support and need for protective custody in an adult jail the sentences were manifestly excessive. He was re-sentenced to IMP2y10m21d/1y9m. The Court had raised with counsel for the applicant whether it ought seek a report as to the applicant’s suitability for a YJC order. Counsel responded that it would be more appropriate if that decision were left to the Adult Parole Board under s.471 of the CYFA to direct that the applicant be transferred to a YJC. At [61] the Court concluded:

“While, under s 471, it is a matter for the Adult Parole Board to decide whether it is in the interests of the applicant that he be transferred to a youth justice centre, we would respectfully endorse the making of any such decision by the Board in order to enhance the prospects of the successful rehabilitation of the applicant into the community upon his release from custody.”

See also *Treloar v The Queen* [2020] VSCA 6.

11.15.6 Physical abuse

In *DPP v Ripper* [2006] VSCA 282 the Court of Appeal allowed a DPP appeal against a sentence of 2 years imprisonment with a non-parole period of 1½ years on one count of recklessly causing serious injury and increased the sentence to 4½ years with a non-parole period of 2½ years. The victim was a 5 year old child who had suffered multiple injuries to many parts of his body. The respondent admitted 270 prior convictions and 27 prior findings of guilt from 32 previous court appearances between 1994 & 2004, including 7 counts of assault. At [22] King AJA, with whom Vincent & Nettle JJA agreed, said-

“The courts have an obligation to protect children from harm, be it physical sexual or psychological. Accordingly, sentences in cases of this kind should send a message which is clear and unequivocal. As Tadgell JA put it in *R v Thompson* [unreported, Court of Appeal, 21/04/1998, pp.7-8]: ‘The courts must do what they can to send to the community a message of crystal clarity that conduct of this kind is intolerable in a civilised society.’ Save for the most unusual circumstances, the infliction of serious injury on young defenceless children will be visited with condign punishment.”

11.15.7 Causing death

In *DPP v Arney* [2007] VSCA 126 the defendant had pleaded guilty to one count of recklessly causing serious injury and one count of manslaughter caused by his punching of his 5 month old daughter, not as an isolated incident arising from a momentary loss of self control, but one of a number to which the respondent admitted. The killing thus involved a degree of deliberation which is lacking in most cases of this kind, the defendant having admitted that he had deliberately punched his daughter in the abdomen so that the injury would not be detected by others. In allowing the appeal, the Court of

Appeal accepted the DPP's categorization that the case "was at the worst end of the spectrum of unintentional homicide by a parent of his or her child, and that accordingly it warranted a sentence of considerably more than the 7 years imprisonment which was imposed". A nine year sentence was substituted on the manslaughter count. The total effective sentence was 11y with an 8y non-parole period.

At [15] Nettle JA said:

"In sentencing offenders in cases of the kind with which we are concerned, it has been common for courts to refer to the gross breach of trust which is involved in the offence and to speak in terms of the need for a sentence which is adequate to express society's abhorrence and denunciation of homicidal offences against defenceless children, and which will provide a level of just punishment and specific and general deterrence sufficient to guard against re-offending and similar offending by others."

At [20] Vincent JA said:

"I agree, and specifically wish to associate myself with the views expressed by Nettle JA concerning not only the abhorrence with which the conduct of the respondent is to be considered, but also the importance of vindicating the values of this community and the rights of a dead child. It is deeply saddening to have to accept that any human being could engage in the kind of abuse that led to the death of a five-month-old infant in this case."

In *R v McMaster* [2007] VSC 133 the defendant pleaded guilty to manslaughter of his partner's 5 year old son by inflicting severe abdominal injuries. In sentencing him to 12y6m imprisonment with a 10y non-parole period, Harper J said at [33]-[34]:

"This was a killing the nature and gravity of which can hardly be over-emphasised. You were in a position of trust, and of power. You abused both, at the cost of a young child's life. The act of standing over a five year old child who is seated on the ground, and then partially standing on his abdomen or pushing your feet into his stomach, with such force as to do fatal damage to his abdominal cavity, is one that - even when seen outside the brutal context in which it took place - is of itself utterly abhorrent.

All life must be protected. Because of their vulnerability, young lives demand special measures to ensure their safety. The death of a child as the result of an assault by a mature adult in the context of a sustained period of abuse is an affront to any civilised community. One measure open to the courts is to impose sentences that will act as a general deterrence to those who might be tempted to abuse the young and powerless. The systematic cruelty to which you subjected Cody is absolutely and unequivocally intolerable. In my opinion, the appropriate sentence on the count of manslaughter is twelve years and six months' imprisonment."

On appeal in *DPP v McMaster* [2008] VSCA 102, describing the reasons of Harper J as "exemplary" and in the course of detailing 12 reasons why an appeal by the DPP should be dismissed, Ashley JA (with whom Lasry AJA agreed and Neave JA grudgingly agreed) said at [5]:

"[I]n *R v AB (No.2)* [2008] VSCA 39 this Court upheld a sentence for a provocation manslaughter of 15 years imprisonment...[G]iving AB full weight and recognising the awful crime which McMaster committed, I find it difficult to see how the learned judge could have imposed a sentence in excess, or at least significantly in excess, of that which he in fact imposed. Counsel for the Director, faced with the obligation of showing that the sentence was inadequate to the extent necessary to enable the appeal to succeed, submitted that his Honour ought to have imposed a sentence of 15 years' imprisonment or upwards. Having regard only to the mitigating circumstance constituted by the plea of guilty, counsel's submission implied that if McMaster had been convicted of manslaughter after a trial at which he had pleaded not guilty, the sentence should have been something in the order of 17 – 18 years. Not even in a case of provocation manslaughter such as AB has such a sentence, it seems, been imposed."

In *R v D'Aloisio* [2006] VSC 216 a father who was suffering from an obsessive compulsive disorder and an obsessive compulsive personality disorder pleaded guilty to manslaughter of his 6 week old son by assaulting him. Eames JA said at [5]:

“Your mental illness, however, is not the whole explanation for your conduct. By your plea, you admit that when you assaulted your son you knew the nature and quality of the acts you were performing, and that they were wrong. The expert evidence confirms that awareness on your part. As your counsel frankly acknowledged, the death of a defenceless child is among the most serious of the categories of the offence of manslaughter, and he accepted that a significant sentence of imprisonment was inevitable, notwithstanding your mental illness.”

In *R v Farquharson* [2010] VSC 462 Lasry J imposed a sentence of life imprisonment with a non-parole period of 32 years on a 41 year old man who had been found guilty – at a second trial – of murdering his three children aged 10, 7 & 2 by driving them into a dam in a staged motor vehicle accident. His Honour said at [3] that “the tragedy of this case almost defies imagination” and that “these were crimes committed against three vulnerable, helpless and wholly innocent children”. His Honour held at [15] that “the reason or reasons why you determined to murder your three children were connected with the separation between you and your wife in November 2004”.

In *R v Acar* [2011] VSC 310 Curtain J imposed a sentence of life imprisonment with a non-parole period of 33 years on a 24 year old offender who had pleaded guilty to one count of murdering his 3 year old daughter when acting out of spite and revenge directed at his child’s mother. An appeal against sentence was dismissed: [2012] VSCA 8.

In *R v Freeman* [2011] VSCA 214 Maxwell P affirmed a sentence of life imprisonment with a non-parole period of 32 years on a 37 year old man who had pleaded not guilty to one count of murdering his 4 year old daughter by throwing her off Westgate Bridge. In the course of sentencing [2011] VSC 139 Coghlan J had described the killing as involving “a most fundamental breach of trust and...an attack on the institution of the family which is so dear to the community” and had found that it was related to the accused’s “increasing anger towards [his] former wife over the Family Court proceedings”. See also *R v Freeman* [2011] VSCA 349.

In *R v Ta Vuong* [2014] VSC 574 after a 20 day trial the 29 year old accused was found guilty of the murder of his partner’s 12 month old infant. He had maintained that the infant’s death was accidental but the jury had accepted confessional evidence from two prison informers. The accused’s expression of remorse over the child’s “accidental death” was held by Emerson J to be irrelevant in the sentencing exercise for murder. In sentencing the accused to IMP 25y/20y her Honour said at [51]:

“The murder of Silas Leithhead was brutal. It took place while you were entrusted with his care and involved a gross breach of trust. You used this tiny, dependent and defenceless child to vent your anger towards his mother. Punishment and general deterrence are important in sentencing in this case, as is specific deterrence.”

In *DPP v UA* [2018] VSC 423 the accused had pleaded guilty to one count of infanticide, having slashed the throat of her 13-month old daughter. She had a history of schizophrenia and had an acute worsening of psychotic and depressive symptoms *post partum*. She had received treatment at Thomas Embling Hospital while on ermand. The Crown conceded that imprisonment was inappropriate. Coghlan JA sentenced her to a community correction order of 30 months duration with, *inter alia*, a mental health assessment and treatment conditions imposed.

In *Akon Guode v The Queen* [2018] VSCA 205 the appellant had pleaded guilty to infanticide, murder and attempted murder, having caused the death of three of her children (twins aged 4y and an infant aged 16m) and having attempted to kill a fourth (aged 5y) by driving her car into a lake. The Court of Appeal accepted that she had had a traumatic life, had suffered a major depressive illness as a consequence of having given birth to her youngest child, and was also suffering from a post-traumatic stress disorder. TES IMP26y/20y was held to be manifestly excessive and a TES IMP18y/14y was substituted. But for the guilty plea she would have been sentenced to IMP33y/27y. At [73]-[74] Ferguson CJ, Priest & Beach JJA said:

“[A]lthough it must be recognised that the applicant owed a separate obligation to each victim not to cause them harm {*R v Bekhazi* (2001) 3 VR 321, 330 [14] (Winneke P)}, it must also be recognised that there is a commonality between the four offences embraced by the indictment, in that it was the single act of driving the motor vehicle into the lake which constituted the criminal act common to each offence. Therefore, despite there being a necessity for there to be some cumulation between the sentences on each charge {in another context, see *DPP v Solomon* (2002) 36 MVR 425, 429–30 [19] (Winneke P); *DPP v Whittaker* (2002) 5 VR 508, 514 [25] (O’Byrne AJA); *R v Izzard* (2003) 7 VR 480, 485 [23] (Callaway JA); *Towle v The Queen* (2009) 54 MVR 543, 571–2

[95]–[97] (Maxwell P); *Vasilevski v The Queen* (2018) 83 MVR 351, 362 [25], [45] (Priest and Santamaria JJA)}, that cumulation should be moderate...

It should not be thought that, in reaching these conclusions, we have lost sight of the fact that three vulnerable children lost their lives (and that a fourth nearly did). Adjectives such as 'tragic' are inadequate to convey the depth of emotional response provoked by the destruction of such innocent lives. Each of the applicant's children had a right to expect that she would protect them and keep them safe from harm. The applicant fatefully and irredeemably, however, breached their trust. But it must also be remembered that, when she did so, her capacity to make calm and rational decisions was severely compromised by a mental condition which was not of her own making. Her situation is pitiable. And although the Court must avoid being weakly merciful, principle nonetheless demands that the punishment inflicted upon the applicant must be mitigated by, and justly reflect, her diminished moral culpability. See *R v Radich* [1954] NZLR 86, 87; *R v Williscroft* [1975] VR 292, 298 (Adam and Crockett JJ). See also *R v Miceli* [1998] 4 VR 588; Richard G Fox, *When Justice Sheds a Tear: The Place of Mercy in Sentencing*, (1999) 25 Monash University Law Review 1, 3."

By a majority of 3:2 the High Court in *The Queen v Guode* [2020] HCA 8 allowed a Crown appeal, quashed the sentences imposed by the Court of Appeal and remitted the matter to that court for further determination according to law. The majority held at [31] that the Court of Appeal had erred by taking into account – as a relevant consideration in the determination of whether the sentences imposed on the charges of murder and attempted murder were manifestly excessive – that the Crown had accepted the respondent's plea of guilty to the charge of infanticide and thus that the charges of murder and attempted murder were to be viewed "in light of the statutory definition of infanticide in s.6(1) of the Crimes Act 1958".

In *DPP v Lindsey (Sentence)* [2018] VSC 239 the 34YO accused had pleaded not guilty but had been found guilty of murder of his 6 month old step-son who had sustained significant and ultimately fatal head injuries whilst in his care. There had been extensive methylamphetamine use and sleep deprivation leading up to the offence. He had been subject to a community corrections order at the time of the offence. In imposing a sentence of IMP34y/27y, Kaye JA said at [34]-[36]:

"You have been convicted of the most serious crime in our legal system, the murder of another human being. The maximum sentence for that offence is life imprisonment. Your offending in this case falls within one of the highest categories of seriousness of the crime of murder. At the time of his death, CD was just six months old. He was entirely harmless, helpless and vulnerable, being at an age at which he was totally dependent on adults for protection and care. At the time at which he was murdered, CD had been entrusted to your care by his mother, and as such it was your responsibility to keep him safe and secure while his mother was absent from the unit. In gross violation of that special trust, you subjected CD to a series of brutal acts of cruel, vicious and sickening violence, which resulted in a number of severe injuries to him, including those from which he died.

The law regards all human life as unique and sacred. However, the life of an infant or a young child is especially precious, because children are so vulnerable and defenceless. The ordinary, natural instinct of any decent human being is to feel tenderness and protectiveness to an infant or young child. The brutal assault by you on Chayse was so contrary to the fundamental values of our society as to defy any comprehensible explanation. What you did to Chayse was an act of total and unmitigated evil. As such, your culpability, for the crime that you have committed, is of a particularly high order.

The direct victim of your crime was, of course, the infant Chayse Dearing. At his age, he had the whole of his life before him. As a result of your cruel crime, he will never grow into childhood, never experience his teenage years, or mature into adulthood. Your senseless and vicious crime deprived him of his most basic right, his right to life."

In *DPP v Noy* [2018] VSC 466 the 26YO accused had pleaded not guilty but had been found guilty of murder of his 11 month old step-son who had sustained very severe blunt force trauma causing transection of the abdominal aorta, spinal fractures and laceration of the right kidney whilst in his care. He had an antisocial/borderline structure of personality, a deprived and difficult childhood, a history of depression, a lack of insight and no remorse. His prospects of rehabilitation were guarded. In imposing a sentence of IMP30y/26y, Coughlan JA said at [65]:

"I regard this as a particularly serious example of the crime of murder. Although the killing was swift, its circumstances were extremely brutal. The principles of retribution,

just punishment and general deterrence are very important. As the matter stands, the principle of specific deterrence also carries some weight.”

In *Akon Guode v The Queen* [2020] VSCA 257 the applicant had been sentenced to IMP26y6m/20y after pleading guilty to charges of infanticide, murder x 2 and attempted murder resulting from her deliberately driving her car into a lake. Four of her children were in the car. Her 4 year old twins and her youngest child (aged 16m) drowned. She had a background of extreme disadvantage and hardship and was suffering a major depressive disorder as a consequence of having giving birth to the youngest child. The Court of Appeal (Ferguson CJ, Priest & Beach JJA) allowed the appeal and substituted a sentence of IMP18y/14y.

11.16 Sentencing for child sexual abuse committed as a child

In *DPP (Cth) & DPP v Dylan Hutchison (a pseudonym)* [2018] VSCA 153 the Court of Appeal dismissed Crown appeals against sentences of two community correction orders each for 3½ years and a good behaviour bond for 3 years imposed on a 20 year old man who had committed most of the offences when he was 16 years of age. On 3 days in May & June 2013 the respondent performed a number of indecent acts with his half-sisters then aged 3 & 16 months. Video images of his actions were captured on a camera used by him and then produced during online conversations with an adult male named Orr who was claiming to be a 17 year old girl. Categorizing the offending as “very serious” the Court of Appeal said at [54]-[55]:

“If all one knew were the objective facts of his offending then one would almost certainly conclude that the only sentence open was one of immediate imprisonment. Sentencing, however, is not nearly so simple. In this case, like many others, there were a myriad of competing considerations that had to be synthesised by the sentencing judge in order to arrive at a result that was just in all the circumstances.

As the appellants properly conceded, there were powerful mitigating circumstances that the judge was required to give appropriate and proper weight to in arriving at a sentence that satisfied all of the legitimate purposes for which sentences are imposed.”

The 8 mitigating circumstances were summarized by the Court of Appeal at [56]-[63] as follows:

- (1) The respondent was only a little over 16 years of age at the time he committed the offences in relation to his half-sisters. Rehabilitation was a powerful mitigating factor in relation to such a young offender, notwithstanding the objective seriousness of his offending: see *R v Mills* [1998] 4 VR 235, 241; *Azzopardi* (2011) 35 VR 43, 55 [37] and 57 [44]. If the respondent’s offending had been detected at or about the time of its commission, he would have fallen to be sentenced under the provisions of the CYFA, where general deterrence would have played no part in the sentencing process: see *CNK* (2011) 32 VR 641. As the judge put it, there was every prospect that the respondent would have received ‘some form of order without conviction’.
- (2) The respondent was himself a victim of Orr’s serious offending, having been groomed and encouraged in his offending by Orr.
- (3) The respondent’s early life and formative years were “clearly traumatic” because of the separation of his parents. Being taken to another country and the sudden death of his mother.
- (4) Upon being arrested, the respondent co-operated fully, refusing legal assistance and making full admissions.
- (5) The respondent did not deliberately seek out child pornography. Rather, “it came with other material” and the fact that that material had not been accessed in the 18 months before the respondent’s arrest was of some moment.
- (6) The extent of the respondent’s shame and remorse was exemplified by the fact that he had originally pleaded guilty to incest, an offence involving sexual penetration, when no such penetration was shown on the videos and in circumstances where any penetration as originally alleged by the prosecution was in fact highly unlikely.
- (7) The respondent had excellent prospects for rehabilitation.
- (8) The consequences of the respondent’s offending against his half-sisters were, as the judge found, devastating for the respondent, in that he had lost his close relationship with his father’s family and was no longer a part of his immediate family group.

In finding no sentencing error on the part of the judge, the Court of Appeal said at [64] & [66]-[68]:

“All of these matters had to be balanced against the very serious nature of the respondent’s offending — offending, the likes of which this Court has been at pains for some time to say is ordinarily deserving of severe punishment by way of significant sentences of incarceration. Some of the most difficult sentencing decisions, however, concern cases where the offending is very serious and the mitigating factors very

powerful. Such cases require a synthesis of relevant matters that often pull in completely different directions. This was the difficult task faced by the sentencing judge in the present case....The judge's sentencing reasons disclose that she was alive to all of the competing considerations competing considerations that she was required to take into account in imposing a just sentence on the respondent. The reasons do not disclose any error in point of principle. The sentence may properly be regarded as a merciful one, given in circumstances that were exceptional. That is, again however, not to say that the sentence imposed was wholly outside the permissible range so as to bespeak error in the exercise of the sentencing discretion: see *DPP v Hayes* [2017] VSCA 285 [47].

As we have already observed, the offending that constituted charges 1 to 4 was committed when the respondent was a little over 16 and 2 months of age. When he was sentenced, the respondent was 20 years and 9 months of age. In *R v Boland* (2007) VR 300 at 304 Nettle JA (with whom Ashley and Dodds-Streeton JJA agreed) said:

'Decisions of this court in *R v Nutter* and *R v Better* recognised that where offences which have been committed while an offender is a child or immature and are not prosecuted until many years after the event, there is good reason to mitigate penalty, or at least to do so where the offender has achieved a significant degree of rehabilitation and there has been no further offending. Although such an offender falls to be sentenced as an adult, common sense and fairness dictate that the assessment of the nature and gravity of the crime and of the offender's moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity. See also *Sherritt v The Queen* [2015] VSCA 1 [34]-[35] (Priest JA, with whom Maxwell P agreed).'

In the present case, while the respondent's offending that constitutes charge 5 cannot be disregarded, common sense and fairness did require consideration to be given to the fact that the respondent was plainly a more mature person at the time of sentencing than he was at the time of his initial offending. He was entitled to be sentenced for his offending in relation to charges 1 to 4 on the basis that the assessment of the nature and gravity of this offending, and of the respondent's moral culpability in respect of it, took into account that what he had done was done as a child. This constituted an additional reason why the penalty to be imposed upon the respondent might be mitigated."

11.17 Sentencing of adults for offence against protective worker

In *R v Gibson* [2006] VSCA 258 the Court of Appeal imposed a sentence of 9 months imprisonment in respect of a charge of threatening to inflict serious injury on a protective worker. The defendant's children were in the custody of DOHS. The defendant had not had access to his children for 3 months as a consequence of the protective worker being on sick leave, causing the defendant to become increasingly resentful and distressed. When the worker ultimately returned to work she called the defendant to arrange access. During that phone conversation the defendant lost his temper and said: "I'm going to come down there and cut your head off."

11.18 Relevance of prospect of deportation

In *Guden v The Queen* (2010) 28 VR 228; [2010] VSCA 196 the Court of Appeal held that the prospect of an offender's deportation was a factor which could bear on the impact a term of imprisonment would have on that offender, both during the period of actual incarceration and upon alirelease. And, where appropriate, it would also be proper to consider the fact that a sentence of imprisonment would result in the offender losing the opportunity of settling permanently in Australia.

In *Mohamed Allouch v The Queen* [2018] VSCA 244 the Court of Appeal allowed an appeal against a aggregate sentence of 12 months' imprisonment with a non-parole period of 6 months imposed on the appellant on nine fraud and theft related offences and substituted an aggregate sentence of 7 months imprisonment. At the time of sentencing it was believed that the appellant was an Australian citizen but it was discovered during the hearing of his leave to appeal that he was in fact a permanent resident. At [39]-[41] Beach & Weinberg JJA said:

[39] "The prospect that an offender is liable to deportation following sentence is, of course, a relevant sentencing factor: see *Guden v The Queen* (2010) 28 VR 288, *Konamala v The Queen* [2016] VSCA 48 and *Da Costa Junior v The Queen* (2016) 307 FLR 153. As the respondent properly conceded, the relevance of an offender's immigration status, as regards the possibility of deportation, is twofold:

- (a) it may be relevant to the hardship that will be felt by an offender, uncertain as to whether at the end of the sentence, he (and perhaps his family as well), will be required to uproot themselves, and return to his country of origin; and
- (b) it is additionally punitive because it destroys the opportunity to settle permanently in this country.

[40] Of course, a court should only reduce a sentence based upon the prospect of deportation where there is sufficient evidence of both the risk, and the impact of that risk, under s 501(3A) of the Migration Act 1958 (Cth) ('the Act'). That section, in combination with other sub-sections [ss.501(6)(a), 501(7)(c), 501CA], relevantly provides that a 'non-citizen' is liable to deportation where he or she is convicted of an offence and sentenced to a term of imprisonment of at least one year. A person is similarly liable to deportation if they have been sentenced to two or more terms of imprisonment, where the total of those terms is 12 months or more [s.501(7)(d)].

[41] On 11 December 2014, amendments to the Act came into force which made visa cancellation mandatory for an offender sentenced to imprisonment of one year or more, unless the Minister is later satisfied, by the applicant, that there is a reason to revoke the cancellation decision. In other words, the effect of the amendment is to require a permanent residency visa to be cancelled, and to impose upon the 'noncitizen' whose visa has been cancelled, the obligation to dissuade the Minister from deporting him or her. The net effect may be to cause the offender to be put into migration detention pending the lengthy period that it is likely to take before a final resolution of the matter has been achieved. In some cases, that may be months, if not years."

In *R v Kumar* [2018] VSC 241 – in sentencing the accused to TES IMP7y/4y on charges of aggravated burglary of his ex partner's home, intentionally causing serious injury to a male guest at her home, contravention of a family violence safety notice and committing an indictable offence while on bail, Croucher J noted at [68]:

"[M]ost importantly, there is evidence before me that Mr Kumar's visa lapsed in August last year and that, as an 'unlawful non-citizen, [he] would be subject to removal from Australia as soon as reasonably practicable'. The parties accept that this means that Mr Kumar faces a significant risk of deportation, particularly given the length of the sentence I am about to impose as well: see, for example, *Schneider v The Queen* [2016] VSCA 76 at [16]-[26] (per Priest JA, with whom Coghlan and Kyrou JJA agreed). Mr Brown, who appeared for the Director at trial and on the plea, accepts that the uncertainty of Mr Kumar's fate in view of the significant risk of deportation makes his time in custody all the more onerous. This, it is also accepted, is particularly so in circumstances where Mr Kumar has been here for nine years, has three children born in this country and has a grave and justifiable concern that he will be unable to have access to those children if he is deported...In my view, this is a very significant additional punishment to Mr Kumar."

In *AS v The Queen* [2019] VSC 260 the appellant – aged 17 at the time of the offending – had pleaded guilty to charges including **assault with intent to commit a sexual offence** and aggravated burglary. He was born in Samoa but he and his parents had moved to New Zealand when he was 3 years old. He was a non-citizen under the Migration Act 1958 and had received a notice of intention to consider cancellation of his visa. He had written a letter of appeal and was awaiting a response from the authorities. At [54] Champion J said:

"I am not in a position to make a clear determination of the likelihood of the appellant's deportation, however I am prepared to accept that the uncertainty of his situation is likely to weigh heavily. I have taken this into account my determination of the appropriate sentence."

See also *Loftus v The Queen* [2019] VSCA 24 at [65]-[83]; *Magedi v The Queen* [2019] VSCA 102 at [55]-[60]; *R v Shoma* [2019] VSC 367 at [100]-[105]; *Foley v The Queen* [2019] VSCA 99 at [21]-[25]; *Akot v The Queen* [2020] VSCA 55 at [33]-[40]; *DPP v Jayadev Patil (a pseudonym)* [2020] VSCA 337 at [60].

In relation to the relevance to a non-parole period of the likelihood of the applicant's deportation after serving his sentence, see *R v Mann* [2011] VSCA 189 at [36]-[43] and the cases cited therein – *Guden v The Queen* at [15] & *R v Strestha* (1991) 173 CLR 48, 57 (Brennan & McHugh JJ). See also *R v Hutton* [2011] VSC 484 at [41]-[42].

In *R v Wunan Yu* [2005] VSCA 18 Winneke P (with whom Charles & Buchanan JJA agreed), referring to the judgment of Marks J in *R v Binder and Langer* [1990] VR 563 at 569-570, to *Shrestha v The Queen* (1991) 173 CLR 48 and to s.5(2AA)(a) of the Sentencing Act 1991, held at [11] that the sentencing judge was wrong to take into account the possible effects of executive action or policy (namely the prospect of the appellant being deported to China) in determining not to set a non-parole period.

11.19 The 'standard sentence' scheme

The 'standard sentence' scheme applies only to offences committed on or after 01/02/2018. It applies only to offenders sentenced under the *Sentencing Act 1991* (Vic). It does not apply to children or young persons sentenced under the *Children, Youth and Families Act 2005* (Vic), to offenders under the age of 18 at the time of the commission of the offence or to offences heard and determined summarily.

Brown v The Queen [2019] VSCA 286 was the first case in which the Court of Appeal considered the standard sentence provisions which were inserted as ss.5A & 5B of the *Sentencing Act 1991* by the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic). At [1]-[8] the Court (Maxwell P & Priest, Kaye, T Forrest & Emerton JJA) described the operation of the provisions and ruled on the key issue whether the standard sentencing scheme required or permitted the sentencing judge to assess the seriousness of the subject offence "taking into account only the objective factors" defined in s.5A(1)(b):

[1] "In 2017, the Victorian Parliament legislated to establish what was described as a 'standard sentence scheme'. The new scheme replaced the 'baseline sentencing' provisions which this Court in 2015 had found were 'incapable of being given any practical operation': *DPP v Walters (a pseudonym)* (2015) 49 VR 356, 360 [9] (Maxwell P, Redlich, Tate, Whelan and Priest JJA).

[2] As the then Attorney-General said in his second reading speech, the new legislation prescribes standard sentences for 12 serious crimes, including murder, rape and sexual offences involving children. The Minister explained the concept:

'The standard sentence represents an offence at the mid-point of objective seriousness, and is calculated at 40 per cent of the maximum penalty. For example the standard sentence for rape is 10 years as it has a maximum penalty of 25 years. For offences with a maximum penalty of life imprisonment, an offence-specific approach has been adopted, with the standard sentence for murder being 25 years': Victoria, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1509 (Mr Martin Pakula, Attorney-General).

[3] This is the first occasion on which the Court of Appeal has had to consider the standard sentence provisions. To facilitate that consideration, three appeals (including the present) were heard together concerning sentences imposed for standard sentence offences, being (respectively) murder, rape and sexual assault...

[4] For the most part, the provisions are clear and the approach required is not in dispute. The key new requirement is that a judge when sentencing for a 'standard sentence offence' must 'take the standard sentence into account as one of the factors relevant to sentencing'. This requirement:

- is to be treated as a 'legislative guidepost', having the same function as the maximum penalty; is to be treated as a 'legislative guidepost', having the same function as the maximum penalty;
- does not affect the established 'instinctive synthesis' approach to sentencing;
- does not require or permit 'two-stage sentencing'; and
- does not otherwise affect the matters which the court may, or must, take into account in sentencing.

[5] The only area of uncertainty concerns the judge's assessment of the seriousness of the offence before the court ('the subject offence'). The 'standard sentence' is defined by s.5A(1)(b) as "the sentence for an offence that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness". The provisions then specify in s.5A(3) that those 'objective factors' are to be determined:

- (a) without reference to matters personal to a particular offender or class of offenders; and
- (b) wholly by reference to the nature of the offending.

[6] It is not in doubt that those specifications apply to the identification of the hypothetical 'middle of the range' offence. The question which was explored at the hearing of these appeals was whether the new scheme required (or permitted) the sentencing judge to assess the seriousness of the subject offence 'taking into account only the objective factors' as thus defined.

[7] The submission of senior counsel for the Director was that, on their proper construction, the scheme provisions neither required nor permitted such an assessment. For the reasons set out in Part I, we would uphold that submission. In our opinion, the standard sentence provisions do not have any bearing on the judge's obligation to assess the seriousness of the subject offence. That assessment remains a necessary part of the process of instinctive synthesis and it is not constrained by the legislative definition of 'objective factors'. Those constraints are referable only to the assessment which gives content to the hypothetical offence as an offence 'in the middle of the range of seriousness'.

[8] In our view, this conclusion is required by the language of the standard sentence provisions. It is also consistent with the express policy of the legislation, which is to preserve instinctive synthesis and prohibit 'two-stage sentencing'. Finally, this construction of the provisions reflects their legislative history, based as they are on the analysis — and the language — in the unanimous judgment of the High Court in *Muldrock v The Queen* (2011) 244 CLR 120.”

In *Julian Lockyer (a pseudonym) v The Queen* [2020] VSCA 321 at [67]-[69] the Court of Appeal (Maxwell P, Beach & Weinberg JJA) said:

[67] “It must be understood that the standard sentencing regime, so recently introduced, does not in any way diminish the importance of giving proper weight to relevant mitigating factors. These include the personal circumstances of the offender, his or her prospects of rehabilitation and, where appropriate, the need to give due weight to a plea of guilty (particularly if coupled with remorse).

[68] If the standard sentencing regime is not approached in accordance with the principles laid down in both *Drake* and *Brown*, it will have replaced 'instinctive synthesis' with 'two-tiered' or 'starting point' sentencing. It is clear that this was not the intent of the Parliament: *Sentencing Act 1991* s.5B(3)(b).

[69] A standard sentence of 10 years' imprisonment, for rape, represents a 'legislative guidepost' {*Brown* (2019) 59 VR 462, 464–5, [4]}, and is to be understood as but one factor to be taken into account in what is obviously a far more nuanced, and careful, process than one which is crudely arithmetic: *Sentencing Act 1991* s.5B(2).”

See also *DPP v Drake* [2019] VSCA 293 at [14]-[17]; *R v Pozzebon* [2019] VSC 631 at [39]-[44]; *R v Eckersley* [2020] VSC 22 esp. at [68]-[69].

