

OFFENDERS RISKING DEPORTATION DESERVE A SENTENCING DISCOUNT — BUT THE REDUCTION SHOULD BE PROVISIONAL

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Offenders who are not Australian citizens and are imprisoned for one year or more risk being deported at the expiration of their sentence. There is considerable divergence across Australia regarding the impact that this should have in the sentencing of offenders. In Victoria, Queensland and the Australian Capital Territory, the risk of deportation can mitigate penalty, but in New South Wales, Western Australia and the Northern Territory, courts have refused to follow this position. The law relating to the connection between the risk of deportation and sentencing is unclear in South Australia and Tasmania. This article analyses the role that the prospect of deportation should have in the sentencing calculus, with a view to harmonising this area of the law. We conclude that deportation at the expiration of an offender's sentence is a hardship and hence should mitigate the sentence imposed by the court. The decision whether or not to deport offenders is, however, generally not known until after the sentence is imposed. This necessarily introduces a degree of uncertainty into the sentencing process. This speculation can be ameliorated by rescinding the discounted portion of the sentence in circumstances where the offender is not ultimately deported at the completion of the sentence. This is consistent with the approach taken to another speculative mitigating factor, namely a promise by offenders to assist authorities. Implementing this framework in relation to offenders who are at risk of being removed from Australia at the expiration of their sentence would enhance the coherency and doctrinal soundness of this area of the law.

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I INTRODUCTION

Offenders who are not Australian citizens or permanent residents can be deported if they fail a ‘character test’.¹ There are a number of circumstances which can result in a person failing to meet the character test, including if they are sentenced to a term of imprisonment of one year or more.² Thus, the sentencing of an offender can trigger a visa cancellation, which ultimately leads to the offender being removed from Australia. The decision about whether an offender will actually have their visa cancelled is made by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs or their delegate.³ Offenders who are deported at the expiration of their sentence may experience a greater hardship than offenders who resume life back in the Australian community when they are released from prison.⁴ Hence, courts in some Australian jurisdictions have held that deportation can be a mitigating sentencing consideration.⁵

However, the decision regarding whether an offender will be deported is made after the sentencing determination. Thus, sentencing courts are required to speculate whether offenders will be removed from Australia once their sentence is completed. This requires judges to engage in a complex decision-making process. Not surprisingly, a considerable divergence has occurred across Australian jurisdictions regarding whether the risk of deportation should impact on the severity of the sanctions that are imposed on offenders.

There is no settled position regarding the role that the risk of deportation has in the sentencing of offenders. Appellate courts in Victoria, the Australian Capital Territory and Queensland have held that the risk of deportation can

¹ *Migration Act 1958* (Cth) s 501 (*‘Migration Act’*).

² *Ibid* ss 501(6)(a), (7)(c). See also below Part II(B) (discussing s 501(2)).

³ *Migration Act* (n 1) ss 496(1), 501(2).

⁴ See below Parts III(B)(2), IV(A).

⁵ See, eg, *Guden v The Queen* (2010) 28 VR 288, 294–5 [25]–[27] (Maxwell P, Bongiorno JA and Beach AJA) (*‘Guden’*); *R v Aniezue* [2016] ACTSC 82, [65]–[67] (Refshauge J) (*‘Aniezue’*); *R v Mohamed* [2016] VSC 581, [48] (Lasry J).

mitigate penalty.⁶ The contrary position has been taken in New South Wales, the Northern Territory and Western Australia.⁷ The position in Tasmania and South Australia is not settled.⁸ The inconsistency in approach is undesirable and in fact untenable from the rule of law perspective.⁹ The common law in Australia is supposedly uniform and should apply consistently throughout Australia.¹⁰ Whether an offender receives a discount on account of the risk of deportation should not be contingent upon the happenstance of which jurisdiction they happen to be sentenced in.

Part of the reason why a divergence of approach exists relating to the impact that the risk of deportation should have in sentencing is that courts have not engaged in considered jurisprudential analysis of the role that this consideration should have in the context of the objectives of sentencing.¹¹ Further, the issue has not been considered at length by scholars.

In this article, we analyse the manner in which the risk of deportation should be factored into the sentencing calculus, with a view to providing a coherent framework for this area of the law. The analysis is grounded in an assessment of mitigating factors and the principle of proportionality. Deportation in the sentencing context is directly linked to the crime for which offenders are punished.¹² We contend that offenders who are deported at the end of their sentence generally experience greater hardship than offenders who resume life in the Australian community once their prison term has been served.¹³ Accordingly, we suggest that the risk of deportation should normally mitigate the sentence.

The problem with this approach is that, as noted above, courts at the time of sentencing are not certain that an offender will be deported after their sentence. Offenders who receive a reduced sanction on account of the risk of deportation, but are not ultimately removed from the country, receive an

⁶ See below nn 48–60.

⁷ See below nn 61–68.

⁸ See below nn 69–72.

⁹ For discussion regarding the need for consistency and certainty in the law, see generally Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) ch 11; John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 270–3.

¹⁰ For a recent statement of this in the criminal law context, see *R v Falzon* (2018) 92 ALJR 701, 712 [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

¹¹ See below Part II(C).

¹² It is not jurisprudentially relevant that the deportation is not ordered by the sentencing court: see below Part II(C)(1).

¹³ See below Parts IV(A)–(B).

unwarranted benefit. The ideal solution is to remove the speculation associated with whether an offender will be deported at the end of their sentence. This can be done by adopting a similar framework to that adopted for another mitigating factor that also involves a degree of uncertainty at the time of sentencing — cooperation with authorities.

Defendants who undertake to cooperate with authorities and give evidence against other offenders receive a sentencing discount.¹⁴ The discount is normally quantified,¹⁵ and if an offender does not fulfil the undertaking, the discounted portion of the sentence is retracted.¹⁶ The same methodology should be applied in relation to offenders who are at risk of deportation. Thus, when an offender is at risk of being deported, courts should stipulate the size of the sentencing discount being accorded. This should be rescinded if deportation does not occur. This approach requires a degree of coordination between prosecution authorities and the Minister, but it is a relatively straightforward system to implement — certainly, it is no more complex than the protocols between prosecution officials and police relating to offenders who promise to assist the police.

In the next part of this article, we examine the existing law relating to the connection between the risk of deportation and sentencing, and explore the different approaches that exist in the respective Australian jurisdictions. This is followed in Part III by an evaluation of the role that the risk of deportation should have in the sentencing of offenders from the perspective of coherency with other relevant mitigating factors, and against the backdrop of the principle of proportionality. In Part IV, we make reform recommendations for how the prospect of deportation should be dealt with in the sentencing calculus. The reform proposals are summarised in the concluding remarks.

II ANALYSIS OF EXISTING LAW

Prior to examining the role of the risk of deportation in sentencing, we provide a brief overview of the sentencing legal landscape, and the circumstances in which offenders can have their visas cancelled.

¹⁴ See below Part IV(C).

¹⁵ *Ibid.*

¹⁶ See below n 163–4 and accompanying text.

A Overview of the Sentencing Legal Landscape

Sentencing law in Australia is a combination of statute and common law. Although each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout Australia. The key sentencing objectives are set out in the main sentencing statutes in each of the nine jurisdictions (ie the six states, two territories, and the federal jurisdiction).¹⁷ They consist of: community protection (which is most commonly pursued by incapacitation);¹⁸ rehabilitation;¹⁹ retribution;²⁰ specific or general deterrence;²¹ and denunciation.²² The nature and severity of the punishment imposed by the courts is principally determined by the principle of proportionality, which provides that the seriousness of the crime should be matched by the hardship imposed by the sanction.²³

In arriving at a sentence, 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 schemes in two jurisdictions — the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Penalties and Sentences Act 1992* (Qld) —

¹⁷ *Crimes Act 1914* (Cth) ss 16A(1)–(2) ('*Crimes Act*'); *Crimes (Sentencing) Act 2005* (ACT) s 7(1) ('*ACT Sentencing Act*'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*NSW Sentencing Act*'); *Sentencing Act 1995* (NT) s 5(1) ('*NT Sentencing Act*'); *Penalties and Sentences Act 1992* (Qld) s 9 ('*Qld Sentencing Act*'); *Sentencing Act 2017* (SA) ss 3–4 ('*SA Sentencing Act*'); *Sentencing Act 1997* (Tas) ss 3(b), (e) ('*Tas Sentencing Act*'); *Sentencing Act 1991* (Vic) s 5(1) ('*Vic Sentencing Act*'); *Sentencing Act 1995* (WA) s 6 ('*WA Sentencing Act*').

¹⁸ *ACT Sentencing Act* (n 17) s 7(1)(c); *NSW Sentencing Act* (n 17) s 3A(c); *NT Sentencing Act* (n 17) s 5(1)(e); *Qld Sentencing Act* (n 17) s 9(1)(e); *SA Sentencing Act* (n 17) s 3; *Tas Sentencing Act* (n 17) s 3(b); *Vic Sentencing Act* (n 17) s 5(1)(e); *WA Sentencing Act* (n 17) s 6(4)(b).

¹⁹ *Crimes Act* (n 17) s 16A(2)(n); *ACT Sentencing Act* (n 17) s 7(1)(d); *NSW Sentencing Act* (n 17) s 3A(d); *NT Sentencing Act* (n 17) s 5(1)(b); *Qld Sentencing Act* (n 17) s 9(1)(b); *SA Sentencing Act* (n 17) s 4(1)(e); *Tas Sentencing Act* (n 17) s 3(e)(ii); *Vic Sentencing Act* (n 17) s 5(1)(c).

²⁰ *Crimes Act* (n 17) s 16A(2)(k); *ACT Sentencing Act* (n 17) s 7(1)(a); *NSW Sentencing Act* (n 17) s 3A(a); *NT Sentencing Act* (n 17) s 5(1)(a); *Qld Sentencing Act* (n 17) s 9(1)(a); *SA Sentencing Act* (n 17) s 4(1)(a); *Vic Sentencing Act* (n 17) s 5(1)(a).

²¹ *Crimes Act* (n 17) ss 16A(2)(j)–(ja); *ACT Sentencing Act* (n 17) s 7(1)(b); *NSW Sentencing Act* (n 17) s 3A(b); *NT Sentencing Act* (n 17) s 5(1)(c); *Qld Sentencing Act* (n 17) s 9(1)(c); *SA Sentencing Act* (n 17) s 4(1)(d); *Tas Sentencing Act* (n 17) s 3(e)(i); *Vic Sentencing Act* (n 17) s 5(1)(b). See also *WA Sentencing Act* (n 17) s 90(3).

²² *ACT Sentencing Act* (n 17) s 7(1)(f); *NSW Sentencing Act* (n 17) s 3A(f); *NT Sentencing Act* (n 17) s 5(1)(d); *Qld Sentencing Act* (n 17) s 9(1)(d); *SA Sentencing Act* (n 17) s 4(1)(b); *Tas Sentencing Act* (n 17) s 3(e)(iii); *Vic Sentencing Act* (n 17) s 5(1)(d).

²³ See below Part III(B).

each set out around 30 aggravating and mitigating considerations,²⁴ whereas the sentencing statutes in the other jurisdictions identify a smaller number of such factors.²⁵ 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.²⁶ There are in fact more than 200 mitigating and aggravating factors in sentencing law.²⁷ The role of deportation in the sentencing decision-making process is not set out in any statutory provision and hence is governed by the common law, which is supposed to operate in a uniform manner throughout Australia.²⁸

The reasoning process by which sentencing decisions are made is known as the ‘instinctive synthesis.’²⁹ This requires judges to identify all of the factors that are applicable to a particular sentence, and then set a penalty.³⁰ However, in doing so, courts are not permitted to set out with particularity the precise

²⁴ *NSW Sentencing Act* (n 17) ss 21A, 24; *Qld Sentencing Act* (n 17) pt 2.

²⁵ The Commonwealth, Australian Capital Territory, Northern Territory and South Australia still have a relatively large number of factors: see *Crimes Act* (n 17) s 16A; *ACT Sentencing Act* (n 17) s 33; *NT Sentencing Act* (n 17) ss 5–6A; *SA Sentencing Act* (n 17) s 11. Tasmania, Victoria and Western Australia have a smaller number of factors: see *Tas Sentencing Act* (n 17) ss 9, 11A–11B; *Vic Sentencing Act* (n 17) s 5(2); *WA Sentencing Act* (n 17) ss 7–8.

²⁶ See, eg, *Bui v DPP (Cth)* (2012) 244 CLR 638, 651 [18] (French CJ, Gummow, Hayne, Kiefel and Bell JJ), with particular reference to the federal sentencing regime.

²⁷ Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) identified 229 distinct mitigating factors: at 55; while Legal Studies Department, Latrobe University, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (Occasional Monograph No 1, 1980), in a study of Victorian Magistrates' Courts, identified 292 factors plead in mitigation: at 62. For a detailed overview of the operation of mitigating and aggravating factors, see Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Longueville Media, 3rd ed, 2015) ch 4. For an overview of mitigating factors, see also Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4.

²⁸ See above n 10 and accompanying text.

²⁹ See *R v Williscroft* [1975] VR 292, 300 (Adam and Crockett JJ) (*'Williscroft'*); *Barbaro v The Queen* (2014) 253 CLR 58, 74 [41] (French CJ, Hayne, Kiefel and Bell JJ) (*'Barbaro'*). See also Chief Justice 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) 6–8.

³⁰ *Markarian v The Queen* (2005) 228 CLR 357, 373 [37] (Gleeson CJ, Gummow, Hayne and Callinan JJ), 378 [51] (McHugh J) (*'Markarian'*); *Wong v The Queen* (2001) 207 CLR 584, 611 [75] (Gaudron, Gummow and Hayne JJ); *Barbaro* (n 29) 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

weight that has been conferred on any particular sentencing factor.³¹ Thus, when sentencing courts state that they have taken a mitigating or aggravating factor into account, it is generally not possible to quantify to what extent that factor has actually influenced their decision.³² Hence, when courts do state that the prospect of deportation has been taken into account as a mitigating factor, it is not possible to ascertain the exact extent to which this has ultimately influenced the sentence.

B Overview of Circumstances where Offenders Can Be Deported

1 Non-Citizens with Substantial Criminal Record Risk Deportation

The relevant statutory provisions which deal with deportation are found in the *Migration Act 1958* (Cth) ('*Migration Act*'). Section 501 gives the Minister the power to cancel visas of people who are not Australian citizens if they do not pass the 'character test'. The character test is defined in s 501(6), which sets out a number of situations in which the Minister *may* cancel a visa, including if the Minister reasonably suspects that the person has been involved in conduct constituting a number of offences, such as people smuggling, or if there is a risk that the person would engage in criminal conduct in Australia.³³ The most relevant aspects of s 501 for the purposes of this article are the provisions dealing with mandatory visa cancellation, given that these are most commonly triggered when offenders are sentenced.³⁴

Section 501(3A)(a)(i) provides that the Minister *must* cancel a visa of a person who fails the character test because they have a relevant 'substantial criminal record'.³⁵ A 'substantial criminal record' is defined in s 501(7) as follows (noting that only sub-ss (1)–(3) are relevant for the purposes of s 501(3A)(a)(i)):

For the purposes of the character test, a person has a *substantial criminal record* if:

- (a) the person has been sentenced to death; or

³¹ *Pesa v The Queen* [2012] VSCA 109, [10] (Maxwell ACJ and Hansen JA); *Barbaro* (n 29) 72 [34] (French CJ, Hayne, Kiefel and Bell JJ).

³² The only two exceptions are pleading guilty and cooperating with authorities. These are discussed further below in Part IV(C) in the reform recommendation section of this article.

³³ *Migration Act* (n 1) ss 501(2)–(3) (powers of cancellation), (6)(ba)(i) (people smuggling), (d)(i) (criminal conduct).

³⁴ For the sake of clarity, this is the key cancellation pathway which is the focus of this article.

³⁵ *Migration Act* (n 1) s 501(3A)(a)(i).

- (b) the person has been sentenced to imprisonment for life; or
- (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
- (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
- (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
- (f) the person has:
 - (i) been found by a court to not be fit to plead, in relation to an offence; and
 - (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
 - (iii) as a result, the person has been detained in a facility or institution.

Although this provision is ostensibly drafted in mandatory terms, the Minister has a power to revoke the cancellation of a visa.³⁶ A person who has their visa cancelled on character grounds can seek to have that decision revoked pursuant to s 501CA, which provides:

- (1) This section applies if the Minister makes a decision (the *original decision*) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

...

- (4) The Minister may revoke the original decision if:
 - (a) the person makes representations in accordance with the invitation; and
 - (b) the Minister is satisfied:
 - (i) that the person passes the character test (as defined by section 501); or
 - (ii) that there is another reason why the original decision should be revoked.
- (5) If the Minister revokes the original decision, the original decision is taken not to have been made.

³⁶ Ibid s 501CA.

The effect of these provisions is summarised by the Victorian Court of Appeal in *Konamala v The Queen*³⁷ in the following terms:

Thus, the practical effect of the key provisions of the Act (in its current form) is that the Minister *must* cancel the visa of a person sentenced to (and serving) a sentence of imprisonment of 12 months or more. Any decision thus made to cancel a visa then stands, unless the Minister later is satisfied that there is a reason why the original decision to cancel the visa should be revoked.³⁸

2 *Not Tenable to Anticipate at Sentencing if Visa Cancellation Will Be Revoked*

The key provision in s 501CA of the *Migration Act* is sub-s (4)(b)(ii), because it is the pathway most readily invoked in order to attempt to revoke a visa cancellation. There are a range of considerations that can influence the decision about whether a visa cancellation should be revoked, including: the offender's level of integration within Australia (including family, work and business matters); the exact nature of the relevant offence; the offender's general character and conduct after the offence; the offender's health; and the length of time the offender has lived in Australia.³⁹ Importantly, these considerations are not closed.⁴⁰ There is a body of case law relating to the criteria relevant to the cancellation of visas.⁴¹ Sentencing courts have not addressed this area of law in any detail. Thus, when judges sentence non-citizens to sanctions which trigger a visa cancellation, they do not examine the offender's personal and other circumstances in an attempt to anticipate whether the offender has a tenable basis for revoking the cancellation of their visa. Presumably, the reason for this is that given the large number of variables that can influence a decision regarding whether to revoke a visa cancellation, it would be futile to attempt to determine with any degree of precision at the time of sentencing whether an offender who fails the character test will ultimately be successful in having the visa revocation rescinded.

³⁷ [2016] VSCA 48 ('*Konamala*').

³⁸ *Ibid* [32] (Maxwell P, Redlich and Priest JJA) (emphasis in original).

³⁹ See, eg, *Timu v Minister for Immigration and Border Protection* [2018] FCAFC 161; *Rodchompoo v Minister for Home Affairs* [2018] FCAFC 215.

⁴⁰ See, eg, *Hooton v Minister for Home Affairs* [2018] FCAFC 142 ('*Hooton*') (in the context of obligations arising from placement on a child sex offender register); *Minister for Immigration and Border Protection v DRP17* [2018] FCAFC 198 (in the context of non-refoulement considerations).

⁴¹ See, eg, *Hooton* (n 40).

It is also pertinent to note that the abovementioned provisions were enacted in 2014.⁴² Prior to that time, a different regime existed relating to cancelling visas on character grounds. The main point of difference was that pursuant to the earlier provisions, the Minister's power to cancel a visa where a person had a relevant substantial criminal record was discretionary.⁴³ Thus, there was no automatic cancellation in these circumstances. For the purposes of sentencing law, it has been held that the change is not material. In *Da Costa v The Queen*,⁴⁴ the Victorian Court of Appeal stated:

Now, as previously, the offender knows that he is at real risk of deportation because of his conviction of the criminal offence. Now, as previously, he must live with the uncertainty surrounding what will be a discretionary decision by the Minister. Previously, the relevant discretion related to cancellation of the visa. Now, the discretion relates to revocation of the cancellation decision. ... It is neither necessary nor appropriate for the Court to investigate whether, in practice, the process will be different. We assume that, under the former provisions, when the Minister was considering whether to cancel a visa, submissions were made on behalf of the offender that no such decision should be made. It must be assumed that, in the future, an application for revocation as a cancellation (assuming the provisions do not change again in the meantime) will be supported by the very same considerations as would hitherto have supported a submission that no cancellation decision should be made.⁴⁵

3 *Summary of Relevant Deportation Provisions for Sentencing Purposes*

The telling point for the purposes of this article, in relation to visa cancellations and sentencing, is that offenders who are not Australian citizens at the time of sentencing will automatically have their visas cancelled if the sentence causes them to acquire a relevant substantial criminal record. This will result in them being deported at the expiration of their sentence unless the visa cancellation is revoked. At the time of sentencing, it is not possible to anticipate with any degree of certainty the likelihood that the visa cancellation will be revoked. Thus, for the purposes of this article, a careful summary of the law

⁴² *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1 items 8, 18. See also *Kristensen v The Queen* [2018] NSWCCA 189, [31] (Payne JA) ('*Kristensen*').

⁴³ *Migration Act* (n 1) ss 501(2)–(3), (6)(a), (7), as at 12 November 2014.

⁴⁴ (2016) 307 FLR 153.

⁴⁵ *Ibid* 163 [42]–[43] (Maxwell P, Redlich and Priest JJA). The same point was reiterated by the Court in another decision decided on the same day: *Konamala* (n 37) [36] (Maxwell P, Redlich and Priest JJA).

relating to visa cancellations on character grounds is not productive. The uncertainty regarding visa cancellation outcomes is exacerbated by the fact that if the Minister does not revoke such a decision, the person can apply to the Administrative Appeals Tribunal for a merits review of the decision.⁴⁶ Following this, judicial review to the Federal Court and the High Court is also available.⁴⁷

*C The Unsettled and Contradictory Existing Law relating to the
Connection between Sentencing and Deportation*

1 Deportation Risk Mitigates Only in Victoria, Queensland and the Australian Capital Territory

A clear divergence of views exists regarding the threshold issue of whether the risk of deportation can influence the sentence imposed by a court. The matter has been considered most frequently by the Victorian Court of Appeal, which has consistently held that the risk of deportation can mitigate penalty.⁴⁸ The leading Victorian authority on the matter is *Guden v The Queen* ('*Guden*'),⁴⁹ where the Court of Appeal held:

In our view, authority does not require, and there is no sentencing principle which would justify, a conclusion that the prospect of an offender's deportation is an irrelevant consideration in the sentencing process. As a matter of principle, the converse must be true. Like so many other factors personal to an offender which conventionally fall for consideration, the prospect of deportation is a factor which may bear on the impact which a sentence of imprisonment will have on the offender, both during the currency of the incarceration and upon his/her release.⁵⁰

⁴⁶ *Migration Act* (n 1) s 500(1)(ba).

⁴⁷ See generally *ibid* pt 8 div 2.

⁴⁸ See, eg, *Valayamkandathil v The Queen* [2010] VSCA 260, [26]–[28] (Neave JA, Buchanan JA agreeing at [44]); *DPP (Vic) v Yildirim* [2011] VSCA 219, [26]–[31] (Warren CJ, Buchanan JA agreeing at [34], Sifris AJA agreeing at [35]); *DPP (Cth) v Peng* [2014] VSCA 128, [21]–[25] (Nettle and Redlich JJA, Priest JA agreeing at [42]); *Tan v The Queen* (2011) 35 VR 109, 141 [128] (Redlich JA, Neave JA agreeing at 112 [1], Lasry AJA agreeing at 146 [154]); *Darcie v The Queen* [2012] VSCA 11, [31]–[45] (Williams AJA, Buchanan JA agreeing at [1]); *Konamala* (n 37) [35]–[36] (Maxwell P, Redlich and Priest JJA); *Schneider v The Queen* [2016] VSCA 76, [21]–[26] (Priest JA, Coghlan JA agreeing at [50], Kyrou JA agreeing at [51]).

⁴⁹ *Guden* (n 5).

⁵⁰ *Ibid* 294 [25] (Maxwell P, Bongiorno JA and Beach AJA).

The same position is taken in Queensland⁵¹ and the Australian Capital Territory.⁵² However, even in jurisdictions where the prospect of deportation can reduce penalty severity, at times the courts have said that, in order for this to occur, some threshold matters need to be established regarding the nature and impact of the risk of removal from Australia.⁵³ The Victorian Court of Appeal has stated that in order for a sentence reduction to be accorded, it is necessary either for the prosecution to concede that deportation may occur, or for the offender to establish the nature of the risk and that deportation would constitute a hardship to the offender.⁵⁴ Thus, the Court of Appeal in *Guden* stated:

That is, in the absence of evidence or an appropriate concession by the Crown, there will be no error in a judge declining to take into account the possibility of deportation. Indeed, in order properly to assess the weight to be given in any particular case to a risk of deportation, evidence would be required sufficient to permit a sensible quantification of that risk to be undertaken. It would also be necessary for a prisoner to demonstrate that deportation in his/her case would in fact be a hardship.⁵⁵

Similar sentiments were expressed more recently by the same Court in *Allouch v The Queen*,⁵⁶ where it was held that ‘a court should only reduce a sentence based upon the prospect of deportation where there is sufficient evidence of both the risk, and the impact of that risk, under s 501(3A) of the *Migration Act*.⁵⁷

Although courts have at times formally indicated that — for the risk of deportation to reduce sentence — it is necessary for the offender to adduce evidence of the nature of the risk and the impact of the deportation, these are not requirements that are applied in substance. Our examination of the relevant decisions shows that these considerations are not effective limitations to the application of this mitigating factor. Courts have not, even in the

⁵¹ See, eg, *R v UE* [2016] QCA 58, [13]–[16] (Philippides JA, Morrison JA agreeing at [1], North J agreeing at [37]); *R v Norris; Ex parte A-G (Qld)* [2018] 3 Qd R 420, 433 [38], 434 [41], [45] (Gotterson JA, Sofronoff P agreeing at 423 [1], Philippides JA agreeing at 435 [54]) (*‘Norris’*).

⁵² See, eg, *Aniezue* (n 5) [65]–[67] (Refshauge J).

⁵³ See, eg, *Guden* (n 5) 295 [29] (Maxwell P, Bongiorno JA and Beach AJA).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ [2018] VSCA 244.

⁵⁷ *Ibid* [40] (Beach and Weinberg JJA).

vaguest of terms, defined or calibrated the level of risk of deportation that needs to be reached before mitigation can occur. Moreover, given the large number of factors that can impact upon decisions regarding whether a visa cancellation should be revoked, it is not tenable for a sentencing court to meaningfully anticipate the ultimate outcome of a visa cancellation.⁵⁸ Thus, to the extent that there is a need for an offender to demonstrate that there is a risk of deportation before it can be an operative mitigating factor, in essence, the offender is merely required to establish that the likely sentence (eg imprisonment for one year or more) will trigger the substantial criminal record cancellation provisions.⁵⁹ Further, the case law also does not contain any meaningful discussion of what type of hardship flowing from deportation needs to be demonstrated in order for mitigation to occur. This requirement is also only a formal, as opposed to substantive, hurdle. However, as discussed below, both of these requirements should be relevant to mitigation based on the risk of deportation, and the manner in which they should operate is set out in the context of a coherent reform framework.⁶⁰

Courts in New South Wales have taken a contrary approach to those in Victoria, the Australian Capital Territory and Queensland regarding the relevance of the prospect of deportation to sentencing. In New South Wales, the risk of deportation is not a mitigating factor. The conflicting authorities regarding the relevance of deportation to the sentencing calculus were extensively dealt with in *Kristensen v The Queen*,⁶¹ where the Court of Criminal Appeal stated that, despite the 2014 changes to the *Migration Act*,⁶² the non-mitigating effect of the risk of deportation remains the position in New South Wales. The Court relevantly stated:

I see no reason based on the provisions of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) to adopt any different approach to sentencing in New South Wales. It remains the case that, as in *Mirzaee, Pham* and *AC*, the applicant here is at risk of deportation once released from prison. True it is that the statute now has an automatic application, subject to safeguards and ultimately to review. The possibility of deportation was not, in *Mirzaee, Pham* and *AC*, a relevant consideration on sentence, even in fixing the

⁵⁸ See above Part II(B)(2).

⁵⁹ Seemingly, the only decision where a court discussed (in some detail) the level of risk that must arise for deportation to mitigate penalty is *Aniezue* (n 5): at [65] (Refshauge J).

⁶⁰ See below Part IV.

⁶¹ *Kristensen* (n 42).

⁶² See above n 42 and accompanying text.

offender's non-parole period. Deportation was a live issue in cases such as the present under the migration law prior to 2014. After the amendment, deportation remains a matter for the Commonwealth Executive Government, subject to review within the Constitutional structure.⁶³

This is the same approach taken in Western Australia. In *Ponniah v The Queen*,⁶⁴ the Court of Appeal simply stated: 'In my opinion, the prospect of deportation is not a mitigating factor. Whether or not a person is deported is an executive decision.'⁶⁵ In *Hickling v Western Australia*,⁶⁶ the Court of Appeal undertook a more extensive analysis of the authorities throughout Australia, and after noting the considerable divergence of approach, stated:

[I]t is not apparent why, as a matter of principle, special mitigatory weight should be given to the effect which the 'prospect of deportation' may have on the impact which a sentence of imprisonment will have on the offender. Many offenders, if not every offender, sentenced to a term of imprisonment suffer uncertainty — even great uncertainty — in prison about matters such as whether their relationships will remain intact; their prospects of employment; whether they will have somewhere to live upon release and where that might be. For some, whether they will return home or back into the community or town in which they lived will be uncertain. These are regarded as matters which are unavoidable consequences of imprisonment and do not constitute mitigating circumstances. We are unable to see the qualitative difference between these factors and the prospect of deportation even under the new regime.⁶⁷

The position taken in New South Wales and Western Australia is also adopted in the Northern Territory.⁶⁸

The position in South Australia is unclear. There is authority for the proposition that deportation can mitigate,⁶⁹ and authority for the contrary posi-

⁶³ *Kristensen* (n 42) [34] (Payne JA, RA Hulme J agreeing at [41], Button J agreeing at [46]). See also *He v The Queen* [2016] NSWCCA 220, [23] (RA Hulme J, Meagher JA agreeing at [1], Harrison J agreeing at [2]).

⁶⁴ [2011] WASCA 105.

⁶⁵ *Ibid* [48] (Mazza J, Pullin JA agreeing at [1], Buss JA agreeing at [2]).

⁶⁶ (2016) 260 A Crim R 33 (Western Australian Court of Appeal) ('*Hickling*').

⁶⁷ *Ibid* 45 [60] (Mazza JA and Mitchell J) (citations omitted). See also at 36–7 [9]–[11] (McLure P).

⁶⁸ *R v MAH* (2005) 16 NTLR 150, 155 [41], [44] (Mildren J, Thomas J agreeing at 159 [61]–[62], Southwood J agreeing at 159 [63]), 160 [64] (Southwood J).

⁶⁹ *R v Zhang* (2017) 265 A Crim R 113, 135 [113] (Chivell AuJ, Kourakis CJ agreeing at 115 [1], Vanstone J agreeing at 115 [2]).

tion.⁷⁰ Most recently, the conflicting authorities have been noted by the South Australian Court of Criminal Appeal, but it has found it unnecessary to resolve the conflict given that no relevant case has occurred where the prospect of deportation has been more than merely speculative.⁷¹ The matter has only been briefly considered in Tasmania.⁷²

2 *No Guidance from the High Court or Scholarly Commentary regarding Deportation and Sentencing*

The issue of whether deportation should mitigate penalty has not been expressly considered by the High Court. The only occasion where the High Court has considered the prospect of deportation in the context of sentencing relates to whether an offender, who is a non-citizen and is likely to be deported upon release, should have a parole period set. In *R v Shrestha* ('*Shrestha*'),⁷³ it was held that a foreign offender who entered Australia in order to import drugs, and who would have left Australia after completing the crime, should have had a parole period set.⁷⁴ Deane, Dawson and Toohey JJ held that if a parole period was set, the offender's status as a non-citizen would obviously weigh on any decision to grant parole when the time for the decision arises, and other considerations would also be relevant, such as the offender's prospects of rehabilitation, and the welfare of the offender's children.⁷⁵ Moreover, Deane, Dawson and Toohey JJ noted that:

At the time when the Court of Criminal Appeal dealt with the matter ... it was simply impossible to say that the circumstances in the future would not be such as would, on balance, justify the respondent's release on parole. Nor was it a case in which it could be said that the requirements of justice — including punishment and deterrence — dictated that the respondent serve in custody the

⁷⁰ *R v Berlinsky* [2005] SASC 316, [27] (Doyle CJ, Bleby J agreeing at [41]). Cf at [66]–[69] (Gray J).

⁷¹ *R v Arrowsmith* (2018) 333 FLR 415, 420–2 [32]–[38] (Parker J, Vanstone J agreeing at 416 [1], Nicholson J agreeing at 416 [2]). See also *R v Leka* (2017) 267 A Crim R 432, 439 [29] (Stanley J, Peek J agreeing at 433 [1], Hinton J agreeing at 440 [37]).

⁷² *Taylor v The Queen* (2015) 26 Tas R 132, 145 [34] (Pearce J, Blow CJ agreeing at 135 [1], Wood J agreeing at 135 [2]).

⁷³ (1991) 173 CLR 48.

⁷⁴ *Ibid* 76–7 (Deane, Dawson and Toohey JJ).

⁷⁵ *Ibid* 76.

whole of the sentence imposed. That being so, it was appropriate that an order that the respondent be eligible for parole be made.⁷⁶

This position is now expressly set out in s 19AK of the *Crimes Act 1914* (Cth). However, it has been acknowledged that considerations relating to the setting of a non-parole period are different to those concerning whether the risk of deportation should mitigate penalty.⁷⁷ Hence, the decision in *Shrestha* does not provide guidance regarding the approach that should be taken to the role of deportation in setting the overall penalty, and we still await guidance from the High Court on the matter.⁷⁸

The divergent views throughout Australia show no signs of harmonising. This is especially the case given that little scholarly attention has focused on the issue, and the secondary authorities that have canvassed the point have done so in a relatively perfunctory manner. Thus, we see that the New South Wales Law Reform Commission, in its *Sentencing* report, did not recommend that the risk of deportation should be relevant to the sentence;⁷⁹ however, the report did not undertake a deep analysis of the issue. The report merely concluded:

Despite the submissions to the contrary, we are not persuaded that there is any need to move away from the established case law [that the risk of deportation does not mitigate penalty severity] and, accordingly, we do not recommend the inclusion of any specific provision to deal with this issue.⁸⁰

Thus, the role that the risk of deportation has in the sentencing of offenders varies markedly throughout Australia. We now discuss how this divergence of opinion should be resolved.

⁷⁶ Ibid 76–7.

⁷⁷ In *Norris* (n 51) it was noted that the fact that deportation is not relevant to parole says nothing about its relevance to sentencing: at 431–4 [36]–[45] (Gotterson JA, Sofronoff P agreeing at 423 [1], Philippides JA agreeing at 435 [54]).

⁷⁸ The absence of direction from the High Court is obviously a key reason for the uncertainty in this area of the law.

⁷⁹ See New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) 94–5 [4.102]–[4.109].

⁸⁰ Ibid 95 [4.109].

III EVALUATION OF EXISTING LAW AND CONNECTION BETWEEN DEPORTATION AND SENTENCING, FROM THE PERSPECTIVE OF EXISTING MITIGATING FACTORS AND THE PRINCIPLE OF PROPORTIONALITY

The above discussion establishes a deep divide regarding the relevance of deportation to sentencing. A telling aspect of the analysis is the relatively unconstrained manner in which the different positions have been reached. The respective positions are, essentially, merely set out without an extensive engagement of the possible counterarguments or a jurisprudential analysis of the issue. This evinces a fluidity and inconsistency in the law, which is surprising even given the discretionary nature of sentencing law. This uncertainty is unsatisfactory, given that the common law is supposed to apply in a unified manner throughout Australia.⁸¹

The reality is that both positions regarding the role of the risk of deportation in sentencing have a veneer of plausibility if the respective judgments are read in isolation to the opposing perspectives. In order to break the impasse, it is necessary to assess the position from a deeper doctrinal perspective. It is to this that we now turn.

A Coherency with Other Mitigating Factors

1 Main Categories of Mitigating Factors

In order to determine if the prospect of deportation should mitigate penalty, a logical starting point is to assess its coherency with the existence of, and approach to, other mitigating considerations. There is no overarching theory which explains, unifies and justifies mitigating (or aggravating) factors.⁸² However, it has been noted that mitigating factors can be divided into four categories.⁸³ To this end, it has been observed that the

first [category] are those relating to the offender's response to a charge and include pleading guilty, cooperating with law enforcement authorities, and remorse. 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, duress, and provocation. The third category includes

⁸¹ See above n 10 and accompanying text.

⁸² See Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 453–5.

⁸³ Mirko Bagaric, 'Sentencing: From Vagueness to Arbitrariness' (2015) 38(1) *University of New South Wales Law Journal* 76, 90.

matters personal to the offender, such as youth, previous good character, old age, and good prospects of rehabilitation. The impact of the sanction is the fourth broad type of mitigating factor and includes considerations such as onerous prison conditions, poor health, and public opprobrium.⁸⁴

2 *Deportation and Other Incidental Sanctions*

The only mitigating factor category which deportation potentially fits into is the fourth one: the impact that the sanction is likely to have on the offender. This consideration relates to incidental or (what is sometimes referred to as) extra-curial hardships that are experienced by offenders as a result of the offending.⁸⁵ More fully, extra-curial punishment has been described as a ‘loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for [their] offence or at least by reason of the offender having committed the offence.’⁸⁶ In addition to the specific examples set out above, these considerations also include loss of employment, and injuries sustained during — or around the time of — the commission of the crime.⁸⁷

Thus, deportation at the expiration of the offender’s sentence fits within this definition, given that it stems from an order not made by the sentencing court and normally constitutes a hardship to the offender.⁸⁸ While it is feasible to place deportation within an established mitigating factor category, it is not clear that this provides a pathway for determining the manner in which it should be treated by sentencing courts. It has been suggested that this is because the law in relation to the impact that incidental forms of punishment should have on the sentencing of offenders is unsettled.⁸⁹ For example, the manner in which incidental hardship impacts on sentencing has been analysed by Chong, Fellows and Richards, who note that there is no coherent principle which informs this area of law.⁹⁰ They observe that:

⁸⁴ Ibid 90 (citations omitted).

⁸⁵ *Silvano v The Queen* (2008) 184 A Crim R 593, 598 [29] (James J, Hislop J agreeing at 601 [45], Hoeben J agreeing at 601 [46]) (New South Wales Court of Criminal Appeal).

⁸⁶ Ibid. See also Mark David Chong, Jamie Fellows and Frank Richards, ‘Sentencing the “Victimised Criminal”: Delineating the Uncertain Scope of Mitigatory Extra-Curial Punishment’ (2013) 35(2) *Sydney Law Review* 379, 381–2.

⁸⁷ See generally Chong, Fellows and Richards (n 86) 388–99.

⁸⁸ In some circumstances, offenders may not experience a detriment if they are deported: see below Part IV(A).

⁸⁹ See, eg, Chong, Fellows and Richards (n 86) 405.

⁹⁰ Ibid.

The rules regarding extra-curial punishment and the manner in which they are applied comprise an area that deserves greater study because of the continuing complexity and ambiguity surrounding both the definitional parameters of extra-judicial sanctions, and the way in which the courts have applied these rules in a flexible, and sometimes improvised, fashion.⁹¹

It is correct to observe that there appears to be no firm consistency in the manner in which incidental sanctions are treated in the sentencing calculus. However, this does not entail that there is not a general consensus regarding the manner in which courts approach these considerations. While, as noted above, there are numerous extra-curial sanctions which can influence an offender's sentence, they can logically be divided into two categories. The first are those which occur as a matter of happenstance, and hence are not imposed in any deliberative manner by a court or other body. The factors which belong in this category are: injuries suffered during the commission of the offence; public opprobrium; and bad health of the offender. The trend of decisions is that these considerations can mitigate penalty, however there are contrary positions which have been asserted in relation to each of these considerations.

Thus, in relation to injuries sustained during the commission of an offence, in *Alameddine v The Queen*,⁹² the New South Wales Court of Criminal Appeal reduced an offender's penalty because he was harmed when his drug-making laboratory exploded.⁹³ A similar approach was taken in *R v Haddara*⁹⁴ by the Victorian Court of Appeal in holding that an arsonist should receive a reduced penalty because he was injured by the fire he lit.⁹⁵ However, in *Khoja v The Queen*,⁹⁶ the Victorian Court of Appeal did not mitigate a penalty for an offender who killed his friend during an act of dangerous driving, and who developed a stress disorder and depression as a consequence of the offence.⁹⁷

The leading decision regarding the role that public opprobrium should have in sentencing is *Ryan v The Queen*.⁹⁸ Half of the judges who considered

⁹¹ Ibid.

⁹² [2006] NSWCCA 317.

⁹³ Ibid [17]–[27], [31] (Grove J, Kirby J agreeing at [34], Hislop J agreeing at [35]).

⁹⁴ (1997) 95 A Crim R 108.

⁹⁵ Ibid 113 (Callaway JA, Brooking JA agreeing at 108–9, Vincent AJA agreeing at 113).

⁹⁶ (2014) 66 MVR 116.

⁹⁷ Ibid 123 [31]–[35] (Maxwell P, Nettle and Priest JJA).

⁹⁸ (2001) 206 CLR 267 ('Ryan').

the issue stated that it should mitigate penalty, but this is not a position that was endorsed by the other members of the Court. Kirby J and Callinan J stated that public opprobrium was a factor which could be taken into account to reduce the sanction imposed by the Court,⁹⁹ whereas McHugh J took the opposite approach.¹⁰⁰ Gummow J did not canvass the issue, while Hayne J 'substantially' agreed with McHugh J.¹⁰¹ In *R v Nuttall; Ex parte Attorney-General (Qld)* ('*Nuttall*'),¹⁰² the Queensland Court of Appeal undertook a survey of the relevant authorities on public opprobrium and indicated that it can mitigate sentence, but should be given little weight given that it was inevitable that high profile offenders would attract adverse media attention.¹⁰³

Courts have generally been prepared to confer a discount where ill health or infirmity make prison more difficult.¹⁰⁴ However, this principle is not unwavering. Thus, we see that in *R v Wickham*,¹⁰⁵ Howie J (with whom Bell J and Hislop J agreed) stated:

Common humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offence. However, where as here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.¹⁰⁶

The other category of extrajudicial punishments are those which arise following a deliberate decision by a body, such as employment deprivations and harsh prison conditions. They are more analogous to the threat of deportation because in order for them to occur, they require a considered

⁹⁹ Ibid 318–19 [177], 322 [186] (Callinan J, Kirby J agreeing at 303–4 [123]).

¹⁰⁰ Ibid 284–5 [52]–[55], 286 [59].

¹⁰¹ Ibid 313–14 [157].

¹⁰² [2011] 2 Qd R 328.

¹⁰³ Ibid 346 [65] (Muir JA, Fraser JA agreeing at 349 [80], Chesterman JA agreeing at 349 [81]).

¹⁰⁴ *R v Smith* (1987) 44 SASR 587, 589–90 (King CJ, Cox J agreeing at 590, O'Loughlin J agreeing at 590). See, eg, *Eliassen v The Queen* (1991) 53 A Crim R 391, 396–7 (Crockett J, McGarvie J agreeing at 397, Phillips J agreeing at 397) (Victorian Court of Criminal Appeal) (where AIDS was mitigating). See also *R v Magner* [2004] VSCA 202, [46]–[48] (Gillard AJA, Batt JA agreeing at [1], Eames JA agreeing at [2]); *AWP v The Queen* [2012] VSCA 41, [66] (Cavanough AJA, Weinberg JA agreeing at [1]); *R v Van Boxtel* (2005) 11 VR 258, 267 [30] (Callaway JA, Ormiston JA agreeing at 259 [1], Charles JA agreeing at 259 [2]); *R v Vachalec* [1981] 1 NSWLR 351, 353 (Street CJ for the Court).

¹⁰⁵ [2004] NSWCCA 193.

¹⁰⁶ Ibid [18] (Bell J agreeing at [1], Hislop J agreeing at [52]).

decision by a court or other body. In relation to these hardships, we see that there is a greater harmony in the law. As demonstrated below, strong authority supports the position that these considerations should mitigate sentence.

The harshest prison conditions are found in what are known as ‘supermaximum’ facilities, and courts typically provide a discount where an offender has spent, or will spend, considerable time in such conditions.¹⁰⁷ Thus, we see that in *Director of Public Prosecutions (Vic) v Faure*,¹⁰⁸ the Victorian Court of Appeal stated that a ‘significant reduction’ in the sentence was justified for this reason.¹⁰⁹ The same approach was taken in *Tognolini v The Queen [No 2]*,¹¹⁰ where the offender was confined to his cell for 20–22 hours per day and was not permitted to associate with other prisoners.¹¹¹ However, even this principle is not absolute. In *Western Australia v O’Kane*,¹¹² the Western Australian Court of Appeal stated:

In [*Western Australia v Richards*] ... it was settled that in determining the duration of a custodial sentence the courts will take into account features of the offence or the offender which will result in imprisonment bearing down more severely upon the offender than upon the average prisoner. His Honour pointed out, however, that it is also important to bear in mind the objective seriousness of the offence and the importance of ensuring that, after due allowance has been made for subjective factors, the punishment should fit the crime. In that case, the court concluded that the special burden of imprisonment on the offender, an Aboriginal man from a remote community who was not literate in English, warranted a lesser term than would otherwise have been imposed for sexual penetration without consent but it did not justify the suspended term of imprisonment imposed by the sentencing judge.¹¹³

People who are sentenced for criminal offences often experience employment deprivations, especially in relation to professional positions (such as medical

¹⁰⁷ *Mokbel v The Queen* (2013) 40 VR 625, 656 [117] (Maxwell ACJ, Buchanan and Weinberg JJA). See generally Jeffrey Ian Ross (ed), *The Globalization of Supermax Prisons* (Rutgers University Press, 2013).

¹⁰⁸ (2005) 12 VR 115.

¹⁰⁹ *Ibid* 121 [28] (Williams AJA, Callaway JA agreeing at 116 [1], Batt JA agreeing at 116 [2]).

¹¹⁰ [2012] VSCA 311.

¹¹¹ *Ibid* [22], [29]–[30] (Maxwell P, Buchanan and Redlich JJA). See also *York v The Queen* (2005) 225 CLR 466, 478–9 [38] (Hayne J); *R v Howard* [2001] NSWCCA 309, [18] (Wood CJ at CL, Beazley JA agreeing at [27], Sperling J agreeing at [28]); *R v Patison* (2003) 143 A Crim R 118, 136 [84]–[87] (Carruthers AJ) (New South Wales Court of Criminal Appeal).

¹¹² [2011] WASCA 24.

¹¹³ *Ibid* [67] (Pullin and Newnes JJA and Mazza J) (citations omitted).

doctors and legal practitioners) where individuals need to satisfy a character requirement.¹¹⁴ A number of different approaches have been taken regarding how this should be factored into the sentencing calculus. In both *Kovacevic v Mills*¹¹⁵ and *G v Police*,¹¹⁶ the sentence was mitigated to avoid damage to the career prospects of the respective offenders. There have also been a number of other instances where sentences have been discounted because of consequential damage to career or work prospects.¹¹⁷ This approach is not always followed. The strongest statement regarding the supposed irrelevance of reduced employment prospects to sentencing is found in the comments of McPherson JA in *R v Qualischefski*.¹¹⁸ His Honour stated that conferring a discount on account of reduced employment prospects ‘smacks of privilege, and can only lead to the evolution of a special class of persons in society who are exempt from the full operation of the criminal law at least at its lower reaches’.¹¹⁹

However, more recently in *Nuttall*, Muir JA (with whom Fraser JA and Chesterman JA agreed) took the view that ‘[t]he respondent’s loss of employment and lack of job prospects on his release are relevant considerations’.¹²⁰

Another incidental sanction that has received some consideration recently is whether offenders who may be liable to some form of ongoing monitoring post sentence, such as sex offenders (ie registration) or terrorists (ie continuing detention), should receive a discounted sentence. The position on this is unclear. It was considered most recently in *Director of Public Prosecutions*

¹¹⁴ See, eg, *Health Practitioner Regulation National Law Act 2009* (Qld) sch ss 55(1)(b), (h)(i); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 15(b), 17(1)(c), (2)(b), 45(2) (on fit and proper person requirements for admission), pt 3.5 div 4 (on show cause events); *Legal Profession Uniform Admission Rules 2015* (NSW) r 10(1)(h).

¹¹⁵ (2000) 76 SASR 404, 406 [10], 419 [74] (Doyle CJ, Mullighan, Bleby and Martin JJ), 420 [79] (Williams J).

¹¹⁶ (1999) 74 SASR 165, 170 [44] (Perry J).

¹¹⁷ See *Moorhead v Police* (1999) 202 LSJS 488, 490 (Doyle CJ); *Ryan* (n 98) 285 [54] (McHugh J), 319 [177] (Callinan J); *Hook v Ralphs* (1987) 45 SASR 529, 543 (von Doussa J); *McDermott v The Queen* (1990) 49 A Crim R 105, 117 (Gallop J, Foster J agreeing at 120–1) (Federal Court); *McDonald v The Queen* (1994) 48 FCR 555, 565 (Burchett and Higgins JJ).

¹¹⁸ [1994] QCA 289 (*‘Qualischefski’*). This case is discussed in Andrew West, ‘Criminal Law’ (1996) 16(5) *Queensland Lawyer* 153, 157 (under the subheading ‘prospective loss of employment as a factor in mitigation penalty’).

¹¹⁹ *Qualischefski* (n 118) 4 (McPherson JA). See also *R v Bragias* (1997) 92 A Crim R 330, 333 (Grove J) (New South Wales Court of Criminal Appeal).

¹²⁰ *Nuttall* (n 102) 343 [59] (Fraser JA agreeing at 349 [80], Chesterman JA agreeing at 349 [81]).

(*Cth*) v *Besim* [No 3],¹²¹ where the Victorian Court of Appeal was not supportive of the view (without firmly deciding) that this could mitigate penalty.¹²²

3 Coherency with the Approach to Other Incidental Sanctions Provides Qualified Support for Deportation Risk as a Mitigating Factor

It follows that some guidance can be gleaned from drawing analogies with similar mitigating factors regarding the approach that should be taken to the risk of deportation in the sentencing calculus. On balance, this supports the position that the risk of deportation should reduce penalty severity. However, for two reasons, this does not provide a compelling reason to adopt this approach. First, as we have just seen, the law is not totally consistent in the view that incidental punishments should mitigate penalty. Secondly, to the extent that this position is supported by existing orthodoxy, it may be the case that, doctrinally, the current legal approach is flawed. As noted above, there is no overarching theory that explains and justifies the mitigating and aggravating factors. Of course, given the large array and diversity of these considerations, it may be the case that no such theory exists. But, if a coherent theory on aggravating and mitigating factors were developed, it is plausible that numerous existing mitigating considerations, including those stemming from incidental punishment, would need to be recalibrated or abolished. This would obviously weaken the case for making the risk of deportation a mitigating factor based on analogy with existing mitigating factors. As noted above, there are over 200 aggravating and mitigating considerations.¹²³ It is beyond the scope of this article to undertake an analysis of them and inquire whether they can be supported by an overarching jurisprudential theory, and if so, the nature and content of that theory. This is admittedly a shortcoming of this article, and hence the strength of the argument for making the risk of deportation a mitigating factor, based on an analogy with the current treatment of mitigating factors, needs to be tempered in light of this observation.

Yet even without undertaking a doctrinal examination of general theories of mitigation (and aggravation), it is still feasible to attempt to evaluate the proper role of the risk of deportation within the context of a fundamental bedrock principle of sentencing, which directly impacts on the manner and extent to which offenders should be punished. This principle is the proportionality thesis, which we now consider in greater detail.

¹²¹ (2017) 52 VR 303.

¹²² *Ibid* 316–17 [47], 318–21 [56]–[63] (Warren CJ, Weinberg and Kaye JJA).

¹²³ See above n 27 and accompanying text.

B *The Principle of Proportionality: Deportation Is Normally a Hardship and Hence Should Mitigate*

1 *Overview of the Proportionality Principle*

As noted above,¹²⁴ the principle of proportionality is a guiding determinant regarding the extent to which offenders should be punished for their crimes. In its crudest form, the principle of proportionality is a thesis that the punishment must fit the crime. A clear statement of the principle of proportionality is found in the High Court case of *Hoare v The Queen*:¹²⁵

[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 ...¹²⁶

In *Veen v The Queen*¹²⁷ and *Veen v The Queen [No 2]*,¹²⁸ the High Court stated that proportionality is an important aim of sentencing. It is considered so important that, at common law, it cannot be trumped even by the goal of community protection, which at various times has also been declared the most important aim of sentencing.¹²⁹

This is not to suggest that proportionality is the only determinant in setting an appropriate penalty. As noted above, studies have shown that there are hundreds of aggravating and mitigating factors which can influence the choice of sanction and its severity.¹³⁰ Moreover, certain sentencing objectives have been held to be especially important in relation to some offence categories. Thus, for example, (marginal) general deterrence is an especially important

¹²⁴ See above n 23 and accompanying text.

¹²⁵ (1989) 167 CLR 348.

¹²⁶ *Ibid* 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis omitted).

¹²⁷ (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

¹²⁸ (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson, and Toohey JJ).

¹²⁹ See, eg, *Channon v The Queen* (1978) 20 ALR 1, 5 (Brennan J) (Full Court of the Federal Court). Proportionality is a common law, not constitutional, principle and hence can obviously be violated by statute. In fact, there are a number of statutory provisions which impose harsh sentences and which violate the principle of proportionality: see below n 134 for examples. Proportionality has also been given statutory recognition in almost all Australian jurisdictions: *Crimes Act* (n 17) ss 16A(1), (2)(k); *ACT Sentencing Act* (n 17) s 7(1)(a); *NSW Sentencing Act* (n 17) s 3A(a); *NT Sentencing Act* (n 17) s 5(1)(a); *Qld Sentencing Act* (n 17) ss 9(1)(a), (11); *SA Sentencing Act* (n 17) s 10(1)(a); *Vic Sentencing Act* (n 17) ss 5(1)(a), 48A(a); *WA Sentencing Act* (n 17) s 6(1).

¹³⁰ See above n 27 and accompanying text.

consideration in relation to drug offences¹³¹ and many tax offences¹³² where it operates to increase the penalty, whereas the goal of rehabilitation often serves to reduce the penalty in relation to certain types of offenders, especially those who are young.¹³³ While these objectives continue to influence the choice of sanction, they cannot take the sentence outside the bounds of a proportionate sentence.¹³⁴

The key aspect of the proportionality principle is that it has two limbs. The first is the seriousness of the crime; the second is the harshness of the sanction. Further, the principle has a quantitative component — the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

¹³¹ *Tulloh v The Queen* (2004) 147 A Crim R 107, 116 [42] (Miller J, Murray J agreeing at 108 [1]), 119 [52] (McLure J) (Western Australian Court of Criminal Appeal); *Aconi v The Queen* [2001] WASC 211, [18] (Steytler J, Kennedy J agreeing at [1], Miller J agreeing at [27]); *R v Stanbouli* (2003) 141 A Crim R 531, 552 [112]–[113] (Hulme J) (New South Wales Court of Criminal Appeal). More recently, see *Nguyen v The Queen* (2011) 31 VR 673, 681–2 [33]–[34], 695 [84] (Maxwell P); *R v Nguyen* (2010) 205 A Crim R 106, 127 [72], 136 [134] (Johnson J, Macfarlan JA agreeing at 109 [1], RA Hulme J agreeing at 137 [137]) (New South Wales Court of Criminal Appeal); *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 39 [159], 51 [218], 63 [260] (McClellan CJ at CL), 71 [307]–[308] (Simpson J).

¹³² See, eg, *R v Bromley* (2010) 79 ATR 692, 697 [30]–[31] (Osborn J) (Supreme Court of Victoria); *R v Nicholson; Ex parte DPP (Cth)* [2004] QCA 393, [18], [20] (de Jersey CJ, Jerrard JA agreeing at [34], Jones J agreeing at [37]); *R v Wheatley* (2007) 67 ATR 531, 536 [27], 540 [58] (Wood J) (Victorian County Court); *DPP (Cth) v Rowson* [2007] VSCA 176, [24] (Kaye AJA, Buchanan JA agreeing at [1], Neave JA agreeing at [2]–[4]).

¹³³ *R v Smith* (1988) 33 A Crim R 95, 97 (Young CJ, Crockett J agreeing at 98, Marks J agreeing at 98) (Victorian Court of Criminal Appeal); *Mason v Pryce* (1988) 53 NTR 1, 9 (Kearney J); *Duca v Police* (1999) 73 SASR 15, 20 (Lander J). On rehabilitation generally, see *R v Kane* [1974] VR 759, 766 (Gowans, Nelson and Anderson JJ); *Williscroft* (n 29) 294–5, 300 (Adam and Crockett JJ), 303–4 (Starke J).

¹³⁴ Unless there is express statutory authority permitting a disproportionate penalty. Some statutory incursions into the proportionality principle have occurred, mainly stemming from the trend towards tougher sentences. In Victoria, for example, serious sexual, drug, arson or violent offenders may receive sentences in excess of that which is proportionate to the offence: *Vic Sentencing Act* (n 17) pt 2A. See especially at s 6D(b). Indefinite jail terms may also be imposed for offenders convicted of ‘serious offences’: at pt 3 div 2 sub-div 1A. Serious offences include certain homicide offences, rape, serious assault, kidnapping and armed robbery: at s 3(1) (definition of ‘serious offence’). The court must be satisfied ‘to a high degree of probability’ that ‘the offender is a serious danger to the community’: at s 18B(1). For similar provisions to those operating in Victoria regarding indefinite jail terms for serious violent and sexual offenders, see *Qld Sentencing Act* (n 17) s 163; *NT Sentencing Act* (n 17) s 65; *Tas Sentencing Act* (n 17) s 19; *WA Sentencing Act* (n 17) s 98.

2 Doctrinal Problems Associated with Proportionality Do Not Undermine Assessment of the Role of Deportation Risk to Sentencing

Despite the clarity with which the principle can be expressed, there are no well-defined and precise criteria regarding the manner in which proportionate sentences are to be determined. The key reason is that legislatures and courts have not developed a workable methodology for matching the two limbs of the principle. As noted by Andrew von Hirsch and Nils Jareborg in developing their 'living standard' approach to offence seriousness,¹³⁵ '[v]irtually no legal doctrines have been developed on how the gravity of harms can be compared'.¹³⁶

The main difficulty with giving content to the proportionality principle is that the currencies in each limb, which are supposed to match up, are normally different. The interests typically violated by criminal offences are physical integrity¹³⁷ and property rights.¹³⁸ At the upper end of criminal sanctions, the currency is (deprivation of) freedom.¹³⁹

These theoretical complexities do not, however, need to be resolved for the purposes of this article. The vagaries associated with the proportionality principle are relatively obvious, and there are mechanisms which, to some extent, already adjust for these considerations. Thus, in relation to sentencing outcomes, current orthodoxy maintains that there is no single correct sentence in any case,¹⁴⁰ and that a lawful sentence is a matter upon which 'reasonable minds will differ'.¹⁴¹ Under this model, courts can impose a sentence within an 'appropriate range' of penalties.¹⁴² The spectrum of sanctions that are regarded as within the acceptable range or tariff is circumscribed by the proportionality principle.¹⁴³

It follows that in order for proportionality to play a meaningful role in guiding sentencing outcomes, there does not need to be precise alignment

¹³⁵ Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11(1) *Oxford Journal of Legal Studies* 1.

¹³⁶ *Ibid* 3.

¹³⁷ In the form of sexual and violent offences, such as rape and assault.

¹³⁸ For example, theft and deception offences.

¹³⁹ Which is obviously the main deprivation associated with imprisonment.

¹⁴⁰ *Markarian* (n 30) 371 [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ). This is consistent with the instinctive synthesis sentencing methodology discussed above in Part II(A).

¹⁴¹ *Hudson v The Queen* (2010) 30 VR 610, 616 [27] (Ashley, Redlich and Harper JJA).

¹⁴² *Ibid* 617 [29], 618 [32].

¹⁴³ See, eg, *Van der Baan v The Queen* [2012] NSWCCA 5, [30] (Hall J, Beazley JA agreeing at [1], Harrison J agreeing at [124]).

between the harm caused by the crime and the hardship inflicted by the sanction. Further, for the purposes of this discussion, the relevant focus is only on one side of the proportionality equation: the hardship limb. And more particularly, the inquiry is whether deportation at the expiration of a prison term can increase the burden on an offender.

Approached from this perspective, greater clarity is injected into whether the prospect of deportation should be a mitigating factor. The ultimate reference point is whether offenders who are not Australian citizens and who are deported at the expiration of their sentence normally suffer more than identically situated offenders who are not deported. In most cases, we contend the answer to this is yes. Thus, it is clear that the fact of deportation can increase the level of hardship experienced by offenders. Moreover, this additional burden stems from the crime committed by the offender and hence constitutes a form of punishment.¹⁴⁴ The fact that the deportation is ordered by a decision-maker other than the sentencing court does not alter the nexus between the hardship and the crime.¹⁴⁵

IV REFORM PROPOSAL: THE RISK OF DEPORTATION SHOULD MITIGATE SENTENCE SEVERITY

It follows from the perspectives of general harmony with the existing approach to incidental hardships, and coherency with the proportionality principle, that the risk of deportation should reduce sentence severity. However, in order to operationalise this recommendation, a number of considerations need to be clarified.

A Risk of Deportation Should Mitigate but Account Should Be Taken of Conditions in the Other Country and Location of Offender's Balance of Family

In light of the above discussion, it emerges that removing an offender from Australia is generally a hardship. However, this reference point is muddled for two reasons. The first is that deportation is not a binary construct. In some cases, it may be that an offender's level of flourishing is likely to be enhanced if they return to their country of origin. There are an infinite amount of consid-

¹⁴⁴ See Nigel Walker, *Why Punish?* (Oxford University Press, 1991) 1–3; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 35.

¹⁴⁵ See Walker (n 144) 1–2.

erations that influence an individual's prosperity. However, there are two obvious and important factors relevant to this inquiry. The first is a country's economic standard of living. There is of course no authoritative measure of living standards, but economic and social prosperity is measured objectively, which provides courts with an objective basis for comparing and contrasting living conditions in Australia with the offender's home country.¹⁴⁶ Where the offender's home country is similar in economic and social prosperity to Australia, this provides a basis for reducing or negating the mitigating effect of deportation.

The other important consideration that impacts a person's level of flourishing is their capacity to spend time with family.¹⁴⁷ Family dynamics and the level of family connectedness experienced by people vary markedly. However, it is nevertheless possible to inject a degree of objectivity into whether flourishing, which is linked to family association, would be meaningfully diminished by deporting an offender. In the migration law context, a 'balance of family' test is used to determine an individual's suitability for some visa classes.¹⁴⁸ The same standard could be applied in the sentencing context. Where the balance of an offender's family are in the offender's home country, this would again go a considerable way to establishing that deportation is not a meaningful detriment to the offender.

While economic prosperity and family connectedness are not the only considerations that influence individual flourishing, it is incontestable that these are two of the most important considerations that influence human decision-making and activity. This is demonstrated by the mass movement of people that is influenced by the search for wealthier lands and the fact that when people do move, they often do so with their family, irrespective of the risks involved.¹⁴⁹ There is a profound difference in the level of disadvantage

¹⁴⁶ See, eg, Legatum Institute, *The Legatum Prosperity Index 2018* (Report No 12, 2018); United Nations Development Programme, *Human Development Indices and Indicators: 2018 Statistical Update* (Report, 2018); 'Better Life Index', OECD (Web Page) <<http://www.oecdbetterlifeindex.org/>>, archived at <<https://perma.cc/U5JF-9QCE>>.

¹⁴⁷ Robert J Waldinger and Marc S Schulz, 'The Long Reach of Nurturing Family Environments: Links with Midlife Emotion-Regulatory Styles and Late-Life Security in Intimate Relationships' (2016) 27(11) *Psychological Science* 1443, 1447-9.

¹⁴⁸ *Migration Regulations 1994* (Cth) reg 1.05. This includes the Parent and Aged Parent visas: at cls 103.213(1), 804.214 respectively.

¹⁴⁹ Approximately 46% of refugees are children: United Nations High Commissioner for Refugees, *A Framework for the Protection of Children* (Policy Framework, 2012) 7. A main driver of migration is to improve economic prosperity — it has been established that '[e]mpirical evidence unequivocally shows that people tend to move from low-wage to high-

that would be experienced, for example, by an offender who is to be deported to Sweden, compared to one whose country of reference is Syria — especially if the Swedish national had most of their family still residing in Sweden, while the family of the Syrian offender are all living in Australia.

The range of considerations that are relevant to whether an offender is likely to prosper by being deported should not be foreclosed by family and economic considerations. Thus, if the prosecution can establish that there are other factors in the offender's home country that are very advantageous to the offender (such as exceptional employment opportunities), these should be relevant to the inquiry. However, the above discussion at least sets out the key considerations that can be used by courts to assess whether an offender is likely to experience a meaningful hardship if they are deported.

B The Presumptive Position: The Risk of Deportation Mitigates Sentence

In the above calculus, it is important to have a presumptive position. To this end, the presumptive position should be that deportation is an event that constitutes additional hardship. It is clear that by their very presence in Australia, offenders have displayed a preference for at least spending some time in Australia, and the negation of this preference is something that offenders almost certainly do not want. In light of this, it follows that the presumption should be that deportation is a detriment. If the prosecution wants to displace this presumption, they would need to adduce evidence that the circumstances in the offender's home country are at least objectively not likely to be worse than in Australia, and that the balance of the offender's family are in their home country (or a combination of these two factors would need to be established).

C The Reform Framework: Rescinding the Discount when Deportation Is Not Ordered

An obvious shortcoming associated with determining whether the risk of deportation should reduce penalty severity is that the key consideration underpinning the inquiry — deportation — is always speculative. This introduces a high degree of unpredictability — and potential unfairness — into the process. If, for example, an offender receives a penalty discount on account of the risk of deportation but ultimately is not removed from the

wage locations': World Bank Group, *Moving for Prosperity: Global Migration and Labor Markets* (Policy Research Report, 2018) 9.

country at the expiration of the sentence, they will have benefited unfairly from the approach set out above.¹⁵⁰ Logically, the manner in which to ameliorate this uncertainty is to reduce the size of the potential discount by the magnitude of the possibility that it will not eventuate. However, this is a calculus that is not possible to apply with any degree of precision, given that it is not feasible to assign even a crude mathematical possibility to the likelihood that deportation will occur. As we have seen, the Minister does not make a decision about whether to rescind a deportation order until after an offender has been sentenced, and there are numerous considerations which impact this decision.¹⁵¹ This uncertainty associated with the deportation decision is increased by the fact that this decision can be appealed.¹⁵²

Yet, there is an alternative framework that can be implemented to eliminate much of the speculation involved with mitigating sentence severity on the basis of the risk of deportation. The first step is to ascertain if deportation would constitute a hardship. If (as in most cases) the answer to this is yes, then the sentence should be mitigated to take this into account. If the offender is not deported at the expiration of their sentence, then the mitigated part of the sentence should be retracted and the offender compelled to serve the additional portion of the sentence.

This proposal would, to some extent, require a departure from the instinctive synthesis approach to sentencing, a key aspect of which is that courts do not indicate the weight or emphasis that has been accorded to particular mitigating or aggravating considerations.¹⁵³ However, this approach is not unwavering. There are two well-defined situations where sentencing courts already do provide a quantified sentencing discount. The first is where an accused pleads guilty.¹⁵⁴ The other is where the accused assists authorities.¹⁵⁵

¹⁵⁰ Unless it can be argued that the prospect of deportation causes considerable anxiety: see below Part IV(F)(2).

¹⁵¹ See above Part II(B).

¹⁵² See above nn 46–7 and accompanying text.

¹⁵³ See above nn 29–32 and accompanying text.

¹⁵⁴ In New South Wales and Queensland, the court must indicate if it does not award a sentencing discount in recognition of a guilty plea: *NSW Sentencing Act* (n 17) s 22(2); *Qld Sentencing Act* (n 17) s 13(4). In Victoria, s 6AAA of the *Vic Sentencing Act* (n 17) states that when courts provide a discount for a plea of guilty, they must specify the sentence that would have been given in the absence of that discount. In Western Australia, ss 9AA(2), (4)(b) of the *WA Sentencing Act* (n 17) permits a court to reduce a sentence by up to 25% for a plea of guilty entered at the first reasonable opportunity. The extent of any discount must be expressly stipulated: at s 9AA(5). In South Australia, recent legislative changes allow for a guilty plea reduction of up to 40% for an early guilty plea: *SA Sentencing Act* (n 17) ss 39(2)(a), 40(3)(a). The extent of any discount must be expressly stipulated: at s 41. The rationale and size of the

Cooperating with law enforcement authorities and providing information which assists in the investigation or prosecution of other offenders is a well-established mitigating factor at common law,¹⁵⁶ and has statutory foundation in several jurisdictions.¹⁵⁷ The main rationale for quantifiable and demonstrable discounts is to encourage the accused to behave in ways which attract these discounts.¹⁵⁸ Pleading guilty saves police, prosecution and court resources, and spares witnesses from testifying in court.¹⁵⁹ Assisting authorities facilitates the detection and prosecution of criminal offences.¹⁶⁰ Thus, in relation to two existing mitigating considerations, sentencing courts already do set out the exact nature and size of any discount accorded to offenders.

typical discount in Victoria is discussed in the Court of Appeal decision of *Phillips v The Queen* (2012) 37 VR 594 (*'Phillips'*). For a relatively recent discussion of the nature and scope of the guilty plea discount, see Elizabeth Wren and Lorana Bartels, "Guilty, Your Honour": Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on Its Operation' (2014) 35(2) *Adelaide Law Review* 361.

- ¹⁵⁵ For examples of the size of the discount available, see *R v Jones* (2010) 76 ATR 249, 261 [43] (Rothman J, McClellan CJ at CL agreeing at 251 [1], Howie J agreeing at 251 [2]) (New South Wales Court of Criminal Appeal); *MSO v Western Australia* [2015] WASCA 78, [59]–[70] (Martin CJ, Buss JA agreeing at [72], Mazza JA agreeing at [73]). In both cases, discounts in the order of 50% were granted.
- ¹⁵⁶ The rationale for the informer discount is discussed in *R v Cartwright* (1989) 17 NSWLR 243, 252–3 (Hunt and Badgery-Parker JJ) (*'Cartwright'*). See also *R v Ngata* [2015] ACTSC 356, [55]–[61] (Refshauge J) (*'Ngata'*). In *Ungureanu v The Queen* (2012) 272 FLR 84 (Western Australian Court of Appeal), it was held that cooperation in this context means voluntary cooperation and does not include information provided in the context of compulsory examination, unless the person goes beyond the provision of information which is necessary pursuant to the terms of the forced examination: at 99–100 [69]–[77] (Murphy JA, McLure P agreeing at 85 [1]–[3], Buss JA agreeing at 86 [7]).
- ¹⁵⁷ Section 37(1) of the *SA Sentencing Act* (n 17) provides scope for additional mitigation where the disclosure relates to 'combating serious and organised criminal activity' and 'contributes significantly to the public interest'. See also *Crimes Act* (n 17) ss 16A(2)(h) (which applies for past cooperation), 16AC (formerly s 21E, as repealed by *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) sch 7 item 7) (which applies for future cooperation and requires the court to state the penalty that would have been otherwise imposed); *ACT Sentencing Act* (n 17) s 36; *Qld Sentencing Act* (n 17) ss 9(2)(i) (which applies to past cooperation), 13A (which applies to promised cooperation and mandates that any discount be prescribed); *Vic Sentencing Act* (n 17) ss 5(2AB)–(2AC) (which expressly stipulates that a discount can be given for a promise to assist authorities and that the court may — but is not required to — indicate the sentence that would have otherwise been imposed); *WA Sentencing Act* (n 17) ss 8(5) (which mandates that any discount be prescribed), 37A.
- ¹⁵⁸ See generally Odgers (n 27) 337–59 [4.142]–[4.178.5].
- ¹⁵⁹ *Cameron v The Queen* (2002) 209 CLR 339, 360–1 [66]–[67] (Kirby J); *Phillips* (n 154) 605 [38] (Redlich JA and Curtain AJA, Maxwell P agreeing at 598 [1]).
- ¹⁶⁰ *Cartwright* (n 156) 256 (Hunt and Badgery-Parker JJ).

The informer discount is especially relevant in the context of the proposed deportation reform. The discount can be on account of cooperation which has already been conferred, or on promised future cooperation.¹⁶¹ In relation to both forms of cooperation, courts set out the discount which has been conferred.¹⁶² This is very important in relation to future discounts to ensure that offenders who promise to assist authorities — but do not fulfil this undertaking — do not benefit unfairly from the sentence reduction. By quantifying the discount given for promised future cooperation, courts can identify exactly the adjustment that should be made to a sentence if the assistance is not ultimately provided.¹⁶³ Thus, if an accused does not provide the cooperation that was promised, they can be resentenced and the mitigatory effect of the cooperation retracted.¹⁶⁴

The key rationale for making the discount contingent on future developments is that the relevant event — the offender’s willingness to fulfil the promise to cooperate with authorities — is uncertain at the time of the sentence. The same situation applies in relation to deportation. It is never certain at the time of the sentence whether, in fact, this event will occur. The desire for accuracy and precision in the imposition of criminal sanctions strongly supports the establishment of a methodology whereby sentencing courts set out the precise deportation discount accorded to offenders, so that the ultimate sentence can, where necessary, be adjusted to reflect the offender’s ultimate deportation status.

D The Reform Framework Provides a Degree of Relative Clarity to Sentencing Law

It follows that in cases where the sentence imposed by a court will result in the offender potentially being deported at the expiration of the sentence, the court should impose the sentence in conventional terms, but stipulate the extent or period of mitigation accorded for the risk of deportation. If the offender is not deported at the end of the prison term, then the mitigated portion of the

¹⁶¹ See above n 157.

¹⁶² See, eg, *R v Golding* (1980) 24 SASR 161, 176 (Wells J). See above n 157 (in particular *Crimes Act* (n 17) s 16AC; *Qld Sentencing Act* (n 17) s 13A; *WA Sentencing Act* (n 17) s 8(5)).

¹⁶³ *Ngata* (n 156) [59] (Refshauge J).

¹⁶⁴ However, when this occurs, the increased penalty does not always equate to the initial decrease, particularly in cases where the failure to fulfil the undertaking results from illness or threats to the offender or their family: *R v YZ* (1999) 162 ALR 265, 273 [42] (Sully and Dunford JJ) (New South Wales Court of Criminal Appeal).

sentence should be retracted, and the full sentence served. This would require some coordination between prosecution authorities, corrections and the Department of Home Affairs — in a similar manner to the process utilised by police, correction and prosecution authorities in cases of promised assistance to authorities. To facilitate this proposed reform, the Minister would need to make a final deportation decision regarding an offender before the expiration of the sentence, and preferably in sufficient time to enable the offender to exhaust any appeal rights. Of course, in some cases, offenders may stretch out their appeal rights beyond the time at which they are released from prison. If they were to win their appeal against a decision to cancel their visa, they would then obviously have unfairly benefited from having their sentence mitigated. However, this is unlikely to be a common event,¹⁶⁵ and hence this approach is still a considerable improvement to the current obscurity associated with this area of the law.

The other theoretical alternative to making this area of the law more coherent is to suggest that deportation decisions are made prior to sentencing. However, this is not tenable given that offenders often serve long custodial terms, and it is not reasonably possible to determine the offender's personal and familial circumstances — all of which can heavily influence deportation criteria¹⁶⁶ — many years before the event.

The criteria set out above for determining whether the risk of deportation should mitigate sentence (especially for a decision regarding whether deportation would cause hardship) are admittedly, to some degree, impressionistic. However, this is not a significant shortcoming of the proposed reform. As we have seen, sentencing law is an approximate exercise,¹⁶⁷ and the reform framework proposed for determining whether the prospect of deportation should mitigate penalty is clearer than the circumstances governing the application of most aggravating and mitigating considerations. A few examples suffice to demonstrate this proposition. Remorse is a common mitigating factor, but there are no established criteria that can apply with clarity to determine if an offender is genuinely contrite.¹⁶⁸ Another mitigating factor is

¹⁶⁵ See 'Visa Statistics: Statistical Information on Visit, Study, Work, Migration and Humanitarian Visas', *Australian Government: Department of Home Affairs* (Web Page, 14 October 2019) <<https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>>, archived at <<https://perma.cc/RLA2-CWBJ>>.

¹⁶⁶ See above Part II(B)(2).

¹⁶⁷ See above Parts II(A), III(B).

¹⁶⁸ See, eg, *Alvares v The Queen* (2011) 209 A Crim R 297, 313–15 [44]–[48] (Buddin J, McClellan CJ at CL agreeing at 300 [1], Schmidt J agreeing at 325 [88]) (New South Wales

delay in the prosecution or sentencing of an offender; however, courts have not articulated — even in an approximate manner — the timeframe necessary to invoke this consideration.¹⁶⁹ In relation to aggravating factors, an example of the nebulous nature of sentencing law is the notion of offence prevalence. This operates to increase sentence severity, but there are no criteria regarding what prevalence means and how it is to be established.¹⁷⁰ These examples can be readily multiplied. However, these brief examples highlight the imprecise nature of sentencing law, and hence support the proposition that the current reform is, at least in relative terms, adequately clear and instructive¹⁷¹ — certainly, it is more instructive and transparent than the operation of many other sentencing and mitigating factors.

E *The Two Stages to the Proposed Reform Can Operate Independently*

It is also important to highlight that the reform proposal suggested in this article effectively involves two stages. The first is to acknowledge that the risk of deportation should mitigate penalty. This is, in effect, an adoption of the position which currently exists in Victoria, Queensland and the Australian Capital Territory. The gloss to the current position is that there should be a presumption that the sentence imposed on an offender will result in the offender acquiring a substantial criminal record, and that this would favour mitigation of sentence, which would apply unless the prosecution can demonstrate that, on the facts of the case, deportation is unlikely to cause hardship to the offender. The other stage of the reform proposal is that the extent to which the penalty is mitigated should be set out by the court, and then retracted if deportation does not occur. This second step requires coordination between the Department of Home Affairs and the relevant prosecution authorities across the country, and will require legislative change.

Court of Criminal Appeal); *R v Whyte* (2004) 7 VR 397, 403 [21] (Winneke P, Bongiorno AJA agreeing at 407 [32], O'Bryan AJA agreeing at 407 [33]).

¹⁶⁹ See, eg, *R v Idolo* (Victorian Court of Appeal, Phillips CJ, Tadgell and Ormiston JJA, 21 April 1998) 13 (Tadgell JA, Phillips CJ agreeing at 16, Ormiston JA agreeing at 16); *R v Miceli* [1998] 4 VR 588, 591–2 (Tadgell JA, Winneke P agreeing at 593, Charles JA agreeing at 593). Cf *R v Moxon* [2015] QCA 65, [33]–[38] (McMurdo P, Morrison JA agreeing at [44], Philippides JA agreeing at [57]).

¹⁷⁰ See, eg, *R v Downie* [1998] 2 VR 517, 521–2 (Callaway JA, Phillips CJ agreeing at 517, Batt JA agreeing at 524); *DPP (Vic) v Janson* (2011) 31 VR 222, 229–30 [34] (Nettle JA, Kyrou AJA agreeing at 233 [55]). Cf *Powell v Tickner* (2010) 203 A Crim R 421, 438 [81]–[84] (Buss JA) (Western Australian Court of Appeal). See also *Pavlic v The Queen* (1995) 5 Tas R 186; *TS v The Queen* [2014] VSCA 24, [32] (Weinberg and Osborn JJA).

¹⁷¹ See above Part II(A) for an overview of the vagueness of sentencing law.

Unless and until the second step is implemented, the first stage of the reform proposal should still be actioned; notably, this can arise through judicial action alone.

F *Miscellaneous Matters Arising from the Link between Deportation and Sentencing*

There are several other issues that exist relating to the role of the prospect of deportation in sentencing, to which we now turn.

1 *No Discount for Offenders without Visas*

An issue that arises in the context of sentencing and deportation concerns how to deal with offenders who are not only non-citizens but also do not have a valid visa at the time of sentencing. In these circumstances, the risk of deportation at the expiration of the sentence should not mitigate penalty. This is because deportation is a natural consequence of the absence of a visa. The imposition and expiration of a sentence merely marks that point at which the deportation will occur.¹⁷²

2 *Anxiety of Deportation Should Not Mitigate*

The second miscellaneous matter to arise from the connection between deportation and sentencing concerns whether the anxiety and stress that some offenders will experience about whether they will get deported at the expiration of their sentence should itself be a mitigating consideration. There is some support for the proposition that the burden of potential deportation is itself a mitigating factor. In *Guden*, the Victorian Court of Appeal held:

In our view, authority does not require, and there is no sentencing principle which would justify, a conclusion that the prospect of an offender's deportation is an irrelevant consideration in the sentencing process. As a matter of principle, the converse must be true. ... As the Crown properly conceded on this appeal, the fact that an offender will serve his/her term of imprisonment in expectation of being deported following release may well mean that the burden of

¹⁷² This is consistent with existing law as set out in *Nguyen v The Queen* (2016) 311 FLR 289 (Victorian Court of Appeal), where Redlich JA inferred (without deciding) that defendants who are living illegally in Australia and do not have a valid visa may be precluded from relying on the risk of deportation as a mitigating factor: at 303 [35]–[36].

imprisonment will be greater for that person than for someone who faces no such risk.¹⁷³

The reality is that a prison term exposes prisoners to an increased risk of a number of adverse events, including being subjected to violence, experiencing relationship breakdown, and reduced employment opportunities.¹⁷⁴ The possibility of these matters eventuating can all cause offenders to experience anxiety. Unease in relation to these matters does not mitigate penalty, and hence, consistent with current orthodoxy, it should also not mitigate in the context of the risk of deportation.¹⁷⁵ Moreover, the same conclusion stems from a principled perspective. The concept of anxiety and stress stemming from the uncertainty associated with the possibility of an adverse event occurring is too vague and obscure to factor into sentencing determinations.

3 *Offenders Who Receive No Discount but Are Deported*

The final miscellaneous matter that arises in relation to deportation and sentencing concerns the situation where offenders do not receive the deportation discount, but are in fact ultimately deported. Even in jurisdictions that currently allow a discount for the risk of deportation, this can currently occur if, at the time of sentence, the court underestimated the risk of deportation.¹⁷⁶ When this occurs, the offender will have been dealt with unduly harshly. If implemented, the reform proposal will reduce the risk of this occurring, because the presumptive position is that mitigation should occur if there is a risk of deportation. This risk is most manifest when the sentence attracts an automatic visa cancellation, but also exists where the offender is found guilty of an offence which results in them failing the character test. Thus, the only situations pursuant to this proposal when offenders will unfairly miss out on the benefits of a sentencing discount on account of the risk of deportation are where, at sentencing, it is assessed that deportation will not be a hardship (because of the prosperity of the offender's home country and/or balance of

¹⁷³ *Guden* (n 5) 294 [25], 295 [27] (Maxwell P, Bongiorno JA and Beach AJA).

¹⁷⁴ See above Part III(A)(2).

¹⁷⁵ As noted above, this is a point that was also made in *Hickling* (n 66), and was one reason that the Western Australian Court of Appeal held that the prospect of deportation should not mitigate sentence severity: at 45 [60] (Mazza JA and Mitchell J). See above nn 66–7 and accompanying text.

¹⁷⁶ This is most likely to arise where the sentence imposed is less than one year of imprisonment, but is in relation to an offence category set out in s 501(6) of the *Migration Act* (n 1), which does not attract an automatic visa cancellation: see, eg, at sub-ss (ba)(i) (people smuggling), (aa)(ii) (an offence committed while escaping from immigration detention).

family connections), and it transpires that this assessment is incorrect. This is not a strong criticism of the proposed reform. Rather, it is an illustration of the unavoidable limits of human foresight, which are manifested in many aspects of the law. In the sentencing domain, this includes assessments regarding whether the offender's family will experience exceptional hardship if the offender is incarcerated, whether an offender's health will deteriorate in prison, and whether an offender will recidivate. The structure of the reform proposal will considerably reduce the circumstances in which unforeseen events undermine the rectitude of judicial decisions concerning whether a sentencing discount should be accorded on the basis that an offender risks deportation at the expiration of their sentence.

V CONCLUSION

The law relating to whether the risk of deportation should mitigate penalty is unsettled. There are conflicting positions that have been adopted by superior courts in a number of states, with three jurisdictions holding that deportation can mitigate penalty, three having the opposite view, uncertainty in South Australia, while the matter has barely been canvassed in Tasmania.

This uncertainty is undesirable and will probably need to be resolved by the High Court. In this article, we have discussed and evaluated the respective approaches to the issue. The key to establishing a clear pathway in this area hinges on acknowledging the fact that being removed from Australia is a detriment and that this stems directly from the commission of a crime. Deportation for a crime is causally related to offending behaviour because it is contingent upon the imposition of a sanction (which constitutes a substantial criminal record), and is imposed in a systematic and deliberative manner as a direct response to the criminal activity. From this, it follows that deportation is a form of punishment and adds to the burden imposed on an offender. Reducing penalty severity by reason of the risk of deportation is in keeping with the general approach to the role of incidental hardships that has been taken by sentencing courts. Moreover, this approach is consistent with the proportionality thesis.

Accordingly, deportation should mitigate penalty unless there is a reasonable likelihood that the offender would not materially suffer from deportation. The presumption should be that deportation will always detrimentally impact on offenders, and this is only capable of being rebutted where the other country has a standard of living which is broadly comparable to Australia, and the offender does not have the balance of their family in Australia.

Adoption of this approach would harmonise this area of the law, thereby moving away from the current unstable position where the status of the risk of deportation is contingent on which Australian jurisdiction the offender happens to be sentenced in. This is the main recommendation of this article. While this approach is preferable to the current approach, it is not the optimal approach.

The manner in which to achieve the greatest coherency in this area of law requires a framework which can accommodate the fact that at the time of sentencing, it is never certain that an offender will be deported. This uncertainty can be eliminated if a systematic and clear approach is taken. To this end, the same framework that currently applies in the case of offenders who promise to assist authorities should be adopted for offenders who are at risk of deportation. Offenders who do not fulfil their undertaking to assist authorities can have the discount they receive for this undertaking retracted. This framework would considerably improve the coherency, transparency and clarity of this area of sentencing law.