Sentencing Advisory Council

CHANGES TO SENTENCING LAW IN VICTORIA: AN OVERVIEW OF 2018

Sentencing law in Victoria can be complex to navigate, particularly as the law undergoes numerous, and often significant, changes every year. The aim here is to provide a non-exhaustive overview of key changes to sentencing law in Victoria in 2018. Many of these changes were the result of legislative amendments. A small number of judicial decisions will also affect the way that sentencing law operates.

ADVICE ON USING THIS OVERVIEW

Caution should be exercised when using this overview. This overview is *not* exhaustive, nor should anything in it be construed as legal advice.

VICTORIA State Government

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1. STANDARD SENTENCES

On 1 February 2018, standard sentences came into effect, providing a form of numerical legislative guidance to sentencing courts for certain serious offences.[1]

The then Attorney-General indicated that the standard sentence scheme had two policy aims: first, to provide a numerical yardstick as to the objective seriousness of standard sentence offences and second, to increase sentences for a number of specified offences.[2]

HOW STANDARD SENTENCES WORK

A standard sentence represents numerically what parliament considers to be 'the middle of the range of seriousness' when considering only *objective factors* relevant to the offending and not *subjective factors* specific to a particular offender, such as their personal circumstances, prior offending or guilty plea.[3]

Courts are required to 'take the standard sentence into account as *one of the factors* relevant to sentencing',[4] in a way that doesn't affect the approach to sentencing known as *instinctive synthesis*.[5] That is, the standard sentence for an offence becomes one of many considerations Victorian courts must take into account when sentencing an offender.

Currently, parliament has set a standard sentence for 12 offences, including murder, rape, eight sexual offences involving children, culpable driving causing death and trafficking in a large commercial quantity of a drug of dependence. The standard sentence for most of these offences is set at 40% of the maximum penalty. For example, the maximum penalty for rape is 25 years' imprisonment; therefore the standard sentence is 10 years. For offences with a maximum penalty of life imprisonment, however, the standard sentence varies.[6]

The standard sentence scheme has also significantly affected the extent to which courts may take sentencing practices for those offences into account. Section 5(2)(b) of the *Sentencing Act 1991* (Vic) requires all courts to take 'current sentencing practices' into account; that is, courts must consider any trends in how an offence is usually sentenced, particularly in comparable cases. When sentencing a standard sentence offence, however, courts are now prohibited from having regard to any sentences imposed on offences prior to the standard sentence legislation coming into operation.[7] This effectively means that sentencing practices for the 12 standard sentence offences have been wiped clean, and courts must start afresh.

1 *Sentencing Act 1991* (Vic) ss 5A–5B, as inserted by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic).

2 Explanatory Memorandum, Sentencing Amendment (Sentencing Standards) Bill 2017 (Vic) 6; Martin Pakula, 'State Election 2018: Statement from Attorney-General Martin Pakula' (2018) 92(11) *Law Institute Journal* 18.

3 *Sentencing Act 1991* (Vic) ss 5A(1)(b), (3).

4 *Sentencing Act 1991* (Vic) s 5B(2)(a) (emphasis added).

5 *Sentencing Act 1991* (Vic) s 5B(3)(b). In *Markarian v The Queen* [2005] HCA 25 (18 May 2005), McHugh J described *instinctive synthesis* in the following terms (at [51]):

> By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.

6 The standard sentence for trafficking in a large commercial quantity of drugs is 16 years' imprisonment: *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71(2). The standard sentence for murder is 25 years' imprisonment and the standard sentence for murdering a custodial or emergency worker is 30 years' imprisonment: *Crimes Act 1958* (Vic) s 3(2).

7 *Sentencing Act 1991* (Vic) s 5B(2)(b).

THE FIRST STANDARD SENTENCE CASE

In November 2018, the Supreme Court of Victoria sentenced the first offender for a standard sentence offence.[8] The offender in that case was sentenced for murder, which has a maximum penalty of life imprisonment and a standard sentence of 25 years' imprisonment. In sentencing the offender, Justice Champion reached six key conclusions about the standard sentence scheme:

1. the standard sentence scheme is valid and capable of practical operation;
2. the standard sentence scheme preserves the operation of instinctive synthesis;
3. the standard sentence for an offence is a legislative guidepost;
4. the standard sentence for an offence is not to take a predominant role in the sentencing exercise;
5. the standard sentence is just one factor to take into account; and
6. in following the legislative requirement to take current sentencing practices into account when sentencing a standard sentence offence, the court may only have regard to sentences imposed under the standard sentence scheme (in accordance with the legislation).[9]

Justice Champion also held that parliament's stated intention[10] of the standard sentence scheme to increase sentencing practices was of no legal effect, because it was not manifested in legislation. In particular, he held that, '[w]hile sentences might rise as a consequence of courts considering the standard sentence as an additional sentencing factor, it is not an imperative to which I must have regard'.[11]

8 *The Queen v Brown* [2018] VSC 742 (29 November 2018).
9 Ibid [57]–[75], [107]–[111].
10 Ibid [54].
11 Ibid [56].

2. CATEGORY A AND B SERIOUS YOUTH OFFENCES

Certain offences committed on or after 26 February 2018 are now classified as either Category A or Category B serious youth offences for offenders aged at least 16 years at the time of the offence.[12]

Table 1: Category A and B serious youth offences

Category A serious youth offences	Category B serious youth offences
Murder	Recklessly causing serious injury in circumstances of gross violence
Attempted murder	Rape
Manslaughter	Rape by compelling sexual penetration
Child homicide	Home invasion
Intentionally causing serious injury in circumstances of gross violence	Carjacking
Aggravated home invasion	
Aggravated carjacking	
Arson causing death	
Culpable driving causing death	
Certain terrorism-related offences	

Two consequences flow from classifying an offence as a Category A or B serious youth offence:[13]

- first, in certain circumstances offenders sentenced for those offences committed on or after 26 February 2018 must be sentenced to adult prison rather than a youth detention facility; and
- second, in certain circumstances those offences committed on or after 5 April 2018 must be uplifted from the Children's Court to be dealt with in the adult jurisdiction.

PRESUMPTION OF ADULT IMPRISONMENT

If a court (other than the Children's Court) sentences a young offender[14] for a Category A serious youth offence, it must not sentence them to a youth justice centre order or a youth residential centre order unless 'exceptional circumstances' exist. Instead, the court must sentence them to a term of adult imprisonment.[15]

Similarly, if a court sentences a young offender for a Category B serious youth offence and the offender has previously been sentenced for either a Category A or a Category B serious youth offence, the court must not sentence them to a youth justice centre order or a youth residential centre order unless 'exceptional circumstances' exist. Again, the court must instead sentence them to a term of adult imprisonment.[16]

UPLIFT TO THE ADULT JURISDICTION

The Children's Court was already required to uplift to the adult jurisdiction certain fatal offences, including murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death (mandatory uplift).[17] The Children's Court must now uplift all other Category A serious youth offences *unless* the court is satisfied that the sentencing options under the *Children, Youth and Families Act 2005* (Vic) are sufficient in that case and one of the following applies:

- it is in the interest of the victim(s);
- the accused is particularly vulnerable because of cognitive impairment or mental illness; or
- a substantial and compelling reason exists (presumptive uplift).[18]

12 *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic).
13 *Children, Youth and Families Act 2005* (Vic) s 3 (definitions of 'Category A serious youth offence' and 'Category B serious youth offence').
14 A *young offender* is an offender aged under 21 years on the date of sentence: *Sentencing Act 1991* (Vic) s 3(1).
15 *Sentencing Act 1991* (Vic) s 32(2C).
16 *Sentencing Act 1991* (Vic) s 32(2D).
17 *Children, Youth and Families Act 2005* (Vic) s 356(3).
18 *Children, Youth and Families Act 2005* (Vic) s 356(6).

For Category B offences, there is a presumption that the proceedings will be determined summarily in the Children's Court; however, the court must consider whether the proceedings should be uplifted on the basis that either the child objects to the summary jurisdiction or exceptional circumstances make the charge unsuitable to be heard summarily.[19]

ADDITIONAL AMENDMENTS TO YOUTH JUSTICE LEGISLATION

In addition to the introduction of Category A and B serious youth offences, a number of other miscellaneous amendments were made to sentencing law relating to young offenders:

- As at 5 April 2018, 'youth justice custodial workers on duty' were added to the list of persons upon whom an assault will attract a minimum non-parole period unless special reasons exist.[20]
- As at 5 April 2018, if a *young offender* is sentenced for escaping from, or doing damage to, a remand or youth justice or residential centre, there is a presumption that sentencing courts will order any period of detention imposed for that offending to be served cumulatively (and not concurrently) with any uncompleted sentences of detention in a youth justice centre, unless the court states otherwise and gives reasons for doing so.[21] Similarly, if a *child* is sentenced for those same escape and damage offences, or for assaulting a youth justice custodial worker on duty, any period of detention imposed must also be served cumulatively with any period of detention in respect of any other offences unless the court states otherwise and gives reasons for its decision.[22]
- As at 1 June 2018, courts may now impose aggregate sentences of detention on young offenders in respect of two or more offences that are founded on the same factors, or are part of a series of offences of the same or a similar character.[23] If the court imposes an aggregate period of detention, it must, in language likely to be readily understood by the young offender, explain the reasons for doing so as well as the effect of that sentence.
- As at 28 October 2018, in sentencing a young offender aged over 16 years and under 18 years at the time of the indictable offence, the County or Supreme Court must take into account whether a minimum non-parole period or head sentence would have been required had the offence been committed by an adult.[24]
- On 2 November 2014, a number of new provisions came into effect relating to how courts must sentence offenders for injuring emergency workers. One of those amendments requires courts to impose a sentence of six months' imprisonment on offenders who intentionally or recklessly injure an emergency worker, contrary to section 18 of the *Crimes Act 1958* (Vic).[25] There were a number of exceptions to this requirement, including the presence of 'substantial and compelling circumstances', which is still in effect (in a slightly modified form). One of the exceptions to that minimum term has, however, been removed as at 28 October 2018. In particular, a court sentencing a young offender (aged under 21 years at the time of sentencing) for that offence must now impose at least six months' detention in a youth justice centre or adult prison; the court no longer has the discretion to consider certain circumstances as a 'special reason' that would justify imposing a lesser sentence for that offence, namely the offender having good prospects of rehabilitation or being particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison.[26]

19 *Children, Youth and Families Act 2005* (Vic) ss 356(8), (3).

20 *Sentencing Act 1991* (Vic) s 10AA, as amended by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) ss 46–47.

21 *Sentencing Act 1991* (Vic) ss 16(1A)(f), 33(1A), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) ss 50–51.

22 *Children, Youth and Families Act 2005* (Vic) ss 411(2A), 413(3A), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) ss 43–44.

23 *Sentencing Act 1991* (Vic) s 32A, as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) s 8.

24 *Children, Youth and Families Act 2005* (Vic) s 586(2); *Sentencing Act 1991* (Vic) s 5(2J), both as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) ss 3, 76(9).

25 *Sentencing Act 1991* (Vic) s 10AA(4), as inserted by *Sentencing Amendment (Emergency Workers) Act 2014* (Vic) s 4.

26 *Sentencing Act 1991* (Vic) s 10A(2A) (as amended), repealed by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79(6); *Sentencing Act 1991* (Vic) s 10AA(2), as amended by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 78(2).

3. EMERGENCY WORKERS

On 5 April 2018, four new offences came into effect in Victoria:[27]

1. intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving (**intentional**);[28]
2. intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving in circumstances in which the vehicle was stolen, an emergency vehicle was damaged or the offence was committed in connection with another indictable offence (**intentional and aggravated**);[29]
3. recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving (**reckless**); and[30]
4. recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving in circumstances in which the vehicle was stolen, an emergency vehicle was damaged or the offence was committed in connection with another indictable offence (**reckless and aggravated**).[31]

As illustrated in Table 2, there are different circumstances of these four offences in which they are classified as Category 1 (mandatory imprisonment),[32] Category 2 (presumptive imprisonment)[33] or neither, often depending on whether the emergency worker, custodial officer or youth justice custodial worker was injured.

If the offence is a Category 1 offence, such that the offender acted *intentionally* not *recklessly*, and an emergency worker was injured, courts must also impose a minimum non-parole period of two years' imprisonment, unless the offender was aged under 18 years or there are *special reasons* not to do so.[34]

Table 2: Circumstances creating Category 1 or 2 offences (or neither) for intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving

Intentional or reckless	Aggravated (Yes/No)	Worker injured (Yes/No)	Category 1 or 2	Minimum non-parole period
Intentional	Yes	Yes	1	2 years
Intentional	Yes	No	2	–
Intentional	No	Yes	1	2 years
Intentional	No	No	–	–
Reckless	Yes	Yes	2	–
Reckless	Yes	No	2	–
Reckless	No	Yes	–	–
Reckless	No	No	–	–

There is also a presumption that all imprisonment sentences for the four new offences are to be served cumulatively on any other uncompleted sentences of detention, unless a court directs otherwise.[35]

27 *Crimes Legislation Amendment (Protection of Emergency Workers and Others) Act 2017* (Vic) ss 15–19.
28 *Crimes Act 1958* (Vic) s 317AC.
29 *Crimes Act 1958* (Vic) s 317AD.
30 *Crimes Act 1958* (Vic) s 317AE.
31 *Crimes Act 1958* (Vic) s 317AF.
32 *Sentencing Act 1991* (Vic) s 3 paras (ic)–(id) (definition of 'Category 1 offence').
33 *Sentencing Act 1991* (Vic) s 3 paras (j)–(k) (definition of 'Category 2 offence').
34 *Sentencing Act 1991* (Vic) s 10AE; *Sentencing Act 1991* (Vic) s 10A(2) (definition of 'special reasons').
35 *Sentencing Act 1991* (Vic) s 16(3D).

4. PRIOR GOOD CHARACTER

New legislation came into effect on 5 April 2018 that significantly reduces the relevance of an offender's prior good character if it assisted them in committing a child sex offence. The legislation was a response to a recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse to overturn previous High Court case law.

THE HIGH COURT CASE

In 2001, the High Court considered the extent to which prior good character could be taken into account when sentencing child sex offences.[36] The offender in that case had no prior criminal history and was an active member of the religious community. The court considered his good character to be a mitigating factor and reduced his sentence.

As a result of that decision, in the absence of legislation to the contrary, sentencing courts were required to accord an offender at least some measure of leniency for their previous good character – even if that good character facilitated the offending itself – though courts were permitted to give less weight to that factor than they otherwise would have.[37]

THE ROYAL COMMISSION'S RECOMMENDATION

In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse released its final report. In it, the Royal Commission noted that both New South Wales[38] and South Australia[39] had already introduced legislation to overturn that precedent and prevent offenders' good character from being taken into account as a mitigating factor if it was of assistance in the commission of a child sex offence. The Royal Commission recommended that all state and territory governments adopt a similar approach.[40]

THE NEW LEGISLATION

As at 5 April 2018, legislation came into force in Victoria giving effect to that recommendation.[41] So long as the offender was aged over 18 at the time of the offence, courts may not have regard to their previous good character (including a lack of prior findings of guilt or convictions) if that good character was of assistance to them in the commission of the offending.

This amendment applies retrospectively to all offenders sentenced after 5 April 2018, not just offences committed after that date.

36 *Ryan v The Queen* [2001] HCA 21 (3 May 2001).
37 *Wakim v The Queen* [2016] VSCA 301 (30 November 2016).
38 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5A).
39 *Criminal Law (Sentencing) Act 1988* (SA) s 10(3)(ba).
40 Commonwealth of Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I–II* (2017) 98–99 (Recommendation 74).
41 *Sentencing Act 1991* (Vic) s 5AA, as inserted by *Justice Legislation Amendment (Victims) Act 2018* (Vic) ss 32–33.

5. YOUTH CONTROL ORDERS

On 1 June 2018, youth control orders came into effect for young offenders.[42]

This new sentencing order is now the most intensive form of community order for young offenders and is intended to operate as an alternative to detention. The objects of the order include:

- providing a judicially supervised, intensive supervision regime for the child;
- punishing the child by imposing restrictions on their liberty;
- engaging the child in education, training or work; and
- giving the child an opportunity to demonstrate a desire to cease offending.[43]

A court must only impose a youth control order if the child is a suitable person, the child consents and a youth control order plan has been developed.[44] The maximum term of a youth control order is 12 months, and it may not extend past the child's twenty-first birthday.[45]

PLANNING MEETING

Before imposing a youth control order, the court must order that a youth control order plan be developed at a meeting involving the child, their lawyer, a youth justice officer, a convenor and any other person directed by the court, such as the offender's family, social worker or teachers.[46] The plan is designed to:

- help the child take responsibility for their actions;
- reduce their likelihood of reoffending;
- provide the child with opportunities to receive support that will assist them to abide by the law and complete the requirements of the order; and
- provide the court with information about which requirements of the order best meet the objects of the order.[47]

CONDITIONS

Youth control orders include strict mandatory requirements, such as participation in education, training or work.[48] The court must also direct the child to attend court at least once a month for the first half of the order so that the court can consider the child's compliance with the order and the ongoing suitability of the requirements of the order.[49] At the hearing, the court may vary the order if it thinks this would be appropriate.[50]

The *optional conditions* of a youth control order include community service, alcohol or drug treatment, counselling, residing at a specific address, a curfew, a prohibition on contacting certain persons, not going to certain places or areas or restricting use of specified social media if required for the protection of the community.[51]

42 *Children, Youth and Families Act 2005* (Vic) ss 409A–409ZA, as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) s 13.
43 *Children, Youth and Families Act 2005* (Vic) s 409A.
44 *Children, Youth and Families Act 2005* (Vic) s 409C.
45 *Children, Youth and Families Act 2005* (Vic) s 409B(2).
46 *Children, Youth and Families Act 2005* (Vic) ss 409D, 409T(3).
47 *Children, Youth and Families Act 2005* (Vic) s 409U.
48 *Children, Youth and Families Act 2005* (Vic) s 409F.
49 *Children, Youth and Families Act 2005* (Vic) s 409L.
50 *Children, Youth and Families Act 2005* (Vic) s 409N.
51 *Children, Youth and Families Act 2005* (Vic) s 409F(2).

CONSEQUENCES OF BREACH

If the child breaches the conditions of the youth control order, a Department of Justice and Community Safety representative may apply within 14 days to have the order revoked.[52] If the court agrees to revoke the order, it must impose a sentence of detention on the child unless there are exceptional circumstances not to do so. A police officer may also apply to have the youth control order revoked if the child has been convicted of an offence punishable by at least five years' imprisonment.

52 *Children, Youth and Families Act 2005* (Vic) s 409Q.

6. CATEGORY 1 AND 2 OFFENCES

Since March 2017, certain offences in Victoria have been classified as either Category 1 or Category 2 offences.[53] If an offender is sentenced for a Category 1 offence, the court must sentence the offender to a term of imprisonment.[54] If an offender is sentenced for a Category 2 offence, there is a strong presumption that the court will impose a term of imprisonment, unless:

- the offender has given an undertaking to assist authorities;
- the offender has impaired mental functioning;
- the court proposes to make a court secure treatment order or a residential treatment order; or
- there are 'substantial and compelling circumstances that are exceptional and rare'.[55]

LIST OF CATEGORY 1 AND 2 OFFENCES

On 28 October 2018, a number of additional offences were added to the list of Category 1 and 2 offences.[56] Table 3 gives the amended list of Category 1 and 2 offences (additional offences are highlighted). With the exceptions of armed robbery and culpable or dangerous driving causing death, these are all new offences that came into effect in the last two years.

Table 3: Category 1 and 2 offences

Category 1 offences	Category 2 offences
Murder	Manslaughter
Intentionally causing serious injury in circumstances of gross violence	Child homicide
Recklessly causing serious injury in circumstances of gross violence	Intentionally causing serious injury
Rape	Kidnapping
Rape by compelling sexual penetration	Arson causing death
Incest (victim aged under 18)	Trafficking in a commercial quantity of a drug of dependence
Sexual penetration of a child aged under 12	Cultivation of a commercial quantity of a drug of dependence
Persistent sexual abuse of a child aged under 16	Providing documents or information facilitating terrorist acts
Trafficking in a large commercial quantity of a drug of dependence	Armed robbery (with firearm)
Cultivation of a large commercial quantity of a narcotic plant	Armed robbery (victim injured)
Aggravated home invasion	Armed robbery (in company)
Aggravated carjacking	Home invasion
Intentionally or recklessly causing serious injury to an emergency worker	Carjacking
Intentionally or recklessly causing injury to an emergency worker	Culpable driving causing death
Aggravated and non-aggravated offences of intentionally exposing an emergency worker to risk by driving (and causing injury)	Dangerous driving causing death
	Aggravated offence of intentionally or recklessly exposing an emergency worker to risk by driving (no injury)

53 *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic). The additional requirement that circumstances be 'exceptional and rare' came into effect on 28 October 2018; see '8. Special Reasons' below.

54 *Sentencing Act 1991* (Vic) s 5(2G).

55 *Sentencing Act 1991* (Vic) s 5(2H).

56 *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) ss 73–74, amending the definitions of 'Category 1 offence' and 'Category 2 offence' in section 3 of the *Sentencing Act 1991* (Vic).

7. SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

Section 5 of the *Sentencing Act 1991* (Vic) guides how courts in Victoria must approach the task of sentencing. It specifies the purposes of sentencing, factors courts *must* have regard to, factors courts *must not* have regard to and factors courts *may* have regard to, in determining the appropriate sentence in each case.

On 28 October 2018, new legislation came into effect that significantly alters the considerations courts may take into account when sentencing, but only in a narrow set of circumstances. In particular, if a court is sentencing an offender for a Category 2 offence (see '6. Category 1 and 2 Offences') and also considering whether there are 'substantial and compelling circumstances' not to impose a period of imprisonment for that offence, then the court must:

- have regard to parliament's intention that an offender sentenced for a Category 2 offence should ordinarily be sentenced to prison, and whether the circumstances of the case would justify a departure from that sentence;[57]
- regard general deterrence and denunciation as having greater importance than any of the other sentencing purposes (that is, punishment, rehabilitation and protection of the community);
- give less weight to the personal circumstances of the offender than to the seriousness of the offence; and
- not have regard to the offender's previous good character (other than the absence of previous convictions or findings of guilt), any early plea of guilty, the offender's prospects of rehabilitation or parity with other offenders.[58]

These changes to the definition of 'substantial and compelling circumstances' were also made to sections 10A(2B)–(3) of the *Sentencing Act 1991* (Vic). Therefore, they similarly affect the considerations a court may take into account in determining whether there are substantial and compelling circumstances not to impose a legislatively specified minimum prison term (see '8. Special Reasons').

57 This consideration was already in effect in March 2017, when the Category 1 and 2 offences were first introduced: *Sentencing Act 1991* (Vic) s 5(2I), as inserted by *Sentencing (Community Correction Order) and Other Acts Amendment Act 2016* (Vic) s 4(1).

58 *Sentencing Act 1991* (Vic) s 5(2HC), as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 76(8).

8. SPECIAL REASONS

For a number of offences in Victoria, courts must impose a term of imprisonment and must also impose either a specified minimum non-parole period or a specified minimum head sentence, unless there are *special reasons* for not doing so. These offences are outlined in Table 4.

Table 4: Minimum head sentences and non-parole periods imposed on offences unless special reasons exist

Offence	Provisions in the *Sentencing Act 1991* (Vic)	Minimum non-parole period	Minimum head sentence
Manslaughter in circumstances of gross violence	Section 9B	10 years	–
Manslaughter by single punch or strike	Section 9C	10 years	–
Intentionally or recklessly causing serious injury in circumstances of gross violence	Section 10	4 years	–
Intentionally or recklessly causing serious injury to an emergency worker, custodial officer or youth justice custodial worker in circumstances of gross violence	Section 10AA(1)	5 years	–
Intentionally causing serious injury to an emergency worker, custodial officer or youth justice custodial worker	Section 10AA(1)	3 years	–
Recklessly causing serious injury to an emergency worker, custodial officer or youth justice custodial worker	Section 10AA(1)	2 years	–
Aggravated home invasion	Section 10AC	3 years	–
Aggravated carjacking	Section 10AD	3 years	–
Aggravated and non-aggravated offence of intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving (causing injury)	Section 10AE	2 years	–
Intentionally or recklessly contravening a restrictive condition of a supervision order or interim supervision order contrary to section 169 of the *Serious Offenders Act 2018* (Vic)	Section 10AB	–	12 months
Intentionally or recklessly causing injury to an emergency worker, custodial officer or youth justice custodial worker	Section 10AA(4)	–	6 months

WHAT CONSTITUTES A SPECIAL REASON?

A special reason exists if:

- the offender has given an undertaking to assist authorities;
- the offender proves on the balance of probabilities that they have impaired mental functioning that was either causally linked to the offence or would make imprisonment more burdensome;
- the court proposes to make either a court secure treatment order or residential treatment order; or
- there are 'substantial and compelling circumstances that are exceptional and rare'.[59]

59 *Sentencing Act 1991* (Vic) s 10A(2).

As at 28 October 2018, the following changes were made to what constitutes a special reason not to impose the minimum term of imprisonment for the offences in Table 4:[60]

- it is no longer a special reason if the offender was aged 18 to 21 years and had a particular psychosocial immaturity that diminished their ability to regulate their behaviour;
- for offenders with impaired mental functioning, the burden or risk of imprisonment must now be '*substantially and materially greater*' than the ordinary burden or risk;[61]
- self-induced intoxication may not constitute impaired mental functioning;[62]
- it is no longer sufficient that the circumstances be 'substantial and compelling'; they must also now be 'exceptional and rare'; and
- significant restrictions are now placed on what the court may take into account when determining whether 'substantial and compelling circumstances' constitute a 'special reason' (for full details of this change, see '7. Substantial and Compelling Circumstances').[63]

60 *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 79.

61 *Sentencing Act 1991* (Vic) s 10A(2)(c)(ii). Previously, the burden or risk of imprisonment had to be '*significantly more*' than the ordinary burden or risk.

62 *Sentencing Act 1991* (Vic) s 10A(2A).

63 *Sentencing Act 1991* (Vic) s 10A(2B).

9. MANDATORY TREATMENT AND MONITORING ORDERS

On 28 October 2018, the mandatory treatment and monitoring order became available for certain Category 1 offences against emergency workers.[64]

This new sentencing order operates as a modified community correction order (CCO). The main differences between the two are that judicial monitoring *must* be attached to a mandatory treatment and monitoring order, whereas it is an optional condition of a CCO, and the court must attach either a treatment and rehabilitation condition or a justice plan condition (the latter applies if the offender has an intellectual disability). A justice plan condition requires the offender to comply with a plan of available services designed to reduce the likelihood of reoffending.[65] The consequences of breaching a mandatory treatment and monitoring order are also more significant than for a CCO.

PRECONDITIONS TO IMPOSING A MANDATORY TREATMENT AND MONITORING ORDER

A mandatory treatment and monitoring order may only be imposed in a very narrow set of circumstances. In particular, a court may only impose such an order if:

- the offender is being sentenced for one of the Category 1 offences involving an emergency worker, including:[66]
  - intentionally or recklessly causing injury or serious injury to an emergency worker, custodial officer or youth justice custodial worker on duty in circumstances in which the offender knew or was reckless to the fact that the victim was one of those specified people; or
  - intentionally exposing an emergency worker, custodial officer or youth justice custodial worker to risk by driving in circumstances in which the victim was injured; and
- the court finds that a special reason exists[67] not to impose the mandatory minimum non-parole period for those offences, which could include:[68]
  - an undertaking by the offender to assist authorities in the investigation or prosecution of another offence;
  - impaired mental functioning at the time of the offence that was causally linked to the commission of the offence and substantially reduces the offender's culpability;
  - impaired mental functioning that makes the burden of imprisonment substantially and materially greater for the offender; or
  - substantial and compelling circumstances that are exceptional and rare; and
- the offender proves that:[69]
  - they had impaired mental functioning at the time of the offence;
  - their impaired mental functioning was causally linked to the commission of the offence; and
  - their impaired mental functioning substantially and materially reduces their culpability;
- the court has received a report from a psychiatrist or registered psychologist;[70] and
- the court considers that a mandatory treatment and monitoring order would be appropriate in all the circumstances.[71]

64 *Sentencing Act 1991* (Vic) s 44A, as inserted by *Justice Legislation Miscellaneous Amendment Act 2018* (Vic) s 80.
65 *Sentencing Act 1991* (Vic) s 80.
66 *Sentencing Act 1991* (Vic) ss 5(2GA), 3(ca)–(cc), (ic)–(id).
67 *Sentencing Act 1991* (Vic) s 5(2GA).
68 *Sentencing Act 1991* (Vic) ss 10AA, 10AE (requirement to impose minimum non-parole period unless special reasons exist); *Sentencing Act 1991* (Vic) s 10A (definition of 'special reasons').
69 *Sentencing Act 1991* (Vic) s 5(2GA)(b)(i).
70 *Sentencing Act 1991* (Vic) s 5(2GB).
71 *Sentencing Act 1991* (Vic) s 5(2GA)(b)(ii).

BREACHING THE ORDER

Breaching a mandatory treatment and monitoring order is regarded as a breach of a CCO and is therefore punishable by up to three months' imprisonment. [72] However, a number of other consequences flow from a proven breach:

- if the court decides to vary the order, it must impose an order as onerous as, or more onerous than, the order previously made;
- if the court decides to cancel the order, the court may only impose one of the following:
  - a sentence of imprisonment;
  - another mandatory treatment and monitoring order as onerous as, or more onerous than, the order previously made;
  - another mandatory treatment and monitoring order as onerous as, or more onerous than, the order previously made combined with a sentence of imprisonment;
  - a residential treatment order; or
  - a court secure treatment order.[73]

REPORTING REQUIREMENT

The Chief Commissioner of Police and the Director of Public Prosecutions are both required to report annually to the Attorney-General (within three months of the end of each financial year) on the operation of mandatory treatment and monitoring orders, including the number of such orders made, the number of proven breaches and any variations or cancellations as a result of those breaches.[74]

72 *Sentencing Act 1991* (Vic) s 83AD.
73 *Sentencing Act 1991* (Vic) s 83AS(1A).
74 *Sentencing Act 1991* (Vic) s 115F.

10. VICTIM IMPACT STATEMENTS

In 1994, legislation was introduced in Victoria requiring sentencing courts to have regard to the impact of the crime on any victims.[75] That legislation allowed victims to outline how the crime affected them through what is known as a Victim Impact Statement, an oral or written statement about any loss, injury or damage they suffered as a result of the offence.

A number of amendments have been made to the Victim Impact Statement provisions over the years. Most recently, in 2018, legislation came into effect that clarifies the extent to which courts are required to outline which parts of a Victim Impact Statement they did and did not take into account.

Victim Impact Statements may contain material that courts must not take into account when sentencing. For example, a Victim Impact Statement may include matters that are inconsistent with the basis on which an accused pleaded guilty or was convicted.[76] Lawyers for the prosecution and defence occasionally submit arguments about which parts of a Victim Impact Statement the court may or may not take into account.[77]

When this occurs, the Court of Appeal has held that it would 'be quite destructive of the purpose of these statements' if complex procedural rules were to surround their admissibility.[78] It has also, however, consistently held that courts must give at least some indication about which parts of a Victim Impact Statement it has taken into account if an objection of some sort is made:

> If objection is taken, on a matter of substance, to any part of the statement, the judge should either rule it inadmissible or make it clear, during the plea or in sentencing reasons, that no reliance would be, or was being, placed on that part of the statement.[79]

THE NEW LEGISLATION

Legislation that came into effect on 29 October 2018 changes this requirement, such that courts are no longer obliged to specify which aspects of a Victim Impact Statement they have taken into account. In particular:

- courts are permitted to receive the whole of a Victim Impact Statement, even if parts of it are objected to or it contains inadmissible material; and
- courts are not required to specify which parts were or were not relied on, although courts are still prohibited from taking into account any inadmissible material.[80]

In addition, parliament expressed an intent for courts to have regard to the following:

- Victim Impact Statements allow victims to tell the court about the impact of the offence on them; and
- Victim Impact Statements are not inadmissible merely because they contain subjective or emotive material.[81]

These changes are retrospective and apply to all sentences imposed on offenders after the legislation comes into effect, not just offences committed after that date.[82]

75 *Sentencing (Victim Impact Statement) Act 1994* (Vic).
76 See for example, *Robinson v The Queen* [2017] VSCA 98 (3 May 2017).
77 See for example, *GEM v The Queen* [2010] VSCA 168 (1 July 2010).
78 *R v Dowlan* [1998] 1 VR 123, 140.
79 *R v Dowlan* [1998] 1 VR 123, 140; *R v Swift* [2007] VSCA 52 (21 March 2007) [8]; see also *Tran v The Queen* [2011] VSCA 383 (8 November 2011).
80 *Sentencing Act 1991* (Vic) ss 8L(5)–(6), as inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 26.
81 *Sentencing Act 1991* (Vic) s 8L(4), as inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 26.
82 *Sentencing Act 1991* (Vic) s 169, as inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 28.

11. INADEQUATE SENTENCING PRACTICES

In 2017, the High Court delivered what was perhaps the most significant sentencing decision in recent years. The case involved a man who had been found guilty of multiple incest offences. The Director of Public Prosecutions appealed his sentence to the Court of Appeal, which reached two key conclusions:

1. current sentencing practices for incest offences were, in general, too low, did 'not reflect the objective gravity of such offending or the moral culpability of the offender' and should therefore be uplifted 'by increments'; and
2. the sentence imposed on that specific offender was not manifestly inadequate because it was consistent with current sentencing practices.[83]

The Director appealed again, this time to the High Court, arguing that while the Court of Appeal's conclusion about the need to increase sentencing practices was appropriate, it should have increased the sentence imposed on that offender as well.

The High Court agreed. Not only were current sentencing practices for incest in general too low, but the sentence in that case should also have been increased. The High Court reasoned that it is important to treat like cases alike by taking into account how others are being sentenced for similar offending; however, '[t]he only expectation that an offender can have at sentence is of the imposition of a just sentence according to law'.[84] Current sentencing practices, the court said, are 'just one factor' to take into account and should not anchor sentencing practices to inadequately low levels.

The question remained, however, about how quickly sentencing practices should change once an appellate court has made a declaration that sentencing practices for a particular type of offence are too low. In 2018, the Court of Appeal addressed this question.

HOW QUICKLY SHOULD SENTENCING PRACTICES CHANGE?

An offender had been sentenced for a number of incest offences and appealed the sentence as being too high. One of his arguments was that any uplifting of sentences for incest offences should have occurred incrementally, rather than immediately, in accordance with past case law.[85] The Court of Appeal disagreed and overturned all past case law suggesting that inadequate sentencing practices should be increased incrementally.[86] That decision, coupled with the High Court's 2017 decision, means that courts must now immediately uplift sentencing practices where they have been declared to be too low.

The Court of Appeal subsequently confirmed that this applies to all offences for which an uplift has been declared, not just incest offences. In that subsequent case, the relevant offences were dangerous driving causing death and dangerous driving causing serious injury.[87]

83 *Director of Public Prosecutions v Dalgliesh (A Pseudonym)* [2016] VSCA 148 (29 June 2016).
84 *Director of Public Prosecutions v Dalgliesh (A Pseudonym)* [2017] HCA 41 (11 October 2017) [65].
85 See for example, *Nguyen v The Queen* [2016] VSCA 198 (11 August 2016); *Ashdown v The Queen* [2011] VSCA 408 (7 December 2011).
86 *Carter v The Queen* [2018] VSCA 88 (11 April 2018).
87 *Director of Public Prosecutions v Weybury* [2018] VSCA 120 (14 May 2018). See also *Sutic v The Queen* [2018] VSCA 246 (27 September 2018); *Stephens v The Queen* [2016] VSCA 121 (30 May 2016).

12. PARTICIPATION IN KOORI COURT

The County Koori Court is an alternative process for sentencing Aboriginal and Torres Strait Islander offenders. Aboriginal Elders or Respected Persons advise the sentencing judge on cultural issues relating to the accused and their offending behaviour, such as kinship connections, how particular crimes have affected the Indigenous community, and cultural practices, protocols and perspectives relevant to sentencing.[88] As at November 2018, the County Koori Court has been in operation for 10 years.[89]

To participate in the process, the offender must be an Aboriginal and Torres Strait Islander person who consents to the jurisdiction and pleads guilty to the offence (other than family violence, a sexual offence or a breach of an intervention order). There are three phases:

1. **Formal arraignment:** the accused enters a plea of guilty.
2. **Sentencing conversation:** in a specially designed courtroom, the accused, judge, Elders and Respected Persons, legal practitioner for the accused, prosecutor, Koori Court officer, Corrections officer and family/support of the accused meet to discuss the offending behaviour.
3. **Formal sentence:** the usual sentencing procedures are followed and the judge delivers the sentence.

Previous case law had already established that participation in Koori Court processes was a mitigating factor to be taken into account in sentencing.[90] There was, however, a lack of guidance about precisely how it was to be taken into account. The Court of Appeal addressed this issue in a 2018 judgment.[91]

RELEVANCE OF PARTICIPATION IN THE PROCESS TO SENTENCING

The case involved an offender who had pleaded guilty to armed robbery and theft. The County Koori Court judge took into account the remorse the offender displayed during the sentencing conversation, the steps he had taken towards making real changes in his life and the openness and respect he showed when engaging with the Elders. The offender appealed against the sentence on the basis that his participation in the Koori Court process had not been given sufficient weight.

Although the Court of Appeal dismissed the appeal, it provided guidance about how participation in a sentencing conversation should be taken into account in future cases. In particular, while the weight to be attached to such participation is a matter for the individual judge in the circumstances of each case, the following factors should be considered:

- the fact that an offender's participation is voluntary, may be confronting to the offender, will likely involve them being 'shamed' and may be rehabilitative;
- the fact that the offender has taken the opportunity to personally demonstrate remorse and insight into their offending and express any intention to reform and how it will be achieved; and
- the court's assessment of the genuineness of the offender's statements during the sentencing conversation.[92]

The court also rejected the suggestion that the County Koori Court should require pre-sentence reports that outline Aboriginal and Torres Strait Islander offenders' backgrounds, similar to *Gladue* reports in Canada. The court considered this argument 'a plea for law reform' and more appropriate for consideration by another body. It also, however, suggested that while current legislation would not allow such reports to be deemed mandatory, nothing would stop offenders from submitting one and asking the sentencing judge to take it into account.[93]

88 County Court of Victoria, 'County Koori Court' (countycourt.vic.gov.au, 2018) <https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/county-koori-court> at 9 January 2019.

89 Provisions establishing the County Koori Court were inserted into the *County Court Act 1958* (Vic) by *County Court Amendment (Koori Court) Act 2008* (Vic).

90 *R v Morgan* [2010] VSCA 15 (19 February 2010).

91 *Honeysett v The Queen* [2018] VSCA 214 (28 August 2018).

92 Ibid [54].

93 Ibid [66].

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