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THE RELEVANCE OF BAIL CONDITIONS TO THE SENTENCING OF OFFENDERS

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I INTRODUCTION

A fundamental principle of the Australian criminal justice system is that a person accused of committing an offence has a right to remain in the community until a finding of guilt is determined.[1] In this context, the function of bail is to uphold this principle by enabling an accused to be free from custody while awaiting sentence. Bail generally involves a promise by the accused to return to court on a specified date, and that promise may be coupled with a condition or conditions to secure the accused's attendance. Although the imposition of bail conditions is primarily designed to facilitate the achievement of the objectives of bail, in Australia there has been a movement since the mid–2000s towards requiring an accused to participate in programs that are of a rehabilitative or reformative nature.[2] Further, certain conditions of bail may place significant restrictions on an accused's liberty that in practice may be as 'onerous'.

In such circumstances, it may be argued that time spent on bail can be considered as a mitigating factor pursuant to the sentencing purpose of rehabilitation and sentencing principle of proportionality.

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1 See, eg, *Woods v DPP* [2014] VSC 1, [3] (Bell J). See also, *Lee v New South Wales Crimes Commission* (2013) 87 ALJR 1082 (Kiefel J); *Cleland v R* (1986) 161 CLR 278, 292 (Deane J).

2 Richard Edney, 'Bail Conditions as a Mitigating Factor in Sentencing' (2007) 31 *Criminal Law Journal* 101, 101, 104-106.

Several authorities provide illustrations of an attempt to recognise such a relationship in Australia.[3] However, the lack of a clear conceptual framework may result in inconsistent approaches and conflicting outcomes. This article seeks to establish an appropriate framework for the consideration of bail conditions as a mitigating factor in the sentencing process.

Using the state of Victoria as an example, this article begins by examining the bail scheme, and the characteristics of conditions of bail. A brief discussion of general sentencing principles will follow, with a particular emphasis on the purpose of rehabilitation and the principle of proportionality. Drawing upon Australian and Canadian decisions, this article will then suggest how conditions of bail can best be considered during the sentencing process. Finally, several avenues for incorporating the proposed framework will be examined. In doing so, it is hoped that the outline provided will facilitate a consistent approach to considering an accused's compliance with bail conditions as a mitigating factor during the sentencing process.

II THE VICTORIAN BAIL SYSTEM

The Victorian statutory bail scheme is found in the *Bail Act 1977* (Vic) ('*Bail Act*' or 'the Act').[4] It begins by preserving the common law presumption in favour of granting bail to an accused: '[a]ny person accused of an offence and being held in custody in relation to that offence shall be granted bail.'[5] The incorporation of such a presumption in the Act reflects the significance of bail; to remove an accused's liberty before conviction would be contrary to the fundamental presumption of innocence. The loss of liberty pre-trial

[3] For example, *R v Delaney* (2003) 59 NSWLR 1; *R v Pullin & Lebeter* [2003] VSCA 141; *DPP v Gany*, [2006] VSCA 148.

[4] Similar statutory schemes exist in all states and territories: *Bail Act 2013* (NSW); *Bail Act 1982* (NT); *Bail Act 1980* (Qld); *Bail Act 1985* (SA); *Bail Act 1994* (Tas); *Bail Act 1982* (WA); and *Bail Act 1992* (ACT).

[5] *Bail Act 1977* (Vic) s 4(1). Other state jurisdictions that contain a similar presumption are: *Bail Act 1985* (SA) s 10(1); *Bail Act* (NT) s 8; *Bail Act 1992* (ACT) ss 8-8A.

has many serious consequences, including loss of employment or income, adverse effects on familial relationships, inability to perform certain responsibilities, exposure to the harsh environment of prison and, if acquitted, no compensation for the time spent in custody.

The primary objective of bail is therefore to ensure that a balance is achieved between an accused's right to the presumption of innocence, the attendance by the accused at trial,[6] and the wider safety of the community.[7] The presumption in favour of bail does not, for example, apply to defendants who are charged with certain serious offences.[8] The presumption is also limited by s 4(2)(d) of the Act, which allows a decision-maker to refuse bail where there is an unacceptable risk that the accused would otherwise fail to surrender into custody, commit an offence while on bail, endanger the safety or welfare of members of the public, interfere with witnesses or otherwise obstruct the course of justice.[9]

Not all Australian bail legislation contains a presumption that an accused is entitled to bail. For example, in New South Wales, the *Bail Act 2013* (NSW) has replaced a number of presumptions concerning bail with a single 'unacceptable risk' test. 'Rather than rely on presumptions … the bail authority [will now] consider particular risks when determining bail, namely, the risk that the accused will fail to appear, commit a serious offence, endanger the safety of individuals or the community, or interfere with witnesses.'[10]

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6 *Woods v DPP* [2014] VSC 1 [60] – [61].

7 *Re Hildebrandt* [2006] VSC 198, 11-13 (King J).

8 *Bail Act 1977* (Vic) s 4(2); *Bail Act 1985* (SA) s 10A; *Bail Act 1992* (ACT) Division 2.4; *Bail Act 1982* (NT) s 7A.

9 For a discussion on the relationship between bail and the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) see *Gray v DPP* [2008] VSC 4; *Re Unumadu* [2007] VSC 284; *Barbaro v DPP (Cth)* [2009] VSCA 26.

10 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 19839 (Greg Smith, Attorney General).

A *Conditions of Bail*

When considering the release of an accused on bail, a decision-maker must impose a condition 'that the accused will surrender into custody at the time and place of the hearing or trial'.[11] Although this condition is mandatory, the imposition of other conditions is discretionary. Further, when considering the imposition of conditions for the release of an accused on bail, the decision-maker must consider the conditions in the following order:

> (a) release of the accused on his or her own undertaking without any other conditions;
> (b) release of the accused on his or her own undertaking with conditions about the conduct of the accused;
> (c) release of the accused with a surety of stated value or a deposit of money of stated amount, with or without conditions about the conduct of the accused.[12]

In *Woods v DPP* Justice Bell, when considering the relationship between bail and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'), held that this provision is designed to ensure that the conditions of bail, if any, impose no greater limitation upon the liberty and human rights of the accused than the circumstances of the case requires.[13] A decision-maker who complies with the obligation to consider the conditions of release in the specified order will need to turn his or her mind to the release of the accused on the least restrictive basis which is appropriate, without preventing him or her from granting bail on more restrictive conditions when required by the facts and circumstances of the case.[14]

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11 *Bail Act 1977* (Vic) s 5(1).
12 Ibid s 5(2). Also see, *Bail Act 2013* (NSW) Division 3; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1994* (Tas) s 7; and *Bail Act 1992* (ACT) s 25.
13 *Woods v DPP* (2014) A Crim R 84, 104.
14 *Bail Act 1977* (Vic) s 5.

Further, commenting on the impact of human rights on bail generally, Justice Bell held that 'a fundamental requirement of human rights law in the context of bail is that the individual facts and circumstances must be properly considered before the severe step of depriving the accused of his or her liberty is taken.'[15] This is irrespective of whether a person has a presumptive entitlement to bail. Specifically, Bell J considered the application of the right of freedom of movement (s 12 of the *Charter*) and the right of liberty and security of each person (s 21 of the *Charter*) stating that these rights are 'potentially engaged by the provisions of the Bail Act and when deciding whether or not to grant bail to a person under arrest on criminal charges and impose conditions of bail.'[16]

Prior to 2010, the *Bail Act* permitted the decision-maker to impose specific conditions requiring an accused: to answer bail; not to commit offences on bail; not to endanger the safety or welfare of the public; and/or not to interfere with witnesses or obstruct the administration of justice.[17] However, the *Bail Amendment Act 2010* (Vic) widened the powers of decision-makers by allowing conditions to be imposed to reduce the *likelihood* of those events happening or conduct occurring. Section 5(2A) provides that, without limiting subsection (2), a court may impose a range of conditions that address the conduct of an accused including reporting requirements, residence restrictions, curfews, restrictions on contacting certain persons, restrictions on travel or exclusions from specified places, attendance and participation in a bail support service,[18] restrictions

[15] *Woods v DPP* (2014) A Crim R 84, 95.

[16] Ibid 90. Other *Charter* rights identified by Bell J relevant to bail decision-making were sections 10(c) (medical treatment), 13(a) (privacy, family home or correspondence), 16(1)–(2) (peaceful assembly and association), 19(2) (distinct culture of Aboriginal persons) and 25(1) (presumption of innocence): at 91-2.

[17] *Bail Act 1977* (Vic) s 5(2)(a)-(d). Also see, *Bail Act 2013* (NSW) Division 3; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1994* (Tas) s 7; and *Bail Act 1992* (ACT) s 25.

[18] Defined as a 'service provided to assist an accused to comply with his or her bail undertaking (whether or not that type of service is also provided to persons

on the use of motor vehicles and/or consumption of alcohol or drugs or dependence, compliance with existing intervention orders and 'any other condition that the court considers appropriate to impose in relation to the conduct of the accused.'[19]

Conditions of this kind, when imposed appropriately, may serve the primary purpose of bail and also operate for the benefit of the accused and the protection of the community. For example, the inclusion of provisions that relate to the 'attendance and participation by an accused, at and in a bail support service, reflects the increasing importance of such services in the management of alleged offenders and the emphasis on their rehabilitation and support in the criminal justice system generally.'[20] Nonetheless, the Victorian Parliament did not intend for such conditions to be imposed as a matter of course.[21] Such conditions must only be imposed for the proper purposes of bail,[22] where a less onerous condition is not capable of facilitating the requisite purposes,[23] and where it is reasonable to do so having regard to the nature of the alleged offence and the circumstances of the accused.[24] Such parliamentary intention can also be observed in other Australian jurisdictions. For example, in New South Wales, this intention is expressly found in s 16 of the *Bail Act 2013* (NSW) which stipulates that a decision-maker must first determine whether an accused poses an unacceptable risk, and conditions are only to be imposed if they will sufficiently mitigate the risk.[25]

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other than an accused on bail) including, but not limited to - bail support programs, medical treatment, counselling services or treatment service for substance abuse or other behaviour which may lead to commission of offences, counselling, treatment, support or assistance services for one or more of the following…services to help resolve helplessness': *Bail Act 1977* (Vic) s 3.

19 Section 5(2A) conditions are defined as 'conduct conditions': ibid s 3.

20 *Woods v DPP* (2014) A Crim R 84, 105.

21 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 2 September 2010, 3607 (Rob Hulls, Attorney-General).

22 *Bail Act 1977* (Vic) s 5(2)-(3).

23 Ibid s 5(4)(a).

24 Ibid s 5(4)(b).

25 *Bail Act 2013* (NSW) s 16.

The flexibility provided by each jurisdiction's *Bail Act*, albeit desirable, may lead to the imposition of bail conditions that go beyond that which is strictly necessary to ensure the objectives of bail. While a decision-maker may not intend to blur the lines of guilt, conviction and sentence,[26] when imposing conditions there may nonetheless be situations where bail conditions and the principles of sentencing may overlap.

The first is where the imposition of bail conditions is designed to achieve the rehabilitation of the accused. Although rehabilitative bail conditions have now become a central feature of Australian bail systems,[27] the 'rehabilitation' should be limited to the extent that it only facilitates the purposes of bail. It should not, for example, be used for the purpose of providing a future sentencing judge with mitigating circumstances.[28] However, it would be near impossible to distinguish an accused's rehabilitation for the purposes of bail from other efforts by the accused to rehabilitate pre-trial. In any event, any form of rehabilitation of the accused is arguably a worthwhile outcome, regardless of whether or not the objectives of bail have concurrently been satisfied. It can therefore be argued that where an accused demonstrates rehabilitation as a result of compliance with bail conditions, such efforts are commendable and may play a mitigatory role during the sentencing process.

The second circumstance where bail conditions may overlap with the purposes and principles of sentencing is where the conduct conditions can be described as punitive. Although bail conditions are limited by the requirement that they be 'no more onerous' than necessary for the purpose of fulfilling the objectives of bail,[29] a

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26 *Bail Act 1977* (Vic) s 5(4)(b).

27 Ibid s 5(2)(g).

28 Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15(3) *Current Issues in Criminal Justice* 220, 223.

29 Cf *Bail Act 1977* (Vic) s 5(3).

decision-maker may nonetheless place conditions that are onerous or stringent — either in nature or in number — on an accused's liberty. In practice such conditions have been likened to sentencing dispositions.[30] However, since the purpose of bail is not to punish the alleged defendant — as this would be clearly unprincipled — it is suggested that the unintended punitive nature of conditional bail may have a mitigatory effect on his or her sentence.

Before considering how conditions of bail may relate to sentencing principles, it is necessary first to examine in more detail how specific conditions may be described as punitive and/or rehabilitative.

1 *Police Reporting Conditions*

Pursuant to section 5(2A)(a) of the *Bail Act*, a decision-maker may impose a condition of bail that requires the accused to report to a police station. Such a condition involves the accused going to a designated police station on a set day or days to sign a bail report sheet. The frequency of such reporting may vary from requiring the accused to report once a week, to doing so daily.[31] It is apparent that where an accused person is required to report to a police station for monitoring, it is a restraint on his or her liberty to the extent of the frequency of reporting. There may also be associated difficulties with the reporting condition, including for example travelling to the nominated police station, or reporting at a time that is convenient to the police officer who is responsible for processing the condition.[32] Accordingly, in some circumstances, the constraints associated with such conditions may be described as punitive.

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30 Victorian Law Reform Commission, *Bail Act*, Final Report (2007) 124.

31 See, eg, *MacBain v DPP* [2002] VSC 321.

32 Victorian Law Reform Commission, *Review of the Bail Act*, Consultation Paper (2005), 106.

Further, despite the popularity of police reporting being imposed as a condition of bail,[33] there is evidence that it is simply ineffective as a mechanism for achieving the objectives of bail.[34] During its 2007 review of the *Bail Act*, the Victorian Law Reform Commission ('VLRC') reported that in several consultations concerns were raised that the condition is unsuccessful in preventing an accused from absconding or re-offending, objectives that are theoretically central to this particular condition.[35] Instead, the prescription of reporting conditions was considered to be unnecessary and it was perceived by the VLRC as 'being used as a form of control and punishment.'[36]

2 *Abstinence Conditions*

Another common bail condition is to direct an accused to refrain from engaging in behaviours that are linked to the alleged offence. Typically, this involves a commitment from the accused to abstain from conduct such as drinking alcohol,[37] using illegal drugs,[38] and/or visiting certain premises.[39] In theory, the aim of imposing such conditions is rehabilitative, as they are imposed to address the underlying causes of the offending behaviour and not merely to

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33 VLRC (2007), above n 30, 124.

34 Victoria Police, *Victoria Police Manual: VPM Instructions, 113-6 Bail and Remand* (2004) [5.3.3].

35 VLRC (2007), above n 30, 121.

36 Ibid 107.

37 *Bail Act 1977* (Vic) s 5(2A)(i). See, eg, *R v Woodburn* [2002] VSC 72. Also see, *Bail Act 2013* (NSW) Division 3; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1994* (Tas) s 7; and *Bail Act 1992* (ACT) s 25.

38 *Bail Act 1977* (Vic) s 5(2A)(i). See, eg, *R v Saunders* [2007] VSC 298. Also see, *Bail Act 2013* (NSW) Division 3; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1994* (Tas) s 7; and *Bail Act 1992* (ACT) s 25.

39 *Bail Act 1977* (Vic) s 5(2A)(f). See, eg, *DPP v Peterson* [2006] VSC 199, 2 (King J). Also see, *Bail Act 2013* (NSW) Division 3; *Bail Act 1982* (NT) s 24; *Bail Act 1980* (Qld) s 11; *Bail Act 1985* (SA) s 11; *Bail Act 1994* (Tas) s 7; and *Bail Act 1992* (ACT) s 25.

prohibit it.[40] However, this theoretical objective is not reflected in current practices. Instead, decision-makers tend to impose abstinence conditions without the support mechanisms that are necessary for an accused to successfully respond to his or her behavioural problems.[41] This can lead to an accused's failure to comply with the initial conditions, and a consequent direction to comply with even harsher conditions. Thus, an apparently rehabilitative condition may in fact be punitive in two ways: first, in restricting the accused's freedom to engage in certain behaviour, and secondly, by exposing an accused to breaches of initial conditions that may result in the imposition of more severe conditions of bail.[42]

3 *Public Transport Bans*

Pursuant to the *Bail Act*, a decision-maker may impose a condition that prevents the accused from using public transport.[43] Typically such a condition is prescribed as a condition of bail where the accused is alleged to have committed some form of offence on public transport, such as recurring vandalism or assault.[44] Concerns expressed about this condition relate to the fact that it can make an accused's day-to-day life quite difficult and should rarely be used, if at all.[45] This is because a ban on using public transport may in effect be an indirect 'ban' on, for example, accessing particular services (for example, mental health support services or drug and alcohol treatment programs), attending a place of employment, or successfully engaging in education or training. Such further restrictions are a restriction on that person's liberty and can be considered as punitive.[46]

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40 VLRC (2007), above n 30, 125.
41 Ibid.
42 Ibid 125.
43 *Bail Act 1977* (Vic) ss 5(2A)(f) or 5(2A)(k).
44 VLRC (2005), above n 32, 107.
45 Ibid.
46 VLRC (2007), above n 30, 126.

4 *Curfews*

The decision-maker may also impose a curfew that requires the accused to be at his or her place during specific times.[47] The only qualification provided by the Act is to ensure that the curfew does not exceed 12 hours within a 24 hour period.[48] Curfew conditions may significantly limit an accused person's autonomy,[49] and may affect his or her ability to meet certain personal or cultural responsibilities.[50] They have been characterised as a form of detention,[51] and have been described as punitive to the extent that they have been classified as a form of pre-sentence punishment.[52]

5 *Home Detention*

An additional special bail condition that may be imposed is home detention.[53] An accused may be required to wear an electronic monitoring bracelet and be directed to only leave his or her house with the permission of the supervising corrections officer.[54] In addition, in 2007, the VLRC found that several defendants had been directed by a magistrate not to leave home without a support worker as a condition of bail. Such conditions evidently restrict an accused's civil liberties to a considerable degree and may, in certain cases, be regarded as punitive.

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47 *Bail Act 1977* (Vic) s 5(2A)(c).
48 *Bail Act 1977* (Vic) s 5(2B).
49 VLRC (2005), above n 32, 109-111.
50 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission to the Victorian Law Reform Commission in response to the 'Review of the Bail Act Consultation Paper* (Victorian Aboriginal Legal Service Co-operative, 2005) <http://vals.org.au/static/files/assets/83ae3c31/VALS_Bail_submission_29_01_08.pdf>.
51 Ibid.
52 VLRC (2005), above n 32, 107-108.
53 Ibid s 5(2A)(k).
54 VLRC (2007), above n 30, 124-125.

6 *Bail Support Services*

The developing trend within the criminal justice system of therapeutic jurisprudence[55] has transformed the nature of bail.[56] Contemporary bail conditions not only seek to satisfy the traditional objectives of bail law, but also attempt to add a rehabilitative element.[57] The purpose of directing an accused to participate in a bail support service is to address the underlying causes of an accused's offending behaviour.[58] In Victoria, for example, the increasing frequency with which accused persons were being required to undergo assessment for participation in a rehabilitative program as part of their bail conditions led to the merging of two court programs (the *Court Referral and Evaluation for Drug Intervention and Treatment* ('CREDIT') and the Bail Support Program (BSP) to create a specific bail support service in the Magistrates' Court: the CREDIT/Bail Support Program.[59]

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55 Therapeutic jurisprudence is a term used to describe an approach which 'seeks to assess the therapeutic and counter-therapeutic consequences of law and how it is applied and to effect legal change designed to increase the former and diminish the latter. It is a mental health approach to law that uses the tools of behaviourally sciences to assess the law's therapeutic impact, and when consistent with other important values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected': see Bruce J Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *UMKC L Rev* 33, 36.

56 Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20(2) *Law in Context* 6, 6-7. Also see, Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 1096, 1096-1126; David B Wexlar, 'Two Decades of Therapeutic Jurisprudence' (2014) 24(1) *Touro Law Review* 17, 17-29.

57 *Bail Act 1977* (Vic) s 5(2A)(g).

58 Edney, above n 2.

59 Victorian Government Health Information, The CREDIT Bail Support Program: A Guide to Working with the CREDIT Bail Support Program – August 2005 (Victorian Government Department of Human Services,2005) <http://docs.health.vic.gov.au/docs/doc/A69711BC8E6A78DFCA25789600025ADF/$FILE/credit-bail-support.pdf>. There are cognate programs in other Australian jurisdictions. For example in New South Wales, defendants can participate in the MERIT (Magistrate Early Referral Into Treatment) program, the primary goal of which is to break the 'substance abuse-crime cycle by involving defendants in treatment and rehabilitation;': Department of Justice,

CREDIT/Bail Support Program is a twelve-week program within a harm minimisation framework for alleged non-violent offenders on bail, and provides assistance to defendants with drug, alcohol, housing or welfare issues.[60] The main objectives of this program include providing access to 'communication, welfare, legal and other community-based support' and addressing the client's substance use and providing early treatment and access to drug treatment and rehabilitation programs.[61]

Although such programs do not have statutory force pursuant to respective bail schemes,[62] the discretion given to decision-makers allows for them to be regularly incorporated into an accused's conditions of bail.[63] While such programs are clearly for the benefit of the accused - and it would arguably be undesirable to discourage their use in this context - it is evident that an objective of such programs is to rehabilitate the accused. In addition, such programs may also limit an accused's liberty and have been labelled as 'onerous' in some circumstances.[64]

Having outlined the way in which some bail conditions may be characterised as rehabilitative and/or punitive, it is necessary to consider how such conditions might be incorporated into the sentencing process.

The Merit Program, (11 November 2014), <http://www.merit.justice.nsw.gov.au/magistrates-early-referral-into-treatment/the-merit-program>. Also see, Australian Institute of Criminology, *Bail Support Services and Programs*, Research and Public Policy Series 121-140, (Australian Institute of Criminology, 2012).

60 Victorian Government Department of Human Services, *The Credit Bail Support Program: A Guide to Working with CREDIT Bail Support Program*, (2005) 4.

61 Ibid.

62 *Cf Bail Act 1978* (NSW) s 36A(1)-(2); *Bail Act 1980* (Qld) s 16(2)(e)(iii).

63 See for example, *R v Silver & Ors* [2006] VSC 154.

64 *R v Nguyen* [2003] VSC 508, 18 (Warren CJ).

B *Bail Conditions and Sentencing Principles*

In all Australian jurisdictions, the sentencing of offenders is guided by a number of sentencing purposes, found in statute[65] and/or at common law. For example in Victoria, Part 2 of the *Sentencing Act 1991* (Vic) ('*Sentencing Act*') re-states the various common law objectives of punishment:

> (a) to punish the offender to an extent and in a manner which is just in all of the circumstances;
> (b) to deter the offender or other persons from committing offences of the same or a similar character;
> (c) to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated;
> (d) to manifest the denunciation by the court of the type of conduct in which the offender engaged;
> (e) to protect the community from the offender; or
> (f) a combination of two or more of these purposes.[66]

Although not to be regarded as a codification of the law relating to sentencing, the statute does affirm that it is only for the purposes listed in subsections (a) to (f) that a court may impose a sentence. In addition, the court must take into account broader principles of sentencing such as proportionality and 'parsimony'.[67]

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[65] See, for example, *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A, s 21; *Sentencing Act* (NT) s 5(1) and 5(2); *Penalties and Sentence Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act* 1988 (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1995* (WA) s 6.

[66] *Sentencing Act 1991* (Vic) s 5; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A, s 21; *Sentencing Act* (NT) s 5(1) and 5(2); *Penalties and Sentence Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act* 1988 (SA) s 10; *Sentencing Act 1997* (Tas) s 3; and *Sentencing Act 1995* (WA) s 6.

[67] See for example, *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 465.

1 *Rehabilitation*

As a sentencing purpose, rehabilitation is concerned with reducing the risk of re-offending by imposing a punishment that provides the accused with educational, psychological, social and medical services, which target the offending behaviour.[68] For example, under section 5(1)(c) of the *Sentencing Act 1991* (Vic), a court should aim to 'establish conditions within which it is considered … that the rehabilitation of the offender may be facilitated.'[69] Neither the common law nor statute claims that rehabilitation is the primary aim of sentencing. However, several Victorian authorities have emphasised the importance of rehabilitation in the wider scheme of sentencing.[70]

Further, it has been accepted that where rehabilitation is already being achieved by the accused, it is essential to ensure that this progress is not reversed:[71]

> Where, prior to the sentence, there has been a lengthy process of rehabilitation…the punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of that rehabilitation.[72]

It may be argued that this approach may equally apply in relation to an accused's compliance with rehabilitative bail conditions during the sentencing process.[73] The sentencing judge may therefore

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68 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook Co, 3rd ed, 2014) [3.105].

69 *Sentencing Act* s 5(1)(c). *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d); *Sentencing Act* (NT) s 5(1)(b) and 5(2); *Penalties and Sentence Act 1992* (Qld) s 3(b); *Criminal Law (Sentencing) Act* 1988 (SA) s 10(1)(m); *Sentencing Act 1997* (Tas) s 3(e)(iii).

70 *R v Williscroft* [1975] VR 292; *R v Tran* (2002) 4 VR 457; *R v Mills* [1998] 4 VR 235.

71 Freiberg, above n 68, [3.105].

72 *R v Duncan* (1983) 47 ALR 746.

73 Edney, above n 2, 111.

consider the extent to which the accused has reformed during his or her time on bail, and seek to impose a penalty that facilitates continued rehabilitation.[74]

The factors that are considered to be indicative of rehabilitation include remorse, restitution, voluntarily seeking treatment and the consequences of delay.[75] Of particular significance in this context is the voluntary seeking of treatment. It is accepted that a sentencing judge will place great emphasis on the efforts made by the accused to deal with his or her offending behaviour. Of course, this is dependent on the sentencing judge's confidence that the treatment is appropriate in light of the seriousness of the offence, and that it is aimed at preventing the accused's re-offending. However it should be noted that regardless of the outcome, an accused's initiative to undertake any form of treatment is generally considered by courts as strong evidence of rehabilitation.[76]

Although compliance with rehabilitative bail conditions may not necessarily have the same significance as the voluntary seeking of treatment by an accused, it may be argued that compliance with such conditions may nonetheless be a mitigatory factor relevant to sentence. As previously discussed, bail support programs are specifically designed to address the underlying causes of offending behaviour. Thus, an accused's successful participation in such programs is some evidence of his or her prospects of rehabilitation, a factor that may be included in the plea in mitigation.[77] In particular, it may demonstrate a capacity to be a law-abiding citizen, receptiveness to a given 'treatment' and ideally an ability to lead a 'good life'.[78]

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74 Ibid.
75 Freiberg, above n 68, [3.105].
76 Ibid [3.105].
77 Edney, above n 2, 111.
78 Tony Ward and Mark Brown, 'The Good Lives Models and Conceptual Issues in Offender Rehabilitation' (2004) 10 *Psychology, Law and Crime* 243.

2 *Just Punishment*

The principle of 'just punishment' requires that the:

> severity of punishment should be commensurate with the seriousness of the wrongs. Only grave wrongs merit severe punishment; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved – severe sanctions for minor wrongs or vice versa. This principle has variously been called a principle of 'proportionality' or 'just deserts'.[79]

In determining a proportionate sentence, the court must have regard to the factors listed in s 5(2) of the *Sentencing Act*, which include 'the nature and gravity of the offence',[80] 'the offender's previous character'[81] and 'the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances'.[82] It is within these parameters that an accused's compliance with bail conditions can become relevant in the sentencing process.

It can be argued that as some bail conditions significantly restrict an offender's liberty and are in effect 'punitive',[83] a court should therefore consider the burdensome nature of such conditions as a mitigating factor when sentencing an accused. In light of the objective of proportionality, it is proposed that a 'just' sentence is

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79 Victorian Sentencing Committee, *Report: Sentencing*, Melbourne, VGPO, (1988) 88.

80 *Sentencing Act* s 5(2)(c). Also see for example, *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act* (NT) s 5(2)(b); *Criminal Law (Sentencing) Act* 1988 (SA) s 10.

81 Ibid s 5(2)(f). Also see for example, *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act* (NT) s 5(2)(b); *Criminal Law (Sentencing) Act* 1988 (SA) s 10.

82 Ibid s 5(2)(g). Also see for example, *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act* (NT) s 5(2)(b); *Criminal Law (Sentencing) Act* 1988 (SA) s 10.

83 Edney, above n 2, 111.

one that considers previous restrictions on the accused's liberty, including complying with his or her bail conditions. It is irrelevant that such compliance is not necessarily voluntary:

> If the applicant was participating in programs the conditions of which amounted to conditions of quasi-custody, then the applicant, should not…be disentitled from obtaining a credit in sentencing…The applicant's motive for undertaking the programs might be relevant in the assessment of the applicant's prospects of rehabilitation but …it is not relevant in determining whether he should be entitled to some credit in sentencing, on the basis that he has already undergone a kind of punishment by being subjected to quasi-custody.[84]

III VICTORIA: CONSIDERING BAIL CONDITIONS DURING THE SENTENCING PROCESS

Traditionally, Victorian decisions recognising the relationship between bail conditions and sentencing have focused on the aggravating effect of an accused committing offences whilst on bail.[85] The potential mitigatory effect of bail conditions has typically been recognised in a limited form, if at all, in judicial decisions.[86] This section discusses key examples of Victorian decisions that attempt to give credit for bail conditions during the sentencing process. It demonstrates the various approaches adopted by the courts, and highlights the potential for inconsistencies without an established framework, which can in turn undermine the fairness of the sentencing process.

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84 *R v Delaney* (2003) 59 NSWLR 1, 6 (James J).

85 In Victoria this fact of aggravation is provided for under s 16(3) *Sentencing Act.* See, for example, *R v Gray* [1977] VR 225. Further, sections 16(1A)(e) and 16(3C) *Sentencing Act* provide that any accused who commits an offence while released on bail must serve the sentence cumulatively rather than concurrently. Also see, the high profile case of R v Bayley [2013] VSC 313 on the aggravating effect of committing offences while on bail.

86 Edney, above n 2.

For example, in *R v Pullin & Lebeter,*[87] the applicants had appealed their respective sentences on the grounds that the trial judge had failed to attach sufficient weight to their personal antecedents, including their compliance with bail conditions. Although the trial judge had made no reference to the time the defendant spent on bail,[88] in allowing both applicants' appeals,[89] Ashley AJA, delivering the judgment of the Court of Appeal, accepted the general proposition that an accused's observance of bail conditions could be considered as a mitigatory factor that can be taken into account in sentencing. In relation to the applicant Pullin, his Honour noted that the accused had complied with strict bail conditions, refrained from taking any illegal drugs and attended several drug counselling sessions. This, his Honour held, was indicative of the accused's commitment to rehabilitation.[90] Similarly Lebeter's compliance with bail conditions was evidence of a sound prospect of rehabilitation.[91]

In *R v Gany*,[92] the sentencing judge considered that it was in the best interests of the community to give weight to the accused's rehabilitation, as evidenced by his compliance with bail conditions. His Honour discussed in great detail Gany's participation in the CREDIT Program, the South East Alcohol and Drug Counselling Services, and several other aspects of his conditions of bail. In determining an appropriate sentence, his Honour considered as mitigating factors '[Gany's] rigorous exposure to and success with the very, very demanding CREDIT program and ...[his] very real prospects of rehabilitation as indicated by [his] progress in the CREDIT program…and [his] already exceptional commitment to that rehabilitation.'[93]

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87 *R v Pullin & Lebeter* [2003] VSCA 141 (Charles and Chernov JJA and Ashley AJA).
88 *R v Pullin & Lebeter* [2002] VCC 128, [62].
89 *R v Pullin & Lebeter* [2003] VSCA 141, [41].
90 Ibid [23].
91 Ibid [24].
92 [2006] VCC 118.
93 Ibid [37].

However on appeal, the Court of Appeal held that the accused's prospects of rehabilitation would not affect his sentence, as the purpose of general deterrence was of more importance.[94] Further Redlich JA, on behalf of the Court, stated that general deterrence and denunciation are central sentencing purposes and an accused's compliance with bail conditions has no effect on such sentencing objectives.[95] The accused was re-sentenced from a wholly suspended sentence, to a total effective sentence of three years and six months' imprisonment, with a minimum term of one year and nine months.

This case reveals a stark difference between the approach adopted by the trial judge, who saw rehabilitation as the goal of utmost importance,[96] and the Court of Appeal's emphasis on general deterrence, to which bail conditions were seen as irrelevant:

> sound prospects of rehabilitation will not lead to any significant amelioration of the prominence of general deterrence in the sentencing process. Denunciation and general deterrence must be at the forefront of the sentencing synthesis.[97]

However, it is argued that this decision does not stand for the proposition that compliance with bail conditions is not relevant to rehabilitation. Rather, it stipulates that where general deterrence and denunciation are the primary sentencing goals, prospects of rehabilitation, including compliance with bail conditions, may have little if any relevance to the determination of the sentence.

In *R v Silver & Or*,[98] Nettle JA, sitting in the trial division, discussed the link between an accused's compliance with bail conditions and sentencing. In his sentencing remarks, his Honour

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94 *DPP v Gany*, [2006] VSCA 148, [27] (Chernov, Vincent and Redlich JJA).
95 Ibid [36].
96 *R v Gany* [2006] VCC 118, [19].
97 *DPP v Gany* [2006] VSCA 148, [35].
98 [2006] VSC 154.

began by considering the personal circumstances of each of the accused. Particularly relevant to this article was the detailed discussion of one of the offenders' participation in the Bail Support Program,[99] and considerable progress towards rehabilitation through participating in the CREDIT Bail Program.[100] Participation in both of the programs required the offender to cease consumption of alcohol and illegal substances, maintain abstinence, and participate in a range of programmes including drug and alcohol counselling, anger management, and positive life style courses.[101] Nettle JA acknowledged that this ought to have a significant effect on the sentence:

> Having regard to the…CREDIT Bail Programme, and in light of the way in which you complied with stringent bail conditions and devoted yourself to the rehabilitation programmes on bail for the better part of a year…You are due credit for what you have already achieved by way of rehabilitation and you are to be encouraged down that path.[102]

Importantly, his Honour appeared to emphasise the impact that compliance with stringent bail conditions can have on both the punitive and rehabilitative component of the sentencing process. While clearly commending the accused's efforts at rehabilitation, in referring to the accused's compliance with 'stringent bail conditions' his Honour stated that '…there is some substance [in the submission]…that [he] should be treated as having in effect already served a period of home detention.'[103]

In contrast, in the Victorian County Court decision of *R v Zehavi*,[104] it was held that a sentencing judge is under no obligation to consider an accused's time spent on bail as a mitigating factor

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99 *R v Silver & Ors* [2006] VSC 154, [85] (Nettle JA).
100 Ibid [87].
101 Ibid.
102 Ibid [116].
103 Ibid [130].
104 [1998] VCC 5364.

during the sentencing process. Rather, time spent on bail may — at most — form part of the background of the defendant's personal circumstances.

This decision concerned a defendant being sentenced for drug-related offences. It was submitted that his time on bail, which required him to report daily and obey the lawful direction of a psychologist, a director of a company, and a rabbi, should be treated as a 'hardship which should…be seen as a mitigatory circumstance.'[105] Although the sentencing judge accepted that the accused had demonstrated significant rehabilitative prospects through his compliance with his bail conditions, he did not accept the notion that it was a 'hardship'. Consequently his Honour considered Zehavi's time on bail as irrelevant for the purpose of sentencing.

Zahavi appealed against his sentence on the grounds that, *inter alia*, the sentencing judge erred in failing to give sufficient weight to his time spent on bail, and had therefore imposed an excessive sentence.[106] In dismissing the appeal, the Court of Appeal held that the sentencing judge had appropriately considered the issue of bail: '[i]t seems that … time spent on bail and how it was spent are matters of minimal, if any, significance to the sentencing disposition. At most, they are part of the background.'[107]

It can be seen from this brief summary that Victorian courts adopt varying approaches in considering the relevance of bail conditions to sentence, presenting the very real danger of inconsistent sentencing practices and unnecessary appeals. If bail conditions are to be considered as a mitigating factor during sentencing, it may be argued that it should be within an established framework in order to facilitate consistency and fair sentencing practice.

[105] *R v Zehavi* [1998] VCC 5364.
[106] *R v Zehavi* [1998] VSCA 81 [4] (Winneke ACJ, Brooking and Batt JJA).
[107] Ibid [8].

In contrast, there is clear New South Wales authority that at least onerous bail conditions may be relevant to mitigation of sentence. In *R v Fowler,*[108] the defendant appealed his sentence on the grounds that, *inter alia*, the sentencing judge had failed to adequately consider the period during which he was subjected to onerous bail conditions. The Court of Criminal Appeal held that:

> in an appropriate case the length and terms of an offender's period on bail awaiting trial or sentence is a matter relevant to the determination of the proper sentence to be imposed. What weight is to be given to such a matter will vary from case to case, depending upon what other factors need to be considered and what sentence is required in the particular case to address the purpose of punishment. Where that purpose is the protection of the community and the conditions of bail are particularly onerous…very significant weight might be placed upon such a factor...[109]

IV BAIL CONDITIONS AND THE SENTENCING FRAMEWORK

A number of avenues are available for the consideration of bail conditions as a mitigating factor under the sentencing principles of rehabilitation and proportionality. Perhaps the most obvious is to uphold the status quo and not expressly acknowledge the significance of an offender's compliance with his or her bail conditions in relation to sentence. The justification for this approach is that bail and sentencing are at opposite ends of the criminal justice spectrum. Special conditions attached to an accused's bail are imposed in light of the presumption of innocence, and are designed to primarily ensure that the objectives of bail law are successfully achieved. As discussed above, the paramount purpose of the *Bail Act* is to ensure that the accused will attend the trial, and is considered to

[108] (2003) 151 A Crim R 166.
[109] Ibid 214 (Tobias JA, James, and Howie JJ).

be 'process-orientated'. [110] In contrast, the process of sentencing is focused on punishment only after a finding of guilt has been determined.[111] In drawing this comparison, it is clear that the two procedures are conceptually distinct. As noted by the Victorian Court of Appeal, '[i]t is true that any person charged may apply for bail and, if the application was successful and ultimately the person is convicted, the time spent on bail will not count as part of any sentence of imprisonment.[112]

Further, it can be suggested that an accused's compliance with bail conditions is purely motivated by self-interest. After all, the alternative for the accused is to be remanded in custody until trial because of the decision-maker's belief that without these attached conditions, the accused will present an 'unacceptable risk'. It follows that in such instances it would perhaps be unprincipled to equate such self-interest as having the same significance as, for example, an accused's initiative of voluntarily seeking treatment. For such reasons, it may be argued that the link between bail conditions and sentencing should not be recognised.

However, it is submitted that the better approach is to formally identify the mitigating effect that bail conditions can have on an accused's sentence. For the purpose of consistency, such an approach should be unambiguous and fixed into current sentencing practices. Doing so is substantiated by several propositions. First, as discussed above, in certain cases a connection exists between conditions of bail and the sentencing principles of rehabilitation and proportionality. Secondly, some judicial authorities have attempted to recognise the relationship between bail conditions and sentencing. However, the lack of an established framework results in inconsistent approaches to the issue and produces discrepant outcomes. As a primary purpose of the *Sentencing Act* is to ensure the promotion of 'consistency … in the sentencing of the

[110] Freiberg and Morgan, above n 28, 222.
[111] Ibid.
[112] *R v Zehavi* [1998] VSCA 81 [8] (Winneke ACJ, Brooking and Batt JJA).

offenders',[113] it appears that the development of a scheme that facilitates the consideration of bail conditions during the sentencing process is necessary to achieve this goal. Thirdly, judicial attempts at recognising the relationship between bail objectives and sentencing goals further indicate that such a framework has the potential to be successfully implemented.

Such an approach is also consistent with other circumstances where a judge may consider an accused's compliance with an order as being relevant to his or her final sentence. For example, although a distinctive sentencing disposition, section 83A of the *Sentencing Act*, which broadly governs the deferral of sentencing by authorising the court to adjourn a sentence hearing for a maximum period of 12 months, has some procedural parallels to bail. The purpose of a deferred sentence is largely rehabilitative,[114] and at the adjourned hearing the court must, when determining an appropriate sentence, have regard to the offender's behaviour during the period of deferral.[115] Similarly, where an offender contravenes a community corrections order, the court, when determining best practice to address the contravention in question, 'must take into account the extent to which the offender has complied with the order.'[116]

A framework to achieve this outcome will now be proposed. Although it will be argued that the ideal method for implementation would be via a guideline judgement, given the traditional reluctance of Victorian courts to utilise guideline judgments,[117] alternative

[113] *Sentencing Act* s 1(a).
[114] Ibid s 83A(1A).
[115] Ibid s 83A(3)(a). Also see Freiberg, above n 68, 196-197.
[116] *Sentencing Act* s 83AS(2).
[117] However, see *Boulton v The Queen* [2014] VSCA 342 (22 December 2014); Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child under 12* (2016, Sentencing Advisory Council) 17, 63; and Sentencing Advisory Council, *Sentencing Guidance in Victoria Report* (2016, Sentencing Advisory Council) Chapter 6: An Enhanced Guideline Judgment Scheme, 129.

avenues for the incorporation of the proposed framework into current sentencing principles will also be examined.

V PROPOSED FRAMEWORK

In accepting the mitigating effect that an accused's compliance with bail conditions can have on his or her sentence, the question arises as to when and how a sentencing judge should recognise this relationship. Since it has been demonstrated that the sentencing purpose of rehabilitation and principle of proportionality are directly affected, it would be impractical to suggest that compliance with bail conditions should be considered in all instances. For this reason, the proposed framework will focus on the recognition of bail conditions as relevant to the sentencing principles of rehabilitation and 'just punishment'.

A *General Recognition of Bail Conditions as Relevant to Sentence*

First, to avoid doubt, it is suggested that the courts expressly recognise that compliance with bail conditions may be considered as a mitigating factor during an accused's sentencing; specifically, that they may impact on the sentencing principles of proportionality and/or rehabilitation.[118] For example, in the context of just punishment, Martin CJ of the Northern Territory Court of Appeal stated in *Pappin v R*[119] that '[i]f, by reason of restrictive bail conditions, the liberty of an offender has been … curtailed … the sentencing court is to take that fact into account.'[120]

[118] See for example, *R v Cartwright* (1989) 17 NSWLR 243; *R v Dennis* (unrep, 14/12/92, NSWCCA); *R v Williams* (unrep, 05/08/93, NSWCCA); *R v Kahamas* (1999) 108 A Crim R 499; *R v Fowler* (2003) 151 A Crim R 166.

[119] [2005] NTCCA 2.

[120] Ibid [18]. Also see *R v Silver & Or* [2006] VSC 154 [130] (Nettle JA).

B *Rehabilitation and Bail Conditions*

A number of the Victorian cases discussed above provide a potential framework for the recognition of bail conditions as relevant to the sentencing objective of rehabilitation. For example, in *R v Pullin & Lebeter*[121] the Court of Appeal accepted the general proposition that an accused's observance of bail conditions *could* be considered as a mitigatory factor that can be taken into account in sentencing, compliance with strict bail conditions being indicative of sound prospects of rehabilitation.[122] In this sense, the bail conditions are evidence of rehabilitative prospects, which may then be factored into the traditional sentencing process.

C *Proportionality and Bail Conditions*

In the context of proportionality, it is suggested that where an accused is required to comply with 'onerous' or 'stringent' bail conditions, there may be a general principle that credits him or her with an appropriate sentencing 'discount'.[123] For example, in the South Australian case of *R v Nguyen*[124] it was held that:

> these matters [bail conditions] should have been drawn to the attention of the sentencing Judge, and … had some bearing on the determination of the sentence. The extent of credit will vary according to the circumstance, but for someone who had no paid employment and who was attempting to bring up very young children with little family support, it was a severe limitation for the fifteen month period.[125]

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121 *R v Pullin & Lebeter* [2003] VSCA 141.

122 Ibid [24] (Charles and Chernov JJA and Ashley AJA). Also see *R v Gany* [2006] VCC 118.

123 See, for example, *R v Campbell* [1999] NSWCCA 76; *R v Eastway* (unrep, 19 May 1992, NSWCCA).

124 [2004] SASC 405.

125 Ibid [38] (Bleby J).

A 'threshold' test for what constitutes 'onerous' or 'stringent' bail conditions may be found in the judgment of Martin CJ in *Pappin v R*: 'if the nature of the curtailment of liberty and the period of that curtailment demonstrate that … the offender has already suffered a penalty of significance.'[126] However, once a determination has been made that the bail conditions were sufficiently onerous, the actual quantum of the sentencing discount to be applied is appropriately within the discretion of the sentencing judge. A helpful analysis of this process is found in the Ontario Court of Appeal's decision in *R v Downes.*[127]

In Canada, the practice of recognising the mitigatory role that a defendant's compliance with 'onerous' or 'stringent' bail conditions can play during sentencing is well established.[128] In *R v Downes*, the defendant had been found guilty of three counts of forcible confinement, two counts of assault, one count of criminal harassment and one count of threatening to kill.[129] The charges arose out of a series of violent offences against the defendant's former girlfriend, between the dates of 18 March 2003, and 12 October 2003. At trial, Downes' compliance with the following bail conditions was discussed: residing with his surety, abstaining from communicating with the complainant and the Crown witnesses; not attending the complainant's home or residence; and observing a curfew and remaining at the house at all times except in the company of his surety.[130] This last condition was described by the Ontario Court of Appeal as amounting 'to house arrest but … contained no exemption for medical necessities, employment and attendance for religious worship.'[131]

At first instance, the defendant's compliance with his bail conditions was not considered as a mitigating factor during his

[126] [2005] NTCCA 2, [18] (Martin CJ).
[127] [2006] 79 O.R (3d) 321.
[128] See Gary Trotter, *The Law of Bail in Canada* (3rd ed) (Carswell, 2012) [9-2]; *R v Rezaie* (1996), 31 O.R (3d) 713 at [25].
[129] *R v Downes* [2006] 79 O.R (3d) 321, [2] – [5] (Rosenberg JA).
[130] Ibid.
[131] Ibid [10].

sentencing. Rather, the trial judge emphasised the defendant's mental health, his lack of remorse and the need for denunciation and deterrence in similar cases. The trial judge imposed a cumulative sentence of 21 months' imprisonment.[132]

However, on appeal, counsel for Downes submitted that the trial judge erred in principle by failing to afford the defendant any credit for the time spent on conditional bail. According to counsel, the suggested amount of credit ought to have amounted to between nine and twelve months of the eighteen months spent on restrictive bail.[133]

On the relationship between restrictive bail conditions and sentencing, the Court held that '[t]ime spent under stringent bail conditions…must be taken into account as a relevant mitigating circumstance. However, like any potential mitigating circumstance, there will be variations in its potential impact on the sentence, and the circumstances may dictate that little or no credit should be given for pre-trial house arrest.'[134] According to the Court, these circumstances can include the 'length of time spent on bail …. the stringency of the conditions; the impact on the offender's liberty; the ability of the offender to carry on normal relationships, employment and activity'.[135] Further, the Court of Appeal held that where submissions are made by the defendant's counsel to consider bail conditions as a mitigating factor, the onus is on the defendant, on the balance of probabilities, to provide the court with information as to the impact of the conditions.[136]

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[132] *R v Downes* [2006] 79 O.R (3d) 321, [14] – [15] (Rosenberg JA).
[133] Ibid [19] – [22].
[134] Ibid.
[135] Ibid [36].
[136] *Criminal Code* (Can) s 724(3).

D *Implementation*

Having indicated some suggestions as to how bail conditions may be considered during the sentencing process, this next part will seek to provide mechanisms for the incorporation of such a framework into the current Victorian sentencing process.

1 *Guideline Judgments*

Since 2004, the Victorian Court of Appeal has had statutory powers to develop guideline judgments.[137] A guideline judgment is defined under s 6AA of the *Sentencing Act* as a 'judgment that is expressed to contain guidelines to be taken into account by courts in sentencing offenders'.[138] Section 6AC of that Act provides that a guideline judgement may set out:

> (a) criteria to be applied in selecting among various sentencing alternatives;
> (b) the weight to be given to the various purposes specified in section 5(1) for which a sentence may be imposed;
> (c) the criteria by which a sentencing court is to determine the gravity of an offence
> (d) the criteria which a sentencing court may use to reduce the sentence for an offence;
> (e) the weighting to be given to the relevant criteria;
> (f) any other matter consistent with the principles contained in the Act[139]

The aim of guideline judgments is to ensure consistent approaches to sentencing and, as an indirect consequence, increase public confidence in the sentencing system.[140] Although they have been

[137] *Sentencing (Amendment) Act 2004* (Vic).
[138] *Sentencing Act 1991* (Vic) s 6AA.
[139] Ibid s 6AC.
[140] Victoria, *Parliamentary Debates*, Legislative Assembly, 20 March 2003, 479 (Robert Hulls, Attorney-General)

found to achieve these goals in NSW,[141] the Victorian Court of Appeal has until recently apparently been reluctant to provide such judgments, the first being issued in 2014.[142] Notwithstanding the Court's apparent reticence, it is suggested that such a judgment would provide a necessary summary of the relevant authorities, and a guide for effectively putting into practice the above principles regarding the relationship between bail conditions and sentencing.

2 *Legislative Reform*

In the absence of a guideline judgment, an alternative avenue for the incorporation of the above framework into current sentencing practices could be through an amendment to the *Sentencing Act*. For example, section 5(2), which outlines the factors to which a court must or most not have regard to in determining an appropriate sentence, could be amended as follows:

- (2H) In sentencing an offender, a court may have regard to the extent to which the offender has complied with bail conditions imposed under section 5 of the *Bail Act 1977* (Vic) as evidence of the offender's prospects of rehabilitation.
- (2I) For the purpose of imposing a sentence which is just in all the circumstances, a court may have regard to the nature of bail conditions imposed, including the period of bail, the stringency of the conditions, and the impact on

[141] Ibid. See also Beth Crilly, 'Guideline Judgements in Victoria: An Examination of the Issues' (2005) 31 *Monash University Law Review* 37.

[142] *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342. See, Lorana Bartels, 'Sentencing Review 2014-2015' (2015) 39 *Criminal Law Journal* 326, 326-350; Sarah Krasnostein, 'Boulton v The Queen: The Resurrection of Guideline Judgements in Australia?' (2015) 27 *Current Issues in Criminal Justice* 41.

> the offender's liberty, including their ability to carry on normal relationships, employment and activity.[143]

3 *Sentencing Reform and Educational Bodies*

In the absence of, or in addition to, such reforms, the potential relevance of bail conditions as a mitigating sentencing factor could be promoted by bodies such as the Victorian Sentencing Advisory Council ('VSAC') or the Judicial College of Victoria ('JCV'). It is suggested that through the VSAC and the JCV, the proposed framework could be circulated among members of the judiciary and, where necessary, relevant educational/professional development programs be established.

Created in 2004,[144] the VSAC is responsible for linking the community, courts and state government through informing, educating and providing recommendations on sentencing issues.[145]Although the VSAC does not have powers to implement recommendations, it is an ideal agent for publishing relevant discussion papers or reviews. Doing so would create awareness of the potential mitigating relationship between bail conditions and sentencing. Further, the VSAC may hold information sessions in an attempt to generate more discussion of the issue.

Operating since 2002,[146] the JCV is an educational institution that provides members of the judiciary with professional development.[147] Its primary role is to enhance judicial knowledge through the provision of appropriate programs and resources that focus on

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[143] Consistent with sentencing practice, the onus of establishing the impact of compliance with bail conditions is on the accused to make out on the balance of probabilities: Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria*, (Lawbook Co, 3rd ed, 2014) Chapter 5.

[144] *Sentencing Act 1991* (Vic) Part 9A.

[145] *Sentencing Act 1991* (Vic) s 108C.

[146] Established pursuant to the *Judicial College of Victoria Act 2001* (Vic).

[147] Ibid s 1.

developments in both the substantive and procedural areas of law.[148] For this reason it is suggested that, in addition to a relevant publication by the VSAC, the JCV could develop and conduct related professional development/educational programs. This would create an opportunity for members of the judiciary to consider the suitability of the suggested framework.[149] This could also include relevant cases being incorporated into the Victorian Sentencing Manual,[150] which provides guidance on interpreting and assessing the weight of factors that are relevant to sentencing, and offers a summary of case law which is to be used as an aid during the sentencing process. This would, at the very least, provide members of the judiciary with an illustration of the value of considering such conditions during the sentencing process, and would also be useful promoting the adoption of a consistent framework.

VI CONCLUSION

This article has sought to establish that despite the different aims of bail and sentencing laws, a defendant's compliance with bail conditions may have a mitigating influence on his or her sentence. Certain conditions of bail require the defendant to undertake some form of rehabilitation in an attempt to prevent re-offending. Alternatively, conditional bail may be characterised as onerous because of a significant restriction on a defendant's liberty. In such circumstances, it is argued that a defendant's time spent on bail may have a mitigatory effect on the sentencing principles of rehabilitation and proportionality.

The analysis of relevant judicial authorities has demonstrated that a lack of guidance produces inconsistent results and unpredictable

[148] Ibid s 5(1).
[149] Ibid s 5.
[150] Judicial College of Victoria, *Victorian Sentencing Manual* (2005) <http://www.justice.vic.gov.au/emanuals/VSM/default.htm>.

outcomes. For this reason, a framework has been proposed, and several avenues for the incorporation of such a framework into current sentencing practices have been discussed. In doing so, it is hoped that the proposed framework will become an integral part of the sentencing process, so that in appropriate cases due credit may be given for a defendant's efforts at rehabilitation and/or compliance with onerous restrictions on his or her liberty.