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AN ARGUMENT FOR ABOLISHING DELAY AS A MITIGATING FACTOR IN SENTENCING

Abstract

Delay is a common mitigating factor in sentencing and can sometimes result in a significant penalty reduction. This is despite the fact that delay does not impact on the seriousness of the offence or the culpability of the offender. This article examines the validity of the rationales which underpin reducing sentencing severity on the basis of delay. It emerges that there is a dearth of critical analysis on this issue. This article attempts to at least partially fill a gap in the literature. There are two different rationales which have been advanced to justify delay reducing penalty severity. The first is anxiety stemming from the waiting associated with a criminal matter being finalised. The second is rehabilitation that the offender may have undergone prior to sentencing. An examination of these rationales establishes that: (i) the anxiety rationale is based on speculative assumptions and reasoning and (ii) the rehabilitation limb cannot justify delay as a sentencing factor given that rehabilitation is a stand-alone, independent, mitigating factor. Hence, it is argued that (subject to one relatively uncommon exception) delay should be abolished as a mitigating factor. This would enhance the transparency and integrity of the sentencing system without undermining any of its appropriate objectives.

I Introduction

Delay is a well-established mitigating factor in sentencing in Australia.[1] Courts often invoke it as a basis for reducing the severity of the sanction that is imposed on offenders, and in some instances it is a powerful mitigating consideration.[2] Despite this, the circumstances in which it is applied by courts are

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1 Kate Warner et al, 'Sentencing Discounts for Delay' (2018) 42(1) *Criminal Law Journal* 22.

2 Ibid 25–6. See also *Sabra v The Queen* (2015) 257 A Crim R 33, 43–4 [33] ('*Sabra*'); *R v Schwabegger* [1998] 4 VR 649, 659 ('*Schwabegger*'); *R v Gay* (2002) 49 ATR 78, 82 [18]; *R v EGC* [2005] NSWCCA 392; *R v Kay* [2004] NSWCCA 130.

unclear and the doctrinal underpinnings of delay as a mitigating factor have not been the subject of extensive judicial or scholarly analysis.[3]

Despite the frequency with which delay is invoked by sentencing courts, it has been noted that there is 'little in the way of critical evaluation of the theoretical foundations for this particular factor to determine whether [it has] … a respectable rationale for acceptance as a relevant sentencing factor'.[4] This article attempts to at least partially fill this gap in the literature by examining the jurisprudential underpinning for delay in the sentencing calculus.

Delay mitigates sentencing severity in two circumstances. First, when the offender during the period of the delay demonstrates progress towards rehabilitation. This is termed the 'rehabilitation limb' of delay. More fully, this limb applies not only when offenders have taken rehabilitative steps, but also when they display remorse. In keeping with orthodox terminology, unless expressly indicated to the contrary in this article, the rehabilitation limb also refers to situations when the offender exhibits remorse. The second main situation when delay reduces sanction severity is when the delay causes the offender anxiety or hardship. This is referred to as the 'fairness limb'.

In relation to both rationales underpinning delay, a notable feature of the existing law is that the circumstances in which delay can be enlivened are strikingly lacking in specificity. There is not even an approximate indication regarding the length of time that needs to pass before delay can mitigate penalty. Thus, the scope of this mitigating factor is vague. This could potentially be addressed by establishing guidelines regarding the acceptable temporal limits associated with finalising criminal matters. However, even if this shortcoming could be addressed it is recommended that delay should in nearly all circumstances be abolished as a sentencing consideration. This is because the rationales underpinning the operation of delay are flawed.

The fairness limb of delay is unsound because it is based on the untested and speculative assumption that offenders are disadvantaged by prolonging the period between the commission of the crime (or being charged with the crime) and being sentenced. It is no less plausible to assert that offenders benefit from delaying their sentencing because it allows them to better plan and arrange their family, financial and other business or work-related matters. The only tenable grounds for reducing sanctions on account of delay are where the offender demonstrates remorse or progress towards rehabilitation, but these are discrete, stand-alone sentencing considerations already and it is futile to ground them in the context of delay.

Effectively abolishing delay as a sentencing factor would make the law more coherent, transparent and consistent without undermining any important sentencing objectives. The focus on the appropriate role of delay in the sentencing calculus and the recommendations in this article are especially timely given that in the foreseeable

3 Warner et al (n 1) 23 lists some of the circumstances in which delay can be mitigatory.

4 Ibid 30.

future many more old criminal cases are likely to come before the courts as a result of the 'continuing stream of historical sexual abuse cases, prompted by the publicity given to the Royal Commission into historical sexual abuse'.[5]

In the next part of the article, I examine the current legal position in relation to delay. This is followed, in Part III, by a discussion and critique of the doctrinal underpinnings of this ground of mitigation. Reform recommendations are made in the concluding remarks.

II The Legal Position on Delay in Sentencing

A *Overview of the Sentencing Landscape*

Prior to examining the role of delay in sentencing, I provide a brief overview of the sentencing legal landscape. Sentencing law in Australia is a combination of statutory and common law. Although each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout the country. The key sentencing objectives are set out in the main sentencing statutes in each jurisdiction. They consist of community protection (which is most commonly pursued by incarceration), rehabilitation, retribution, specific deterrence, general deterrence and denunciation.[6] The nature and severity of the punishment that is imposed by the courts is chiefly determined by the principle of proportionality, which at common law sets the upper limit for the severity of the sanction that is imposed.[7]

In arriving at a sentence, the courts are also required to take into account a large number of aggravating factors (which increase penalty) and mitigating factors (which operate to reduce penalty severity). The source of aggravating and mitigating considerations varies considerably throughout Australia. The sentencing legislative

5 Warner et al (n 1) 33.

6 *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4, 9; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) ss 3, 6.

7 In *Hoare v The Queen* (1989) 167 CLR 348, the High Court unanimously stated that '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 light of its *objective* circumstances': at 354. In *Veen v The Queen* (1979) 143 CLR 458, 467 and *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472, the High Court stated that proportionality is the primary aim of sentencing. Proportionality has also been given statutory recognition in all Australian jurisdictions except Tasmania: *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 2017* (SA) ss 3, 4, 10; *Sentencing Act 1991* (Vic) ss 5(1)(a); *Sentencing Act 1995* (WA) s 6(1).

schemes in two jurisdictions (the *Crimes (Sentencing Procedure) Act 1999* (NSW)[8] and the *Penalties and Sentences Act 1992* (Qld))[9] each set out more than 30 aggravating and mitigating considerations, whereas the sentencing statutes in the other jurisdictions only identify a small number of such factors. Despite this, there remains a considerable convergence regarding the mitigating and aggravating factors that operate throughout Australia because most of these considerations stem from the common law.[10] There are in fact more than 200 mitigating and aggravating factors in sentencing law.[11] Delay is one such mitigating consideration. Although it is frequently invoked by sentencing courts, it does not have a statutory basis in any Australian jurisdiction and instead is grounded in the common law.[12] To give some examples of other sentencing considerations, important aggravating factors[13] are: prior criminal record;[14] high vulnerability or innocence of victim;[15] offences committed while on bail or parole;[16] breach of trust and monetary motive for the crime.[17]

The reasoning process by which sentencing decisions are made is known as the 'instinctive synthesis'.[18] This requires judges to identify all of the factors that are applicable to a particular sentence, and then set a precise penalty.[19] However, courts are not permitted to set out with particularity the precise weight that has been

8 See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A, 24.

9 *Penalties and Sentences Act 1992* (Qld) pt 2.

10 See *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

11 Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identifies 229 different mitigating factors. For an overview of the operation of mitigating and aggravating factors, see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4; Stephen J Odgers, *Sentence* (3rd ed, 2015) ch 4.

12 See Warner et al (n 1).

13 Examples of important mitigating factors are provided in Part III, Section C of this article.

14 *Field v The Queen* [2011] NSWCCA 70; *Saunders v The Queen* [2010] VSCA 93.

15 *R v Tran* (2002) 4 VR 457; *DPP v Grabovac* [1998] 1 VR 664; *R v Eisenach* [2011] ACTCA 2; *Royer v Western Australia* (2009) 197 A Crim R 319; *R v El-Chammas* [2009] NSWCCA 154.

16 *R v Gray* [1977] VR 225; *R v Basso* (1999) 108 A Crim R 392; *R v AD* (2008) 191 A Crim R 409.

17 *DPP (Vic) v Truong* [2004] VSCA 172; *Carreras v The Queen* (1992) 60 A Crim R 402; *A-G (Tas) v Saunders* [2000] TASSC 22; *Hill v The Queen* [1999] TASSC 29; *R v Ottobrino* [1999] WASCA 207; *R v Black* [2002] WASCA 26.

18 See *R v Williscroft* [1975] VR 292, 300; *Barbaro v The Queen* (2014) 253 CLR 58 ('*Barbaro*'). See also Wayne Martin, 'The Art of Sentencing — An Appellate Court Perspective' (Conference Paper, Singapore Academy of Law & State Courts of Singapore Sentencing Conference, 9 October 2014) 6–9.

19 *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*'); *Wong v The Queen* (2001) 207 CLR 584; *Barbaro* (n 18).

conferred on any individual sentencing factor.[20] The alternative approach to the instinctive synthesis is termed the two-tier or two-step approach.[21] It involves a court setting an appropriate sentence commensurate with the severity of the offence and then making allowances up and down, in light of relevant aggravating and mitigating circumstances.[22] The two-step approach was firmly rejected by the High Court in *Markarian v The Queen*:

> 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.[23]

Thus, when sentencing courts state that they take a mitigating or aggravating factor into account it is not possible to quantify to what extent that factor actually influences their decision. Despite this, as noted below, courts often state that delay is an important mitigating consideration and hence, reforms relating to delay have the capacity to meaningfully influence sentencing outcomes. I now consider in greater detail the current role that delay has in the sentencing calculus.

B *Overview of Causes of Delay and Recognition of Delay as a Mitigating Factor*

It is well-established that delay can result in a sentence reduction, sometimes resulting in a considerable degree of leniency. The seminal statement regarding the operation and importance of delay is by Street CJ in *R v Todd* ('*Todd*'):

> where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion,

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20 *Pesa v The Queen* [2012] VSCA 109, [10]. The only exceptions are discounts which are accorded for pleading guilty and cooperating with authorities: see Mackenzie and Stobbs (n 11).

21 This received support from Kirby J in *Markarian* (n 19).

22 The contrasts are also set out by McHugh J in *Markarian* (n 19): 'By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. 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': at 377–8 [51].

23 (2005) 228 CLR 357, 375 [39]. The competing approaches were most recently considered by the High Court in *Barbaro* (n 18), where the plurality confirmed the instinctive synthesis approach: at 72 [34].

> and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.[24]

The relevance of delay to sentencing has not been considered at length by the High Court. However, in *Mill v The Queen*, Wilson, Deane, Dawson, Toohey and Gaudron JJ cited *Todd* with approval and stated:

> The long deferment of the trial or punishment of an offender [in this case brought about by the fact that the offender was being dealt with for offences committed in different states], with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence.[25]

As alluded to in the above passage, there is often a significant time lapse between when an offender commits an offence and when they are sentenced. There are myriad reasons that can cause or contribute to the delay. Often the reason relates to the circumstances in which the offence is committed, for example, when the victim does not report the crime until well after it has occurred or when police do not identify or apprehend the offender until a long time after the offence. In many cases delay is caused by the positive acts of the offender, such as where the offender conceals the offence, absconds or actively drags out the court process, for example, by pleading not guilty in circumstances where there is not a tenable defence.

Another common cause of delay relates to institutional reasons stemming from the operation and functioning of the legal system.[26] Court backlogs invariably result in a significant time lapse between when an accused is charged and sentenced. The latest data from the Productivity Commission show that while finalisation times for courts vary considerably throughout the country, there is often a long processing time for criminal matters.[27] In the Supreme Courts of the two largest jurisdictions,

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24 [1982] 2 NSWLR 517, 519–20 ('*Todd*'). See also *R v Merrett* (2007) 14 VR 392, 399–401 ('*Merrett*'); *R v Law; Ex parte A-G (Qld)* [1996] 2 Qd R 63, 66 ('*Law*'); *R v SP* (2004) 149 A Crim R 48, 56–7 [31]–[35]. For a more recent summary of the authorities, see *Ridgeway v The Queen* [2016] NSWCCA 184; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194. For a summary of the principles relating to delay in the federal sphere, see Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (1st ed, 2018) 54–7.

25 (1988) 166 CLR 59, 66 ('*Mill*'). See also *R v Gardner* [2015] QCA 70.

26 This is especially the case where an offender is sentenced for offences in more than one jurisdiction: see, eg, *Mill* (n 25).

27 Productivity Commission, *Report on Government Services* (Report, January 2018) pt C ch 7.

New South Wales and Victoria, 11.2% and 7.3% respectively of non-appeal criminal matters are not finalised within 24 months of commencement.[28] Even in relation to what are typically regarded as less serious and more straightforward matters, it is not uncommon for more than 12 months to pass before matters are finalised. Thus, we see that in Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory the number of criminal cases which are not finalised within 12 months from the date of commencement is 10% or more.[29]

It is not surprising then that delay is a commonly invoked sentencing consideration. A study by the Victorian Sentencing Advisory Council which examined sentencing appeals in Victoria in the calendar years of 2008 and 2010 noted that delay was a frequently invoked ground of appeal.[30] In 2008, it was the equal eighth most common ground of appeal raised by offenders (equating to 10.5% of all appeals), while in 2010 it dropped to number 12 (equating to 9.1% of all offender appeals).[31]

A more recent study of sentencing considerations, this time focusing on jurors' view of 140 sentencing decisions imposed in the Victorian County Court during the period 2013–14, noted that delay was a mitigating factor in 64 of the cases.[32] It was therefore the third most common mitigating factor (after rehabilitation and good character).[33] While it is not possible to ascertain exactly how much emphasis was attributed to delay,[34] the sentencing remarks indicated that in 16% of instances when delay was relevant it was given a 'lot of weight',[35] while it was accorded little or no weight in 21% of cases and some weight in the remaining 63% of cases.[36]

I now examine the rationales which underpin delay as a mitigating factor.

C *Rationales for Delay: Fairness and Rehabilitation*

While the range of situations that can result in or contribute to delay is considerable, the courts have placed some, albeit loose, limits on the circumstances in which delay can operate to reduce penalty. The parameters of when delay can mitigate penalty

28 Ibid attachment table 7A.19.

29 Ibid.

30 Sentencing Advisory Council, *Sentence Appeals in Victoria: Statistical Research Report* (Report, March 2012).

31 Ibid 139, 142–3 (in 2010 the grounds of 'failure to take into account delay' and 'weight to delay' are listed separately but have been grouped together to reach this figure). The rate at which the ground succeeded was 25% in 2008 and 14% in 2010.

32 Warner et al (n 1) 25.

33 Ibid.

34 This is due to the instinctive synthesis approach to sentencing, which is discussed further in Part II of this article.

35 Warner et al (n 1) 26.

36 Ibid.

logically derive from the rationales underpinning this consideration. A relatively recent discussion of the rationales for delay is set out in *Tones v The Queen* ('*Tones*').[37]

In *Tones*, the Victorian Court of Appeal confirmed the position in *Todd* that delay can reduce penalty as a matter of fairness to the accused because a long wait for finalisation of a criminal matter can cause an offender stress and anxiety. This is known as the fairness limb of delay. The basis for the fairness limb has been described in numerous ways, but the overarching justification is that it is assumed an accused experiences anxiety, stress and more generally inconvenience from delay.[38] The nature of the inconvenience has been articulated in several ways, including that it is unfair for an accused to have a matter 'hanging over his head'[39] for a considerable period, it is unfair to keep the offender in a 'state of suspense'[40] or that as a result of the delay an offender might spend 'years in emotional hell … terrified that the day may come when he is found out'.[41]

In *Tones,* the Court also noted that there is another well-established basis upon which delay can mitigate penalty. This is termed the rehabilitation limb. The Court confirmed the existence of the fairness and rehabilitation limbs and the fact that delay can be a strong mitigating factor in the following passage:

> It is well established that significant delay between the time that an offender is interviewed by police and the time that charges are laid, and delay between the laying of charges and trial, can be a powerful mitigating factor. There are two

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37 [2017] VSCA 118.

38 In some instances, courts have expressed some doubt over the fairness limb. Thus, in *R v Pickard* [2011] SASCFC 134, Blue J stated: 'mere unnecessary delay, without being coupled with relevant changes occurring during the delay, is not usually a reason in itself to reduce or suspend a sentence if otherwise indicated (although this will obviously depend on the length of the delay and the particular circumstances)': at [97]. But this proposition has been subsequently criticised: *Sabra* (n 2) 45–6 [40].

39 *Merrett* (n 24) 400 [35] quoting *Duncan v The Queen* (1983) 47 ALR 746, 749 ('*Duncan*'). In this case, the offences were committed in June 2001, charges were laid in April 2004 and the applicants were sentenced in June 2006. More fully, Maxwell P stated at [34]–[35]: 'On a proper analysis … the significance of delay as a sentencing factor cannot depend on whether or not there is a satisfactory explanation for the delay. There is, of course, a strong public interest in criminal conduct being investigated and prosecuted as quickly as is reasonably practicable. But the absence of an explanation for the delay could not, by itself, justify any greater reduction in the sentence than would be made in a case where the delay was satisfactorily explained. The relevance of delay lies rather in the effect which the lapse of time –– however caused –– has on the accused. Delay constitutes "a powerful mitigating factor". In particular, it focuses attention on issues of rehabilitation and fairness'. His Honour then quoted *Duncan*: 'The very fact of the long delay in bringing the matter to court which led the applicant to have this matter hanging over his head for nearly four years is rightly prayed in aid on his behalf': at 749. See also *R v Nikodjevic* [2004] VSCA 222 ('*Nikodjevic*').

40 *R v Blanco* (1999) 106 A Crim R 303, 306 [16]–[17] ('*Blanco*'); *Todd* (n 24) 519.

41 *Holyoak v The Queen* (1995) 82 A Crim R 502, 508 ('*Holyoak*').

> limbs to delay. The first limb concerns unfairness to the offender, in the sense that the relevant charge — or the prospect of such a charge — was 'hanging over' the accused's head and caused him or her anxiety ('unfairness limb'). The second limb concerns whether, during the period of the delay, the offender made progress towards rehabilitation and whether there were good prospects of ongoing rehabilitation ('rehabilitation limb').[42]

The second (rehabilitation) limb is in fact divided into two separate but often interrelated categories. The first is when the offender demonstrates steps towards rehabilitation. The other is when the offender displays remorse. Thus, it has been stated that

> [t]here are two aspects to the rehabilitation limb. The first is whether the offender has accepted responsibility for the offending, acknowledged its wrongfulness and expressed remorse. The second is whether the offender has taken steps to reform, including by seeking counselling or other appropriate professional assistance, refraining from committing any further offences and being a valuable member of the community. For example, in *R v Merrett, Piggott and Ferrari*, this Court held that one of the offenders in that case had made 'a number of significant changes in his life'.[43]

While the second delay limb is logically comprised of two situations, courts typically refer to both of these situations as the rehabilitation limb.

D *Particular Circumstances in Which Delay Can Mitigate Penalty*

The application of the rationales underpinning delay has resulted in the courts prescribing a number of concrete situations when delay can mitigate penalty.[44]

The fairness limb of delay can be invoked in relation to delay at all stages of the criminal justice system. In particular, it is relevant 'where there is delay between the date of apprehension of the offender, or first indication to him by some person in authority that he is likely to be prosecuted, and the date of the sentence'[45] or where there is tardiness in the manner in which the matter is dealt with by prosecution officials[46] and the court system.[47] Thus, most of the common scenarios in which a

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42 *Tones v The Queen* [2017] VSCA 118, [36] ('*Tones*').

43 Ibid [41].

44 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 429–33; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2nd ed, 2015) 383–8; Odgers (n 11) 371–6; *Merrett* (n 24) 400 [34]–[36]; *DPP (Vic) v WRJ* [2009] VSCA 174, [14]–[20]; *Tones* (n 42) [36]–[43].

45 *Law* (n 24) 66. See also *Thorn v Western Australia* [2008] WASCA 36, [37].

46 See, eg, *R v Palmer* [2000] VSCA 236; *Nikodjevic* (n 39).

47 *Khoury v The Queen* (2011) 209 A Crim R 509.

delay occurs in the context of finalising criminal charges can enliven the fairness limb.

However, there are a number of situations where the courts have expressly stated that the fairness limb of delay will be accorded less weight. Most of these scenarios relate to circumstances where the offender was the cause of the delay or could have readily expedited the matter being brought to finality. Thus, less weight is generally given to delay if the time lag is between the commission of the offence and the charging of the accused[48] and in some cases it has been stated that in such circumstances no discount is accorded.[49] This is because in these situations the offender could have readily expedited the matter by coming forward to police[50] and in relation to certain offences, especially sexual offences against children, it is foreseeable that there would be a delay in reporting the offences.[51] It is thus not surprising that the circumstance in which the fairness limb is least applicable is when the delay is caused by the absconding of the offender.[52] In this context, however, it does not necessarily follow that no weight will be accorded to delay because 'it is appropriate for a sentencing judge to give attention to the fact that a person living as a fugitive will always be fearful of apprehension'.[53] Following an analysis of the case law, Stephen Odgers QC concludes that it is 'problematic' to determine the relevance of delay prior to arrest.[54] He notes that 'the weight of authority is that such delay will not, in general, be taken into account as a mitigating factor. However, there are judicial observations that there may be cases where a long delay between offence and arrest may be relevant to sentence … Perhaps it is a matter of degree'.[55]

Further, where there is a delay because of the complexity of the matter, either at the investigative or trial phase,[56] less discount is normally accorded.[57] Similarly, less emphasis is normally accorded to delay when the offender drags out the finalisation of

48 However, it is not the case that normally no weight is given to delay in these circumstances: see, eg, *Dragojlovic v The Queen* (2013) 40 VR 71; *CD v The Queen* [2013] VSCA 95.

49 *Law* (n 24) 66–7 (delay of 15 years in making a complaint not mitigating); *Holyoak* (n 41) 508–9. See also *Nikodjevic* (n 39).

50 See *Bell v The Queen* [2001] WASCA 40 ('*Bell*') as cited in Freiberg (n 44) 431.

51 See *Bell* (n 50); *R v Glennon* [1993] 1 VR 97; *R v Liddy (No 2)* (2002) 84 SASR 231, 285 [185]–[187]. But this is not a settled rule: see *Holyoak* (n 41).

52 *Scook v The Queen* (2008) 185 A Crim R 164 ('*Scook*'); *Gok v The Queen* [2010] WASCA 185; *Walker v The Queen* [2016] NSWCCA 213.

53 *R v Reeves* [2002] NSWCCA 33, [13].

54 Odgers (n 11) 375.

55 Ibid.

56 It is sometimes stated that where the prosecution has been tardy in prosecuting a matter that it would then be inconsistent for it to contend that the offence is serious and hence the prosecution is bound to accept that the delay should mitigate: *Scook* (n 52); *Giourtalis v The Queen* [2013] NSWCCA 216 ('*Giourtalis*').

57 *Giourtalis* (n 56) [1789]–[1792].

a matter due to the manner in which they conduct the plea negotiations.[58] However, it is relatively settled that when the delay is caused by the offender contesting criminal charges this does not diminish the significance of delay in sentencing, given the right of the accused to plead not guilty.[59] In *Scook v The Queen* it was noted that

> delay will not ordinarily be a mitigating factor if it is caused by the offender's obstruction or lack of co-operation with the State, prosecuting authorities or investigatory bodies, but the offender's reliance on his or her legal rights is not obstruction or lack of co-operation for this purpose.[60]

The courts have been more liberal in applying the rehabilitation limb of delay, at least from the perspective that in this context the reasons for the delay are less relevant. Thus, even when the cause of the delay is that the offender has absconded this limb can still apply.[61] However, in some instances the courts have opted for a stricter approach to the application of the rehabilitation limb where the delay is caused by the accused.[62] In *R v Whyte*, Winneke P noted:

> Where, however, the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period.[63]

Thus, we see that even in relation to the rehabilitation limb when the offender is responsible for the delay, sometimes less weight is accorded to this consideration.

E *Matters of Proof*

The extent to which the factors relating to delay need to be demonstrated before this ground can be enlivened to reduce penalty is to a large degree dependent on the limb which is being invoked. From the evidential perspective, the fairness limb is the easiest to satisfy and typically is applied on the mere setting out of the extent of the delay. This is because courts often readily assume that offenders experience anxiety as a result of waiting for a considerable period to learn their fate in relation to criminal matters. Occasionally, the courts have adverted to the desirability of producing 'some evidence',[64] for example a psychological report, in support of the hardship caused by delay, but typically no evidence is provided and courts generally

58 *R v Ververis* [2010] VSCA 7, [14].

59 *Arthars v The Queen* (2013) 39 VR 613, 621 [27].

60 (2008) 185 A Crim R 164, 176 [60].

61 *Marshall v The Queen* [2011] VSCA 130.

62 *R v Thompson* (1987) 37 A Crim R 97, 100 ('*Thompson*'); *R v Berry* (2007) 17 VR 153, 189 [124]–[125].

63 (2004) 7 VR 397, 404 [25] ('*Whyte*').

64 *Tones* (n 42) [38].

accept assertions from the bar table that the delay has caused hardship.[65] This is illustrated by the observation of Holmes JA (with whom Gotterson JA and Philippides J agreed) in *R v Cox*: '[n]or is it imperative, in my view, that there be direct evidence that delay has had an impact through the protracted anxiety of the threat of prosecution; in a sufficiently obvious case an inference to that effect may be drawn'.[66]

The courts are generally more probing in relation to the rehabilitation limb. There are a number of evidential requirements that courts generally apply in order for mitigation to be accorded for rehabilitation or remorse.[67] However, in circumstances where delay has occurred and an offender seeks to invoke the rehabilitation limb, the courts have nevertheless displayed a willingness to accord some mitigation merely on the basis that the offender has not committed other offences since the offence(s) for which they are being sentenced. In *Tones* the Court stated:

> Both aspects of rehabilitation — remorse and reformation — must be demonstrated, in order for the court to give full weight to that limb. Less than full weight will be accorded where reliance is placed merely on abstinence from further offending. … In the present case … [c]ounsel on the plea stated that reliance was placed on rehabilitation but did not identify the basis upon which it should be inferred. It was certainly relevant to 'reformation' during the period of delay that the appellant had not committed any offences since the offending for which he was to be sentenced. But, as counsel for the appellant conceded, he was not able to submit that the appellant accepted responsibility for his wrongdoing or was remorseful. Further, counsel did not suggest that the appellant had taken any steps towards rehabilitation during the period of the delay.[68]

Thus, generally the courts will accord some weight to delay in relation to both limbs even in the absence of proof of anxiety or steps towards rehabilitation.

F *How Long Is Too Long: What Is Delay?*

One aspect for which there is surprisingly little guidance on the role of delay in sentencing is the threshold issue of what time period qualifies as a delay. There are not even vague guideposts in relation to this matter. In *R v Idolo*, the Court stated that 'what is undue delay deserving of mitigation of punishment is essentially a matter of degree to which common sense is to be applied'.[69] Further, it was noted in *R v Miceli*[70] that in order for delay to reduce penalty the delay need not be inordinate in length.

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65 Ibid.

66 (2013) 92 ATR 80, 105 [102].

67 See further Part III below.

68 *Tones* (n 42) [42]–[44].

69 [1998] VSC 276, [25].

70 [1998] 4 VR 588, 591.

Some guidance regarding the duration of time that needs to pass before delay can be invoked can potentially be discerned by examining individual cases where the relevant length has been specified. This approach does not, however, facilitate the establishment of even crude guidelines on this issue. In *Nguyen v The Queen*,[71] drug offences were committed between August 2012 and March 2013. The offender was charged in late March 2013. The committal commenced in November 2013 and spanned over five days, finishing in January 2014. The plea was in early May 2015 and the sentence handed down on 18 May 2015. Thus, approximately 16 months passed from committal to sentence. It was held that the delay was 'unremarkable'.[72] By contrast, in *O'Brien v The Queen*,[73] there was a 16-month period between the making of the complaint and charges being laid against the offender, and this was held to constitute a relevant delay. Similarly in *Sabra v The Queen* ('*Sabra*'),[74] a delay of 17 months between the making of admissions by the offender and charges being laid was sufficient to invoke the principle. While the latter two cases suggest that a relatively short timeframe enlivens delay as a mitigating factor, this is contradicted by other cases where longer delays did not mitigate sentence.

The Queensland Court of Appeal in *R v Moxon*[75] therefore held that little weight should be accorded to delay despite that fact that there was more than a five-year period between the authorities investigating a matter and charging the offender. President McMurdo held that while the offender had rehabilitated during this period, this was not mitigatory because the offender was businessman, father and responsible member of the community and '[h]is prospects of rehabilitation were therefore always excellent, irrespective of the delay'.[76] Further, in *Luong v The Queen*[77] no discount was accorded for delay despite a two-and-a-half-year gap between detection of the relevant fraud and the charging of the offender. Justice Price (Hoeben CJ at CL and Fullerton J agreeing) of the Court of Criminal Appeal of New South Wales declined to reduce the penalty on account of delay because there was no evidence of inconvenience caused to the offender arising from the lapse of time. However, as we have seen, generally such evidence is not necessary, which underlines the inconsistent manner in which delay is applied by sentencing courts. Justice Price relevantly stated:

> In my view, it was open to the Judge to find that the delay was not such that it ameliorated the sentence. … The applicant did not give evidence of any uncertain suspense or strain suffered as a result of the delay. This was not a stale offence but one that had been discovered by the victim after the applicant had defrauded him for over two and a half years. If the applicant had any concerns about delay in the

71 [2016] VSCA 276.

72 Ibid [32].

73 [2014] VSCA 94 ('*O'Brien*').

74 (2015) 257 A Crim R 33, 46 [41].

75 [2015] QCA 65.

76 Ibid [37].

77 [2014] NSWCCA 129 ('*Luong*').

> prosecution of the fraud offence, it was always open to him to bring his offending to the attention of the police. The Judge was entitled to express her reservations about the applicant's remorse and prospects of rehabilitation. I am not persuaded that the applicant suffered detriment by the delay that entitled him to an element of leniency.[78]

Curiously, the Court gave no weight to delay in this case despite the fact that it endorsed[79] the comments of Wood CJ at CL in *R v Blanco*, where his Honour stated that a 'measure of understanding' needs to be accorded when a delay occurs.[80]

Thus, there is not even an approximate period of time that needs to elapse before delay can operate to mitigate a sentence.

G *Delay Can Be a Weighty Consideration*

As noted in the introduction to this article, sentencing courts do not ascribe a specific weight to each of the mitigating (or aggravating) considerations. Consequently, despite the uncertainty surrounding the precise circumstances in which delay can reduce penalty severity, it is clear that when delay is operative it can considerably reduce the penalty for an offence.[81] The considerable weight that is accorded to delay on the basis of the fairness limb alone is demonstrated by *Tones* where the sentence reduction was in the order of 25% to 50% for child sex offence charges.[82]

In light of the above discussion, I now examine whether there is a doctrinally sound basis for mitigating penalties on account of delay.

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78 Ibid [42].

79 Ibid [40].

80 *Blanco* (n 40) 306 [16].

81 See also *Merrett* (n 24); *R v Tiburcy* (2006) 166 A Crim R 291; *R v Tezer* [2007] VSCA 123; *R v Kane* [1974] VR 759, 767 (Gowans, Nelson and Anderson JJ); *Thompson* (n 62) 100 (Street CJ); *R v Shore* (1992) 66 A Crim R 37, 46–7 (Badgery-Park J); *R v Braham* (1994) 116 FLR 38, 50 (Angel J); *Mill* (n 25); *Prehn v The Queen* [2003] TASSC 55; *Schwabegger* (n 2); *Law* (n 24); *Tamamovich v The Queen* [2011] VSCA 330; *R v WAS* [2013] QCA 93; *O'Brien* (n 73); *R v Illin* (2014) 246 A Crim R 176; *Underwood v The Queen (No 2)* [2018] VSCA 87 (because the offender was in custody during the period of delay).

82 *Tones* (n 42) [47]. The Court of Appeal described this as 'very generous': at [48]. The key delay in this case consisted of six years between when the complainants reported the matter to police in 2007 and when the accused was charged in 2013: at [6]. See also Part I of this article.

III Analysis of Rationale for Delay in Sentencing

A *The Fairness Limb*

As noted above, delay is a commonly invoked mitigating ground. Despite this, the doctrinal underpinnings of delay as a mitigating factor are unclear. To some extent, this is because there are numerous circumstances in which delay operates to reduce penalty and arguably this has discouraged attempts to improve the coherency of this area of the law. Nevertheless, in order for delay to maintain its role in the sentencing calculus, it is necessary for a justification to be established, as opposed to simply being assumed.

I now analyse the appropriateness of delay as a mitigating factor in sentencing, commencing with an examination of the fairness limb. As we have seen, current orthodoxy provides that the fairness limb is one of two reasons underpinning delay as a sentencing factor. This is grounded in the notion that the accused endures inconvenience and stress, stemming from the long wait for the criminal justice process to arrive at a sentence.[83] There are, however, several problems manifest with this limb.

The first is that in accordance with the current evidential approach, the fairness limb is grounded in speculative considerations. In order to enliven this limb, as noted above, generally there is no need for offenders to establish that the wait for the sentence has caused them actual stress or inconvenience. The fairness limb of delay is based on inferred, as opposed to demonstrated, inconvenience. While it is tenable to postulate that offenders would prefer not to have a long delay between the commission of the offence and their sentencing, it is no less equally plausible to suggest that in some (and in fact many) circumstances offenders are advantaged by delay because it provides them with a greater opportunity to plan for any sentence that they may receive. Delay in finalising a case allows offenders time to complete or progress any objectives, projects and activities that they are undertaking including, for example: bracing themselves emotionally and psychologically for a prison term; putting in place support structures for their family should they be sent to prison; transitioning their business dealings and employment activities; and organising financial matters. This is a matter that has in fact been noted by Wood J (Gleeson CJ and Barr J agreeing) in *R v V*:

> As was pointed out in *Thompson* each case depends on its own circumstances. In some instances the delay can operate to the offender's advantage so far as it provides an opportunity, for example, for the offender to establish a new life …[84]

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83 See Part II above.

84 (1998) 99 A Crim R 297, 300. This was endorsed in *Luong* (n 77) [41] (Price J). In the broader context it should be acknowledged that the expectation of timeliness is associated with the right to fair trial, however, this is not a legally enforceable expectation. As noted by Mason CJ in *Jago v District Court (NSW)* (1989) 168 CLR 23, 33: '[T]he Australian common law does not recognize the existence of a special right to a speedy trial, or to trial within a reasonable time … there is no constitutional guarantee of a speedy trial, the remedies are discretionary …'. See also *R v Clarkson* [1987] VR 962, 972.

The key point being that there is no intrinsic and obvious part of human nature that suggests that people prefer to bring forward experiences that are inevitable and unpleasant; certainly not to the extent that delaying an unpleasant experience should reduce the severity to which a wrongdoer should be subjected.

While there is some intuitive appeal with invoking delay as a mitigating factor, intuition is not a basis for adjusting benefits and burdens. Further, there is no obvious counter-intuition associated with the view that individuals benefit from extending the time frame in which they are sentenced. A post-reflective consideration of the consequences of delay establishes concrete reasons why an individual might in fact benefit from a considerable passing of time between the commission of the crime and the time in which they are sentenced. The proposition that delay can advantage offenders is supported by the fact that offenders often seek to adjourn the commencement of legal proceedings. A New South Wales study showed that less than 40% of listed trials proceeded at the first listing date.[85] The main reason for this was late guilty pleas and the second most common reason was an adjournment as a result of an application made by defence counsel.[86] In addition to this, it has been noted that offenders often enter a guilty plea at a very late stage for numerous reasons, including the hope that the matter will be withdrawn due to a lack of evidence or that a witness will become less credible due to the effluxion of time.[87] Further, in the study it was expressly noted that defendants who face a term of incarceration are advantaged by a delay because this equates to more time in the community.[88]

There is also a significant additional problem associated with the fairness limb of delay. This is pragmatic, as opposed to principled, but perhaps equally intractable. Considerable rule of law issues are raised by the fact that there are not even approximate parameters regarding the length of delay that is required before a penalty reduction can be accorded. In addition to this, there is also no guidance regarding whether any reduction stemming from delay should be commensurate with the length of delay. In order for an individual's legal interests to be impacted there should be some parameters guiding the process, otherwise the transparency and predictability of the law is diminished.[89] Sentencing is, as noted above, an opaque and

85 Don Weatherburn and Joanne Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (New South Wales Bureau of Crime Statistics and Research, 2000) 17 ('*Managing Trial Court Delay*'). The survey period was from 2 August 1995 to 1 October 1999. See also Don Weatherburn and Joanne Baker, *Delays in Trial Case Processing: An Empirical Analysis of Delay in the NSW District Criminal Court* (2000) 10(1) *Journal of Judicial Administration* 6.

86 Weatherburn and Baker, *Managing Trial Court Delay* (n 85).

87 Jason Payne, 'Criminal Trial Delays in Australia: Trial Listing Outcomes' (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 47.

88 Ibid.

89 Geoffrey de Q Walker, *The Rule of Law* (Melbourne University Press, 1988) 3; Joseph Raz, *The Authority of Law* (Clarendon Press, rev ed, 1979) ch 11, 214–16; John Finnis, *Natural Law and Natural Rights*, ed Paul Craig (Oxford University Press, 2nd ed, 1980) 270–6; HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652.

to some extent impressionistic area of the law.[90] Thus, it has been noted that in any case, 'there is no single correct sentence'[91] and that the 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.[92] However, even in this context it is difficult to find examples of more nebulous considerations that impact sentencing decisions than delay. Thus, even inherently vague considerations which are very difficult to ascertain, such as remorse, require some validation and hence there is no basis for enabling delay to operate in such an obscure manner.[93]

In order for delay to legitimately reduce a sentence it is important that at a minimum, the courts (or legislators) develop criteria regarding acceptable and unacceptable time limits for a criminal matter to be finalised. Arguably, this criticism is not insurmountable, because at least theoretically, it might be possible to develop these time limits in a number of ways. The most obvious is to set temporal measures which prescribe, albeit crude, time frames for when delay can reduce sentence. A number of different time frames would need to be developed to deal with the typical situations when delay becomes relevant. By way of example, a norm could be established such that delay becomes relevant when the period between charging and sentencing is more than, say, two years,[94] or when the period between the commission of the offences and the sentence is more than five years. Guidelines of this nature would need to be flexible enough to accommodate other common variables, such as the reasons for the delay — and in particular, the role of the offender in contributing to or causing the delay. It is the need to accommodate these many variables, and the lack of a coherent doctrinal basis upon which to anchor these factors, that creates considerable doubt about the possibility of developing systematic, principled guidelines under this limb. In any event, until a tenable model of this nature is developed, a strong case for abolishing the fairness limb of delay can be mounted.[95]

It is important to note that delay can in some instances cause tangible, as opposed to speculative, disadvantages to offenders. The recommendation that the fairness limb

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90 See *Markarian* (n 19).

91 Ibid 301 (Gleeson CJ, Gummow, Hayne and Callinan JJ), 405 (Kirby J).

92 *Hudson v The Queen* (2010) 30 VR 610, 616.

93 For further discussion of remorse as a sentencing consideration, see further below in Part III, Section B.

94 Another could be by reference to the norms in a particular jurisdiction, where, for example, the average times for finalising criminal matters are regarded as acceptable but anything beyond that as justifying some level of mitigation.

95 As discussed below in Part III, Section E, it is possible to set out guidelines in relation to specific and narrow causes of delay, such as where it is caused by the operation of the court system. Legislation, which sets relatively prescriptive sentencing reductions for pleading guilty (see for example, *Sentencing Act 2017* (SA) ss 39–40; *Sentencing Act 1995* (WA), s 9AA) could also be used as a model for designating the nature of discount that should be accorded. This is made possible by the fact that there is data regarding the typical institutional time frames from the finalisation of criminal matters, but this approach cannot be applied in the context of the many other more amorphous situations where delay occurs.

of delay be abolished does not include circumstances when tangible disadvantage is caused. Instead, this disadvantage should be accommodated within the sentencing calculus. When there is a considerable delay before an offender is sentenced, this can result in a harsher penalty regime being applicable at the time of sentencing,[96] or an offender no longer being eligible to be prosecuted as a child offender[97] or result in a deterioration of the health of the offender,[98] all of which make it more burdensome to deal with the impact of a criminal sanction. However, all of these discrete concrete burdens are independent mitigating factors.[99] In these circumstances, the manner in which the changed circumstance is dealt with is governed by principles which do not involve consideration or application of the fairness limb of delay.[100] Thus, these considerations cannot provide a logical or jurisprudential anchor for the fairness limb and are not discussed further in this article.

I now analyse the rehabilitation limb of delay, which I argue should also be abolished.

B *The Rehabilitation Limb*

The other basis upon which delay reduces penalty is the rehabilitation limb. As we have seen, a key distinction between the operation of this limb and the fairness limb is that the former is enlivened more readily when the offender has caused the delay.[101] Despite the fact that the rehabilitation limb has a greater scope for operation than the fairness limb the rationale in support of it is, in fact, less compelling. The key aspect about the rehabilitation limb is that the consideration that is driving the relevant inquiry and potential penalty adjustment is the extent to which the offender has reformed their mindset. However, there is no necessary nexus between delay and rehabilitation. Delay is simply a vehicle which can sometimes facilitate the rehabilitation of an offender. And importantly, rehabilitation is itself a well-established, distinct mitigating factor.

Prior to elaborating on this, I provide a brief overview of the role of rehabilitation (which is not associated with delay) in the sentencing inquiry. In *Vartzokas v Zanker*,[102] King CJ stated that rehabilitation aims to re-establish offenders as

96 See *GPR v The Queen* [2007] NTCCA 12; *Katsis v The Queen* [2018] NSWCCA 9; *Radenkovic v The Queen* (1990) 170 CLR 623.

97 See *Strickland v The Queen* [2011] NSWCCA 166; *R v Boland* (2007) 17 VR 300.

98 See *R v Smith* (1987) 44 SASR 587; *R v Magner* [2004] VSCA 202; *Hicks v The Queen* [2016] VSCA 162.

99 See, eg, *Leighton v The Queen* [2010] NSWCCA 280.

100 See the cases cited immediately above relating to each of these considerations.

101 See Part II of this article.

102 (1989) 51 SASR 277.

'honourable law-abiding members of the community'.[103] In a similar vein, it has been observed that rehabilitation aims to ensure that 'the sentence imposed is consistent, if possible, with the offender's returning to society as a contributing member'.[104] In more direct terms, it has been noted that rehabilitation consists of attitudinal reform which makes it less likely that an offender will reoffend.[105] Thus, the essence of rehabilitation is a changed attitudinal disposition in an offender, which is more conducive of law-abiding behaviour.

While there is no set criteria regarding how courts assess rehabilitation, the two most well-established considerations that are suggestive of good prospects of rehabilitation are youth[106] and an absence of prior convictions.[107] More fully, in *Elyard v The Queen*,[108] Basten JA noted that in evaluating an offender's prospects of rehabilitation, the court will normally look at a range of matters including:

> (a) evidence of the past conduct and behaviour of the offender;
>
> (b) professional opinions, taking into account past conduct and behaviour and expressing views as to future prospects, and
>
> (c) at least in some cases, the opinions and expressions of intention of the offender himself or herself.[109]

It follows by looking at the nature of rehabilitation and the considerations which the courts look to for its presence, that rehabilitation and delay are logically and pragmatically distinct considerations. Delay merely sometimes provides the backdrop to an offender making progress toward rehabilitation.

Moreover, rehabilitation is an independent, stand-alone, sentencing consideration. Rehabilitation is expressly set out as a sentencing objective in the sentencing statutes

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103 Ibid 279. This approach was also endorsed in *EF v The Queen* [2015] NSWCCA 36, [52] quoting *R v Pogson; R v Lapham; R v Martin* (2012) 82 NSWLR 60, 87 [122] (McClellan CJ at CL and Johnson J).

104 *R v Valentini* (1980) 48 FLR 416, 420.

105 A similar definition is adopted by Frances A Allen, 'Criminal Justice, Legal Values and the Rehabilitative Ideal' (1959) 50(3) *Journal of Criminal Law and Criminology* 226.

106 *R v Gordon* [2011] QCA 326, [40]–[41]; *R v Mills* [1998] 4 VR 235.

107 *R v GDP* (1991) 53 A Crim R 112; *R v E (a child)* (1993) 66 A Crim R 14, 32; *KT v The Queen* (2008) 182 A Crim R 571; *R v MD* (2005) 156 A Crim R 372; *R v PP* (2003) 142 A Crim R 369.

108 (2006) 45 MVR 402 ('*Elyard*').

109 Ibid [19]. See also *LJP v Western Australia* [2010] WASCA 85; *Skipworth v Western Australia* [2008] WASCA 64, [13] (McLure JA); *Cameron v The Queen* (2002) 209 CLR 339, 357–60 [65] ('*Cameron*').

of all Australian jurisdictions[110] and is also a mitigating factor at common law.[111] There are, in fact, two ways in which rehabilitation can reduce penalty severity. First, as we have seen, good prospects of rehabilitation is itself a mitigating factor. Second, it can result in more weight being accorded to rehabilitation as a sentencing objective and accordingly less emphasis being placed on other sentencing objectives which incline in favour of harsher penalties, namely community protection, specific deterrence and general deterrence.[112] When an offender is found to have good prospects of rehabilitation, the fact that this might have occurred in the context of a delay between the offending behaviour and the sentence is irrelevant to the impact that rehabilitation will have on the ultimate sanction.

Remorse is a well-established, independent mitigating factor in all Australian jurisdictions (and which we have seen is also a consideration that can enliven the rehabilitation limb of delay).[113] The presence of remorse can operate to significantly reduce the severity of the punishment meted out to an accused. As was explained in *Neal v The Queen*:

> Contrition, repentance and remorse after the offence are mitigating factors leading in a proper case to some, perhaps considerable, reduction of the normal sentence.[114]

Remorse, for sentencing purposes, is a feeling of regret or sorrow for what one has done.[115] While remorse often underpins rehabilitation, the two are distinct mitigating considerations because they do not always co-exist.[116] The main rationale for

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110 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Crimes Act 1914* (Cth) s 16A(2)(n); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 21A(3)(h); *Sentencing Act 1995* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m); *Sentencing Act 1997* (Tas) s 3(e)(ii); *Sentencing Act 1991* (Vic) s 5(1)(c); *Sentencing Act 1995* (WA) ss 33F(1)(a), 65(1)(a), 67(1), 71(1)(a), 74(1), 84B(1)(a).

111 Mackenzie and Stobbs (n 11) 48–9; Odgers (n 11). See also *Yardley v Betts* (1979) 22 SASR 108, 112 (King CJ); *R v Williscroft, Weston, Woodley & Robinson* [1975] VR 292, 303–4 (Starke J); *Duncan* (n 39) 749; *Dadleh v South Australian Police* (1996) 66 SASR 352, 355 (Perry J); *R v Fabian* (1992) 64 A Crim R 365; *R v Denyer* [1995] 1 VR 186, 192–4 (Crockett J).

112 Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 5th ed, 2018) ch 9.

113 *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson* (2000) 49 NSWLR 383, 412 [118] (Spigelman CJ); *Cameron* (n 109); *Davy v The Queen* (2011) 207 A Crim R 266.

114 *Neal v The Queen* (1982) 149 CLR 305, 315 (Murphy J) (‘*Neal*’). See also *R v Starr* [2002] VSCA 180, [25]–[28] (O’Bryan AJA); *Murphy v The Queen* [2000] TASSC 169, [18]–[19] (Slicer J). A case where considerable weight is given to remorse is *CD v The Queen* [2013] VSCA 95 (‘*CD*’).

115 *R v Young (A Pseudonym)* [2019] NSWDC 55, [65] (Haesler SC DCJ).

116 Odgers (n 11).

ascribing weight to remorse in the sentencing calculus is because of the assumption that repentant offenders accept that their behaviour was wrong and are presumably less likely to reoffend.

From the pragmatic perspective, it is often difficult for the courts to identify remorse because it is sometimes viewed as consisting of 'self-serving untested statements'.[117] As was noted by Winneke P of the Victorian Court of Appeal in *R v Whyte*:

> It has been said, in my opinion properly, that it is rare to find convincing evidence of genuine remorse. Indeed, remorse is an elusive concept which is not to be confused with such emotions as self-pity.[118]

The problems associated with ascertaining true expressions of remorse are notoriously difficult and led Asche CJ in *R v Jabaltjari* to remark that

> [t]he difference between being sorry for what one has done and sorry for being caught is a difference which judges may not always wish to investigate too thoroughly.[119]

Despite this, there are several indicia which are often viewed as being suggestive of remorse, including: pleading guilty; cooperating with police; making reparation; extending an apology; and self-inflicting injuries or attempting suicide.[120]

Irrespective of the pragmatic difficulties associated with identifying remorse, the important point for the purposes of this article is that it too is a stand-alone mitigating factor.[121] Remorse can sometimes operate in the context of offenders who experience delay, but this link is merely contingent. In order for remorse to apply, it is unnecessary to refer to the period of time between the offence or charges being laid and the sentencing.

Thus, there is no logical or doctrinal reason to bring in the notion of delay in order to justify reducing sentences where the offender has rehabilitated or displayed remorse. Delay, at best, is the backdrop against which rehabilitation or remorse occur, but it is a legally irrelevant backdrop. There is no need to call-in delay to mitigate sentence. This is demonstrated by the inescapable reality that (i) rehabilitation and remorse are stand-alone mitigating factors, and (ii) there is no suggestion that these considerations mitigate more powerfully when contrition or rehabilitation occur a long time after the offence.

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117 *Alvares v The Queen* (2011) 209 A Crim R 297, 315 [50], quoting *R v Qutami* (2001) 127 A Crim R 369, 380 [79] (Spigelman CJ).

118 *Whyte* (n 63) [21] (Winneke P).

119 *R v Jabaltjari* (1989) 64 NTR 1, 10.

120 New South Wales Law Reform Commission, *Sentencing* (Discussion Paper No 33, 1996) [5.66].

121 *Neal* (n 114); *CD* (n 114).

Put slightly differently, it is clear that if a court finds that an offender has demonstrated strong progress towards rehabilitation, the offender will get the same discount whether they are sentenced one year or 10 years after the offence. There is no additional or reduced rehabilitation adjustment on account of the extent of the delay. In circumstances when an offender shows contrition or progress towards reform well after the crime, delay is not the actual basis for the penalty reduction; rather it is merely the instrumental basis through which a well-established sentencing aim assumes relevance in sentencing process. Of course, a long period of good conduct by a historic offender is usually more compelling evidence of rehabilitation than a promise to comply with the law in the future. However, the difference between these matters goes to the question of whether a court as a matter of fact should find that the offender has meaningful prospects of rehabilitation. Delay is only one of many considerations that can impact this inquiry. Other considerations can include, for example, the extent of the prior criminality of the offender and any counselling and educational programs undertaken by the offender since the offence.

It follows that the rehabilitation limb is futile. It does no logical or doctrinal work in the sentencing calculus. Judgments that refer to delay as a mitigating consideration on the basis of rehabilitation would be no less accurate or sound if they did not refer to delay and merely set out the rehabilitation which had occurred. There is in fact some existing judicial support for this position. In *Bell v The Queen*, Anderson J stated that

> [t]he mere fact that an offender has led a blameless life between the time of the offences and the time of sentencing is not necessarily an indication of rehabilitation, especially in cases of intra-familial sexual abuse of young children. There may be explanations for the cessation of offending other than genuine rehabilitation, the most obvious of which might be that the child or children have left home or have matured to a stage at which the offender can no longer get away with his or her offending. In this respect, there is a distinction, and I think an important distinction, to be made between cases in which all that appears is that the offender has not been convicted of any offence between the time of the offences and the time of sentencing and cases in which there are genuine claims to rehabilitation and remorse … In my opinion, this case is a case of mere lapse of time, as in *Sell v The Queen*, without any factors positively emerging in favour of leniency during the period between the cessation of the offending and the passing of sentence.[122]

Thus, in this case Anderson J made a clear distinction between delay per se (which should not mitigate) and delay which can provide the opportunity to rehabilitate or display remorse (which can mitigate). In a similar vein, in *Scook*, Buss JA expressly stated that

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122 *Bell* (n 50) [10], [13]. In this case, Anderson J also gave no weight for delay on account of the fairness limb: at [8].

> delay is not, of itself, a mitigating factor … [However, it] may be conducive to the emergence of mitigating factors; for example, if, during the period of delay, the offender has made progress towards rehabilitation or other circumstances favourable to him or her have emerged …[123]

His Honour further outlined other circumstances under which delay could be a mitigating factor, such as

> if: (a) the delay has resulted in significant stress for the offender or left him or her, to a significant degree, in 'uncertain suspense'; or (b) during the period of delay the offender has adopted a reasonable expectation that he or she would not be charged …[124]

Similar sentiments were also expressed by Blue J in *R v Pickard* who stated:

> Mere unnecessary delay, without being coupled with relevant changes occurring during the delay, is not usually a reason in itself to reduce or suspend a sentence if otherwise indicated ...[125]

However, in *Sabra*, Bellew J (Meagher JA and Schmidt J agreeing) noted that this approach is not consistent with the weight of authority and that, in fact, delay can mitigate even without evidence of a relevant change to the offender's circumstances. His Honour stated that Blue J's view was

> not wholly consistent with the decisions of this Court in *Blanco*, *King*, *Gay* and *Giourtalis*. Generally speaking, those decisions support the proposition that delay can be relevant at a number of levels, and that it can operate to mitigate an otherwise appropriate sentence in the absence of evidence that it caused a particular change in an offender's circumstances.[126]

It could be contended that despite the sentiments expressed in *Sabra*, the courts often only apply the rehabilitation limb of delay when there is evidence of rehabilitation, and hence there is no reason to formally abolish this limb. If this is correct, it is in fact a strong justification in favour of abolishing the rehabilitation limb of delay — there is no utility in retaining a legal norm which is futile. However, the better view is that abolishing the delay rehabilitation limb will demonstrably improve the law. First, it will clarify and simplify the law by ensuring that the court's time and focus is not consumed by consideration of a superfluous factor. In addition to this, the proposed reform is likely to substantively improve this aspect of sentencing law by ensuring that judges and lawyers are less likely to misapply the delay rehabilitation

123 *Scook* (n 52) 176 [58], [62].

124 Ibid [63]. These comments have been endorsed in a number of judgments: see, eg, *Giourtalis* (n 56) [1790] (Bathurst CJ); *R v Donald* [2013] NSWCCA 238, [45] (Latham J).

125 [2011] SASCFC 134, [95].

126 *Sabra* (n 2) 45 [40].

limb (as a result of focusing on delay per se and as opposed to its instrumental role in the context of rehabilitation) and it will enhance the integrity of the law by clarifying the scope of a mitigating factor.

Thus, it follows that neither of the existing rationales which are currently invoked to justify mitigating penalties on the basis of delay are sound. Consequently, delay should be abolished as a sentencing factor unless another justification applies. It is to this that I now turn.

C *Coherency with Other Mitigating Factors*

While the orthodox rationales in support of delay as a sentencing consideration do not justify it as a mitigating factor, this does not necessarily mean that delay has no role in sentencing. It may be that it can be justified by reference to a different rationale. To this end, there are two possible approaches. The first reference point is coherence with existing mitigating rationales. Surveying existing mitigating factors could provide a grounding for arguing by analogy or from doctrinal consistency that delay should operate to reduce sentence severity. While as noted below, there is no overarching theory of mitigation in sentencing, established mitigating factors can be divided into four categories.[127] The first are those relating to the offender's response to a charge, which include pleading guilty,[128] cooperating with law enforcement authorities[129] and remorse.[130] The second are factors that relate to the circumstances of the offence and which contribute to, and to some extent explain, the offending. These include mental impairment,[131] duress[132] and provocation.[133] The third category includes matters personal to the offender, such as youth,[134] previous

127 See Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (Victorian Attorney-General's Department, 1988) 359–60.

128 See *Cameron* (n 109).

129 See *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt and Badgery-Parker JJ); *R v El Hani* [2004] NSWCCA 162, [66] (Howie J); *TXT v Western Australia* (2012) 220 A Crim R 266, 270–1 [28] (Buss JA).

130 *Whyte* (n 63); *Barbaro v The Queen* (2012) 226 A Crim R 354; *Phillips v The Queen* (2012) 37 VR 594.

131 See *R v Tsiaras* [1996] 1 VR 398; *Muldrock v The Queen* (2011) 244 CLR 120; *R v Verdins* (2007) 16 VR 269; *R v Puc* [2008] VSCA 159.

132 *Tiknius v The Queen* (2011) 221 A Crim R 365.

133 *Tao Va v The Queen* (2011) 37 VR 452. It should be noted that when the latter three considerations apply in an extreme form they can constitute either a full defence to a crime (in the case of mental impairment or duress) or a partial defence in some jurisdictions (as is the situation with provocation). See also Mirko Bagaric et al, *The Criminal Law of Victoria, New South Wales and South Australia* (Thomson Reuters, 2019) chs 4, 14–15.

134 *R v Neilson* [2011] QCA 369; *R v Kuzmanovski; Ex parte A-G (Qld)* [2012] QCA 19, [15]–[16] (Fraser JA).

good character,[135] old age[136] and good prospects of rehabilitation.[137] The impact of the sanction is the fourth broad type of mitigating factor and includes considerations such as onerous prison conditions,[138] poor health[139] and public opprobrium.[140]

Delay does not neatly fit into these categories. The only plausible alignment that delay has with these considerations is with the last category — the impact of the sanction. The fairness delay limb is grounded in the view that delayed sentencing can cause anxiety and distress to offenders. However, as we have seen above, on a closer examination this assessment is flawed.

While delay does not align with existing established categories of mitigating factors, potentially it could be justified by reference to an overarching sound theory of mitigation, which has a reformist component. Given the existing array of mitigating and aggravating factors, there is no established theory which explains and justifies these considerations. However, it has been suggested that there is scope to develop further mitigating (and aggravating) factors if they promote a sentencing objective.[141] As discussed above, the key sentencing objectives are community protection, general deterrence, specific deterrence, rehabilitation, retribution and denunciation.[142] The only tenable sentencing objective which delay falls into is rehabilitation, but as noted above this cannot provide an independent foundation for delay to operate to reduce penalty.

Thus, it follows that even by taking a broad consideration of aggravating and mitigating factors, there is no basis for anchoring delay as a mitigating factor. Delay should be abolished as a sentencing consideration.

D *Subsidiary Argument for Limiting the Relevance of Delay: People Should Not Benefit from Their Own Wrongdoing*

One further matter that merits discussion regarding both the fairness and rehabilitation limbs of delay is that there is potentially an additional ground for abolishing their application in some contexts. As we have seen, the courts are at times reluctant to accord significant mitigation when the reason for the delay is caused by the offender — this is especially in relation to the fairness limb. Arguably, this reluctance

135 Although it has limited weight in relation to white collar offenders: *R v Coukoulis* (2003) 7 VR 45, 59–60 [42] (Ormiston JA).

136 *Gulyas v Western Australia* (2007) 178 A Crim R 539; *R v RLP* (2009) 213 A Crim R 461.

137 *R v Osenkowski* (1982) 30 SASR 212; *R v Skilbeck* [2010] SASCFC 35; *Elyard* (n 108).

138 *Western Australia v O'Kane* [2011] WASCA 24; *Tognolini v The Queen* [2012] VSCA 311.

139 *Dosen v The Queen* [2010] NSWCCA 283; *AWP v The Queen* [2012] VSCA 41.

140 *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*').

141 Warner et al (n 1).

142 See Part II of this article.

should be firmed into a concrete principle. This is because to allow delay to justify a sentencing reduction in such circumstances conflicts with another principle of justice: that individuals should not benefit from their own wrongdoing.[143] This principle is forcefully articulated by Ronald Dworkin and is manifested in several areas of law, including the forfeiture rule at common law (which disentitles murderers from taking property entitlements from their victims).[144] Pursuant to this principle, it can be argued that offenders who cause or contribute to a delay in the finalisation of their case should not be eligible for a 'delay discount'. Shades of the principle are reflected in comments by Nettle JA where the court declined to accord significant weight to delay in circumstances where it was partly attributable to the fact that the offender did not facilitate the investigation of a complex deception matter. His Honour stated:

> It would be both illogical and contrary to ordinary notions of justice and fairness if a sentencing judge were precluded from taking into account the extent to which the offender had stood by declining to do whatever he or she could do to bring the matter to fruition.[145]

The 'no benefit from own wrongdoing' principle arguably applies less or perhaps not at all to situations where the delay arises not from the acts of the offender but from their omissions. In this context, the most common omission by an offender which leads to a delay in finalising a criminal case is where an offender does not voluntarily disclose that they are the perpetrator of a crime. To invoke the 'no benefit from one's own wrongdoing' principle in this situation would be to impose a positive obligation on offenders to report their own crimes. This expectation is contrary to existing orthodoxy. There is no sentencing principle which, for example, makes it an aggravating factor for offenders to conceal their crimes. The fact that offenders are not expected to come forward and report their crimes is further underlined by the fact that voluntary disclosure of offending is a stand-alone mitigating factor, and one which often applies very powerfully.[146] Thus, it would take a considerable (and almost certainly improbable) shift from the prevailing expectations for the 'no benefit from own doing' principle to abolish a delay as a mitigating consideration in

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143 See generally Ronald Dworkin, *Law's Empire* (Fontana Press, 1986).

144 The principle can be traced to *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, where a woman who killed her husband was barred from benefiting from his life assurance policy. The Court held that 'no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person': at 156. See also *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ). For a discussion of the principle, see Andrew Hemming, 'Killing the Goose and Keeping the Golden Nest Egg' (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342; Carla Spivack, 'Killers Shouldn't Inherit from Their Victims or Should They?' (2013) 48(1) *Georgia Law Review* 145.

145 *Day v The Queen* [2011] VSCA 243, [18]. See also *Giourtalis* (n 56) [1791].

146 *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ); *Latina v The Queen* [2015] VSCA 102; *DPP (Vic) v CPD* (2009) 22 VR 533; *Ryan* (n 140) 294–7 (Kirby J).

circumstances where the delay arises from the fact that the offender did not voluntary disclose their involvement in a crime.

However, the 'no benefit from own wrongdoing' principle can be used to negate or attenuate mitigation which is grounded in changed circumstances, (such as rehabilitation or experiencing anxiety) which occur during a period of delay caused by active unreasonable steps taken by an offender in a bid to frustrate legal proceedings — for example where offenders pursue clearly unmeritorious defences. Thus, if the recommendations in this article for fully abolishing delay are not adopted, this principle should be applied to at least negate the relevance of delay where offenders cause the delay.

E *Abolishing Delay as a Mitigating Factor Will Not Further Slow Down the Criminal Justice System*

As we have seen, court processing times in Australia for criminal matters are relatively slow. This is undesirable. There is a strong interest in the expeditious finalisation of criminal matters from the interests of victims, the community and the offenders.[147] Moreover, long delays in criminal matters diminish the rectitude and quality of decision-making in this area. Delay increases the likelihood of witness unavailability and reduces the accuracy of witness memory and often the availability of other sources of evidence.[148] A possible counter to the proposal to abolish delay as a mitigating factor is that it will remove one of the incentives to expeditiously finalise criminal matters. While this is not a particularly strong argument, it merits some consideration for reasons of comprehensiveness.

The considerations that influence the timeliness of criminal matters are essentially institutional, and in particular the amount of government resourcing to agencies in the criminal justice sector, and in particular police, prosecutors and the courts. There is no evidence that providing (or not providing) a discount to offenders on account of delay would influence government spending and priorities concerning the criminal justice sector. This is evident from the fact that the current approach which provides a discount on the basis of delay is at odds with the 'tough on crime' policy that permeates much of the criminal justice sector throughout Australia.[149] Further, there has been no suggestion that governments should increase spending on courts because the current system facilitates the more lenient treatment of offenders.

147 The desirability for trials to be quickly processed is observed most readily in the United States where the accused has a constitutional 'right to a speedy and public trial': *United States Constitution* amend VI. See, eg, Susan L Thomas, 'When Does Delay in Imposing Sentencing Violate Speedy Trial Provision' (1991) 86 American Law Reports (4th ed) 340. However, this right does not apply post-conviction, since sentencing does not form part of the 'trial' process: see *Barker v Wingo*, 407 US 514 (1972); *United States v Ray*, 578 F 3d 184 (2nd Cir, 2009).

148 Payne (n 87).

149 Mirko Bagaric and Athula Pathinayake, 'Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation' (2015) 40(1) *Australian Bar Review* 64.

The only consideration, which seems to have influenced the criminal justice system to expedite the finalisation of criminal matters, is the welfare of victims. Hence, we see that in some jurisdictions stricter time frames are imposed for the hearing of sexual offence matters in order to reduce anxiety felt by complainants in these cases.[150] Thus, abolishing mitigating considerations on account of delay is likely to have no effect on the progress of criminal matters and the rate at which they are finalised.

IV Conclusion

Delay is a mitigating factor which is regularly invoked by sentencing courts and one which can sometimes result in a considerable penalty reduction. Somewhat curiously (given the frequency with which delay is applied by sentencing courts), the scope and parameters of when delay can mitigate penalty are poorly defined. There is not even approximate guidance regarding the length of time that needs to elapse before this ground is enlivened. This is unacceptable from the perspective of transparency and consistency in judicial decision-making.

Perhaps even more problematic is the fact that the doctrinal underpinnings of delay have not been carefully examined, and the principle is not firmly grounded. To the extent that delay has undergone judicial evaluation, the courts have attempted to ground the principle in two rationales.

The first is that it is unfair for an offender to have to wait a considerable period of time to learn their fate because this causes the offender anxiety and stress. This rationale is flawed because it can be asserted with equal persuasion that offenders are advantaged by having additional time to arrange their affairs before they are subjected to a criminal sanction. While the uncertainty associated with the outcome of a criminal prosecution is undesirable, this can arguably be offset (as opposed to being exacerbated) if offenders have appropriate time to prepare themselves for the sanction they might receive in order to optimally organise their affairs before sentencing.

The second rationale for delay is grounded in offender rehabilitation or remorse that sometimes occurs after an offence. However, rehabilitation and remorse are well-established existing, independent mitigating factors. The fact that an offender may express contrition or become less inclined to commit crime after either a long or short period following the offence is irrelevant to the application of these mitigating grounds, and there is no basis for according additional mitigation where remorse or rehabilitation arises a long time after the offence.

Thus, neither of the existing rationales justify the preservation of delay as a mitigating factor. Moreover, delay cannot be justified on the basis of coherence with existing sentencing considerations or by reference to alignment with other sentencing

150 See, eg, *Criminal Procedure Act 2009* (Vic) ss 211–12.

objectives (other than rehabilitation). It follows that delay should be abolished as a sentencing consideration. The only qualification to this is in relation to offenders who are remanded in custody pending the finalisation of their case, and this would only mitigate penalty when the offender did not contribute to the delay. The reform proposed in the article would simplify this area of sentencing law and enhance its coherency, while not compromising the pursuit of any sentencing objectives.