CONDITIONING SENTENCING TO PREVENT DOUBLE PUNISHMENT OF OFFENDERS WHO COMMIT OFFENCES WHILE ON CONDITIONAL LIBERTY

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Defendants in criminal matters can be placed on numerous forms of conditional liberty, including bail, parole and community-based orders. Committing offences while on conditional liberty is regarded as an aggravating sentencing consideration. This results in heavier penalties often being imposed on this cohort of offenders. While this is a well-established sentencing principle, its doctrinal rationale remains unclear and, in some instances, seemingly flawed. In certain circumstances, committing an offence while on conditional liberty is a separate offence. In other situations, the breach of conditional liberty results in incidental punishment, such as revocation of bail or parole. Thus, increasing sanction severity for offenders who commit offences while on conditional liberty can result in double punishment. We propose a principled doctrinal approach for dealing with offences which are committed while on conditional liberty which would inject doctrinal clarity and fairness into the sentencing process.

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I Introduction

Conditional liberty is an order which requires a defendant to comply with specified behavioural requirements during the term of the order. Historically, the common law empowered a judicial officer to make orders binding the person to keep the peace and be of good behaviour.[1] While Australia received the common law and associated statutes, the position in Australia is that the general framework for conditional liberty is statutory.[2] Common forms of conditional liberty are bail, probation, bonds, community correction orders, suspended sentences, and intensive correction orders. A universal requirement of conditional liberty is for defendants not to commit an offence. Thousands of defendants each year breach this requirement.[3] Hence, the manner in which breaches

[1] See Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 4th ed, 2017) 864.

[2] See *Justices of the Peace Act 1361*, 34 Edw 3, c 1; *Devine v The Queen* (1967) 119 CLR 506, 516 (Windeyer J); *Forbutt v Blake* (1981) 51 FLR 465, 474–5 (Connor ACJ). For commentary, see ibid 864–8; Brendon Murphy, 'Retaining and Expanding Breach of Peace' (2017) 41(4) *Criminal Law Journal* 222.

[3] In a comparatively recent study by Carolyn Whyte examining 2,520 bail grants by Northern Territory criminal courts, 21% of adults had committed another offence within four months of

of conditional liberty are dealt with by the criminal justice system impacts a large number of defendants. The established approach is that committing an offence while on conditional liberty is an aggravating factor in sentencing for that offence. The result is that defendants who commit offences while on conditional liberty are often punished more severely than other offenders who are otherwise similarly placed but who were not on conditional liberty at the time of the offence.

In addition to receiving a harsher sanction for the offence which was committed while on conditional liberty, the breach of conditional liberty can also trigger other hardships. These come in two main forms. First, committing an offence while on conditional liberty is often a discrete offence for which offenders receive a separate penalty.[4] These offences (such as committing an indictable offence while on bail) are often referred to as secondary offences. Second, the breach of conditional liberty by committing an offence may result in the cancellation or revocation of the underlying order, such as bail, parole or an intensive correction order, with the consequence that the offender is imprisoned — this is so even where the breaching offence is a separate offence.

While the rationale for aggravating penalties on account of a breach of conditional liberty has not been carefully considered, it is most typically grounded in the breach of trust that is supposedly involved in committing offences on conditional liberty.[5] In a similar vein, such a breach may be equated with disobedience of court orders as a form of contempt.[6] It has also been asserted that additional punishment is justified in these circumstances for reasons of specific deterrence, protection of the community and limited prospects of rehabilitation.[7] Intuitively, this is a sound approach. However, examined more closely, the doctrinal underpinnings for treating breach of conditional liberty as an aggravating consideration are dubious.

In this article, we discuss and evaluate the rationales for punishing offenders who commit offences while on conditional liberty more severely. The rationales

being placed on bail: Carolyn Whyte, Department of the Attorney-General and Justice (NT), *Reoffending while on Bail: Analyses of Adult and Youth Defendants* (Analysis, 25 March 2021) 4. The concept of conditional liberty also applies to a breach of a bond or suspended sentence: see Paul McGorrery and Zsombor Bathy, Sentencing Advisory Council (Vic), *Secondary Offences in Victoria* (Report, September 2017), discussed in Part IV below; New South Wales Sentencing Council, *Sentencing Trends and Practices: Annual Report 2019* (Report, August 2020) 53–66.

[4] See below Part V(A).

[5] See generally Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Lawbook, 9th ed, 2022) ch 8.

[6] CJ Miller, *Contempt of Court* (Paul Elek, 1976) 234.

[7] See below Part III.

in favour of aggravating penalty for committing offences are challenged by the fact that most of these offenders already receive additional punishment in some form for violating their conditional liberty. This is most obvious in circumstances where the breach constitutes a distinct criminal offence. Many offenders are in fact sentenced to prison for the separate offence of breaching bail or parole or contravening an intensive correction order.[8] To aggravate their penalty for violating their conditional liberty potentially infringes the proscription against double punishment. Moreover, considerations such as specific deterrence and community protection can be fully reflected in the penalty for the secondary offence. The potential for double punishment is not as manifest in circumstances when the breaching offence does not constitute a distinct offence, but there is still a risk of this occurring given that often the breach will be the catalyst for cancellation of the relevant order and the imposition of a prison term: for example, in cases of suspended sentences, intensive correction orders, bail and parole.

We suggest that to coherently and fairly deal with offending which involves a breach of conditional liberty, the net punishment imposed on the offender must remain proportionate to the gravity of the offence. This entails that breaching conditional liberty should not be an aggravating consideration when it constitutes a separate offence or results in a significant additional hardship being imposed on the offender, such as revocation of an order which has the effect of the defendant being imprisoned. Committing an offence while on conditional liberty should only aggravate penalty when the defendant experiences no other apparent adverse hardships stemming from the breach. We contend that this approach is consistent with the entrenched and fundamental sentencing principle of proportionality and avoids the prospect of sentencing errors and unfairness arising out of double punishment.

II Overview of Existing Law

A *Overview of the Sentencing System*

As a federal system, Australian sentencing law is shaped by state-based legislation and established principles in the general law. There are local variations in legislation but many of the purposes of sentencing are broadly similar,[9] including retribution, denunciation, specific and general deterrence, protecting

[8] See below Part V.

[9] For a more thorough overview, see Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010) 42–52; Bagaric, Edney and Alexander (n 5) ch 7.

the community (and victims) from the offender, and the rehabilitation of the offender.[10]

The sentence ordered by a court is the result of a consideration and application of relevant factors and principles drawn from statute and general law. These include the maximum penalty for the offence, the objective seriousness of the offence, the subjective features of the offender, and specific aggravating and mitigating factors. Ultimately the judicial officer is guided by a process of 'instinctive synthesis' to reach a sentence proportionate to the gravity of the offence and culpability of the offender to achieve individualised justice.[11] There is an extensive range of mitigating and aggravating elements that may be involved in a particular sentencing determination,[12] with more than 200 aggravating and mitigating factors identifiable from Australian sentencing jurisprudence.[13]

B *The Relevance of Breach of Conditional Liberty to Sentencing*

1 *The Framework: Consequence of Committing an Offence while on Conditional Liberty*

Conditional liberty refers to situations where defendants are released into the community with restrictions placed upon them, often with the prospect of being imprisoned if they breach any of the stipulated conditions. An order placing an offender on conditional liberty can occur in three main settings. The first is at the pre-trial stage. Bail is a common form of conditional liberty while an

[10] Classically, see *Veen v The Queen [No 2]* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen [No 2]*'). The relevant legislative provisions are *Crimes Act 1914* (Cth) s 16A(2); *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

[11] See Mackenzie, Stobbs and O'Leary (n 9) 28–30, 53–4; Bagaric, Edney and Alexander (n 5) 37–56, ch 6; John Anderson et al, *Criminal Law Perspectives: From Principles to Practice* (Cambridge University Press, 2021) 105–10.

[12] In New South Wales ('NSW') and Queensland, there are more than 30 statutory aggravating and mitigating factors: *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A–24; *Penalties and Sentences Act 1992* (Qld) pt 2.

[13] Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) identified 229 factors: at 55; while Legal Studies Department, La Trobe University, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (Occasional Monograph No 1, 1980) identified 292 relevant sentencing factors: at 62. For an overview of the operation of mitigating and aggravating factors, see Mackenzie, Stobbs and O'Leary (n 9) ch 4; Bagaric, Edney and Alexander (n 5) chs 8–9; Anderson et al (n 11) 113–14.

offender awaits trial.[14] The second is the sentencing stage when an offender is placed on a sanction which involves express behavioural requirements or restrictions, such as community-based orders, suspended sentences and intensive correction orders.[15] Finally, conditional liberty is also an aspect of parole when an offender is released from prison back into the community after having served the custodial portion of their sentence.[16] The restrictions or requirements which can be imposed in these contexts vary, sometimes markedly, but a universal condition is to desist from committing any offences for the duration of the order.[17] If this condition is breached, the breach is an aggravating factor in sentencing the offender for the breaching offence.[18]

To be clear, breach of conditional liberty operates as an aggravating factor when two key criteria are satisfied. The first is that the offender commits an offence, for example a theft, while at conditional liberty in relation to an earlier offence or offences. This is termed the 'breaching' offence. Second, the offender has been previously placed on an order by the criminal justice system as a result of being convicted of an offence, being proven to have committed an offence or being suspected of committing an offence, such as a robbery. This is termed the 'foundational offence'. Aggravation attaches to the breaching offence (theft) because it was committed while the offender was on conditional liberty for the foundational offence (robbery). Depending on the form of conditional liberty, the offender may also be liable for re-sentencing for the foundational offence (robbery) as a result of the breach.

At the outset, it is important to emphasise that committing an offence while on conditional liberty often has a number of detrimental consequences for the defendant. The first is, as noted above, aggravation of the sentence for the breaching offence. Second, the breaching offence often results in the order which underpins the conditional liberty being cancelled. A more punitive disposition is then imposed on the defendant for the foundational offence, in the

[14] See generally McGorrery and Bathy (n 3) 11–22.

[15] See ibid 23–32; Neil Donnelly, 'The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-Term Prison Sentences' (Bureau Brief No 148, NSW Bureau of Crime Statistics and Research, August 2020) 2–3; Joanna JJ Wang and Suzanne Poynton, 'Intensive Correction Orders versus Short Prison Sentence: A Comparison of Reoffending' (Crime and Justice Bulletin No 207, NSW Bureau of Crime Statistics and Research, October 2017) 1–2.

[16] See McGorrery and Bathy (n 3) 33–6; Hamish Thorburn, 'The Effect of Parole Officers on Reoffending' (Crime and Justice Bulletin No 214, NSW Bureau of Crime Statistics and Research, July 2018) 2.

[17] See McGorrery and Bathy (n 3) 11, 33.

[18] See below n 21 and accompanying text.

form of a prison sentence or imposition of a longer period of imprisonment.[19] This occurs, for example, where a suspended sentence is cancelled or an intensive correction order or parole order is revoked. Third, in some instances the commission of a breaching offence can itself constitute a distinct offence. This is called a secondary offence and examples are a breach of bail or a contravention of a community correction order.[20]

2 *Legal Approach to Aggravating Penalty Severity for Offending while on Conditional Liberty*

At common law, it is well-established that the commission of an offence while the offender is subjected to conditional liberty is an aggravating factor in determining an appropriate sentence.[21] This principle is also expressly recognised by statute in some jurisdictions.[22] In *Porter v The Queen* ('*Porter*'), it was clearly stated that s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) captures

> the common law principle that an offence committed whilst a person is subject to conditional liberty, whether on bail or whilst subject to a good behaviour bond or a community service order or periodic detention or parole, constitutes an aggravating factor for the purpose of sentence.[23]

This aggravating factor has been applied broadly. Thus, in *Porter*, the Court noted that in the context of s 21A(2)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), conditional liberty is not limited to situations 'where the foundational offence … must be punishable by imprisonment'.[24] The aggravation for breach of conditional liberty applies even when the offender is not ultimately found guilty of the foundational offence.[25] Moreover, in order

[19] McGorrery and Bathy (n 3) 50–1.

[20] Ibid 1–7. See below Part IV.

[21] See, eg, *Porter v The Queen* [2008] NSWCCA 145, [86] (Johnson J) ('*Porter*'); *Kerr v The Queen* (2016) 78 MVR 191, 203 [71]–[72] (Bathurst CJ) ('*Kerr*'); *Buchwald v The Queen* [2011] VSCA 445, [191] (Hansen JA); *Osborne v The Queen* [2018] VSCA 160, [41]–[42] (Maxwell ACJ); *McCartney v The Queen* (2012) 38 VR 1, 21 [97] (Maxwell P, Neave JA and Coghlan AJA), citing *R v Czerniawsky* [2009] VSCA 2, [16] (Kellam and Weinberg JJA); *R v Breen* [2008] VSCA 178, [28]–[30] (Osborn AJA).

[22] See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j); *Sentencing Act 1991* (Vic) s 16(3C).

[23] *Porter* (n 21) [86] (Johnson J). See also *McGovern aka Lanesbury v The Queen* [2021] NSWCCA 176, [53]–[60] (Bellew J, Bell P agreeing at [1], Rothman J agreeing at [2]).

[24] *Porter* (n 21) [86] (Johnson J).

[25] *R v Deng* (2007) 176 A Crim R 1, 13 [64] (James J, Mason P agreeing at 2 [1], Hislop J agreeing at 16 [87]).

for aggravation to attach to the breaching offence, this offence does not need to be similar to the foundational offence.[26] When the offences are similar, however, the aggravation is heightened.[27] In some instances where the offences are of a different nature, the breach may be regarded as only a 'minor matter of aggravation'.[28]

An offence committed while on conditional liberty is regarded as a subjective matter increasing the culpability of an offender and is thus an aggravating factor for the purposes of determining penalty.[29] The impact of this consideration can be quite considerable in that it can elevate the punishment to the 'upper boundary of the sentencing range'.[30] However, the loading cannot be so significant as to increase the permissible penalty range beyond that which is proportionate to the seriousness of the breaching offence itself.[31] This aggravating factor operates not only to increase penalty but also to influence whether there should be concurrency or cumulation of the sanctions.[32] This is important in terms of the principles of proportionality and totality as, in some instances, the mere breach of conditional liberty may itself constitute an offence, such as failing to attend court in accordance with a bail undertaking.[33]

With that analysis of the current judicial approach to sentencing offenders who have violated their conditional liberty in some way across a spectrum of

[26] The previous offences do not need to be of the same nature as the offence for which the offender is sentenced: *Kerr* (n 21) 203 [71]–[72] (Bathurst CJ, Hoeben CJ at CL agreeing at 209 [122], Price J agreeing at 209 [123]).

[27] *Frigiani v The Queen* [2007] NSWCCA 81, [23]–[25] (Howie J, Simpson J agreeing at [1], Barr J agreeing at [2]).

[28] *BIP v The Queen* [2011] NSWCCA 224, [72] (Hoeben J), quoted in Stephen J Odgers, *Sentence: The Law of Sentencing in NSW Courts for State and Federal Offences* (Lougeville Books, 3rd ed, 2015) 321.

[29] For the proper characterisation of a breach of conditional liberty as an aggravating factor in the sentencing process, see *MR v The Queen* [2021] NSWCCA 218, [38]–[39], [53]–[54] (Bellew J, Bathurst CJ agreeing at [1], Simpson AJA agreeing at [2]) ('*MR*'), quoting the High Court in *Muldrock v The Queen* (2011) 244 CLR 120, 132 [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). It was held in *MR* (n 29) that the sentencing judge had been in error in using the appellant's breaches of parole and bail as increasing the objective seriousness of the breaching offences; rather, these breaches were aggravating subjective matters going to penalty: at [38]–[39], [53]–[54] (Bellew J).

[30] *Challis v The Queen* (2008) 188 A Crim R 154, 161 [36] (Hoeben J).

[31] *R v Morris* (New South Wales Court of Criminal Appeal, Kirby ACJ, Badgery-Parker and Bruce JJ, 14 July 1995) 5 ('*Morris*'); Odgers (n 28) 320, citing *Hillier v DPP (NSW)* (2009) 198 A Crim R 565, 574 [30] (Basten JA) ('*Hillier*').

[32] Odgers (n 28) 321, citing *R v Richards* [1981] 2 NSWLR 464, 465 (Street CJ) ('*Richards*'); *R v Snider* [2004] NSWCCA 134, [40] (Kirby J).

[33] See, eg, *Bail Act 2013* (NSW) s 79; *Bail Act 1977* (Vic) ss 30A–30B.

potential forms of contravention in mind, we now turn to synthesise and then evaluate the rationales for this approach.

III Rationales for the Current Approach to Aggravating Penalties for Offenders on Conditional Liberty

The courts have provided a number of discrete and sometimes overlapping justifications for aggravating the punishment for offences committed while on conditional liberty. One of them is that it represents an abuse of their freedom. Chief Justice Street in *R v Richards* stated (in the context of committing an offence while on bail):

> As the lists of persons awaiting trial on serious criminal charges continue to lengthen, there are at large within the community an increasing number of persons on bail. Many of those persons will in due course plead guilty to, or be found guilty of, the offences for which they are awaiting trial. The community must be protected as far as possible from further criminal activities by persons who take advantage of their liberty on bail to commit further crimes. The only means open to the criminal courts to seek to provide this protection is to pass severely deterrent sentences upon those who thus abuse their freedom on bail. This will ordinarily involve a significant accumulation of the sentence for any subsequent offences on top of the sentence proper to be passed for the original offence. It must be made abundantly plain that persons at large on bail cannot expect to commit further crimes 'for free'. On the contrary, they will receive salutory [sic] penalties for the very reason that they have *abused their freedom* on bail by taking the opportunity to commit further crimes.[34]

Thus, the policy justification for stern punishment for offences committed while on conditional liberty is similar to the considerations that underpin more severe punishments for offences involving a breach of trust.[35] The breach is of the court's trust in the offender to comply with their undertaking to be of good behaviour while at liberty in the community. In a similar vein, breaches of such undertakings and orders have been equated to a form of contempt of court.[36]

Another rationale relates to the broader workings of and public confidence in the criminal justice system. It has been observed that when an offender

[34] *Richards* (n 32) 465 (emphasis added).

[35] See also *Stebbins v Tasmania* (2016) 25 Tas R 421, 440 [53] (Estcourt J), 460 [112] (Pearce J); *R v Gray* [1977] VR 225, 230 (McInerney and Crockett JJ); *R v Basso* (1999) 108 A Crim R 392, 397–8 [21]–[25] (Chernov JA); *Richards* (n 32) 465 (Street CJ); *Jeffries v The Queen* (2008) 185 A Crim R 500, 513 [91] (Johnson J).

[36] Miller (n 6) 234–5.

abuses conditional liberty, there is a 'very real risk that the whole regimen of non-custodial sentencing options will be discredited'.[37] In this way, non-custodial sentencing options are perceived as lenient and inappropriate outcomes because the community believes such options are not taken seriously by offenders and the risk of recidivism is greater than if the offenders had originally been imprisoned.[38]

Related to the integrity of the criminal justice system in terms of achieving the objectives of punishment, the New South Wales Court of Criminal Appeal in *R v AD* went to some length to explain that breaching conditional liberty and abusing custodial work release privileges must be an aggravating consideration without expressly grounding a rationale, stating:

> His Honour found that the fact that the offences were committed whilst the respondent was on parole or in gaol were circumstances of aggravation. He said, 'The genesis of some of these offences was whilst he was in custody' and refers to the respondent being granted work release from July 2004. It is uncontroversial that the commission of an offence by an offender who is on conditional liberty is a matter of aggravation that is relevant to the determination of an appropriate sentence: see *R v Readman* (1990) 47 A Crim R 181; *R v Richards* (1981) 2 NSWLR 464 at 465; *R v Tran* [1999] NSWCCA 109 at [15] [sic].
>
> In *R v Moffitt* (1990) 20 NSWLR 114 at 128 [sic] … Badgery-Parker J said:
>
> > … an offender who takes advantage of his liberty on parole to commit further crimes should not only suffer the revocation of his parole and the consequent need to serve out the balance of the original sentence, but should also suffer a significant punishment for the later offence to mark the gravity of his conduct in thus abusing his parole.
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> In *R v Jones* (unreported, Court of Criminal Appeal, NSW, 30 June 1994) at 6 [sic], Finlay J said, 'Here the applicant committed his offence whilst on conditional liberty following his conviction for an identical offence. That is, undoubtedly, a matter of major aggravation'. In *R v WHS* (unreported, Court of Criminal Appeal, NSW … 27 March 1995) at 7–8 [sic], McInerney J said, 'If an offence is committed whilst on bail, and it is in the same general character as those for which bail has been granted, then the offender must expect to face heavy

[37] *Morris* (n 31) 5 (Kirby ACJ, Badgery-Parker and Bruce JJ). In this case, the offender had committed offences which amounted to a breach of the recognisance: at 10.

[38] Imogen Halstead, 'Public Confidence in the New South Wales Criminal Justice System: 2014 Update' (Crime and Justice Bulletin No 182, NSW Bureau of Crime Statistics and Research, February 2015) 1–2, 18–19; Karen Freeman, 'Have New South Wales Criminal Courts Become More Lenient in the Past 20 Years?' (Crime and Justice Statistics Bureau Brief No 101, NSW Bureau of Crime Statistics and Research, March 2015) 1, 10.

> cumulative sentences as a specific deterrent to those who may be granted bail from involving themselves in further crime.'[39]

The passage is enlightening because it effectively assumes that there is a justification without one being articulated. At the end, there is seemingly a passing reference to specific deterrence in the quote from McInerney J in *R v WHS*.[40]

There are two other rationales related to the purposes of criminal punishment that have been expressly provided as justifying the aggravation of penalties for offenders who breach conditional liberty. The first is diminished prospects of rehabilitation, notably in the context of release on parole after serving a sentence of imprisonment.[41] In *R v Fernando*, the New South Wales Court of Criminal Appeal noted:

> The policy behind this approach [aggravating penalty when the offender was at conditional liberty] of the courts is, in part, stated by Lee J, with whom Gleeson CJ and Abadee J agreed in *R v Vranic* (NSWCCA, 7 May 1991, unreported) when his Honour said at p4 [sic]:
>
> > The commission of offences on parole demonstrates that the expectation of rehabilitation of the prisoner has not been realised and that through his own conduct the substantial mechanism designed for rehabilitation, ie parole has failed to achieve its purpose. The Court in such circumstances cannot proceed on the same expectation of rehabilitation that is open in other circumstances.[42]

The second is the greater need to protect society through incapacitation where the rehabilitative opportunity and effect have both not been realised. In *Do v The Queen*, it was held that

> [t]he offences were committed by the applicant in circumstances where punishment, including imprisonment for a previous similar offence, had had no rehabilitative effect upon him and the offences were committed in breach of parole.

[39] (2008) 191 A Crim R 409, 419 [41]–[43] (Harrison J).

[40] See also Odgers (n 28) 320, citing *R v Speeding* (2001) 121 A Crim R 426, 430 [21] (Giles JA); *R v Gibbons* (2013) 233 A Crim R 236, 242–3 [38] (RS Hulme AJ).

[41] Odgers (n 28) 320, quoting *R v Fernando* [2002] NSWCCA 28, [42] (Spigelman CJ) ('*Fernando*') and citing *R v Cicekdag* (2004) 150 A Crim R 299, 301 [7] (Grove J), 310 [52] (Hoeben J).

[42] *Fernando* (n 41) [42] (Spigelman CJ); Odgers (n 28) 320. See also *R v Tran* [1999] NSWCCA 109 for the reference by Wood CJ at CL to the '[b]etrayal of the opportunity for rehabilitation': at [15].

> A lengthy custodial sentence is warranted for specific deterrence and protection of the community.[43]

Overall, a synthesis of the relevant case law reveals that the rationales for aggravating the severity of penalty in cases involving breach of conditional liberty have been both expressly stated and implied through the simple fact of the breach occurring. They range from it being akin to a breach of trust by the offender, to achieving, or recognising the limited prospects for achieving, the traditional purposes of punishment in relation to that offender. The offender's behavioural deficits in abusing the trust placed by the court in them to abide by their undertakings and/or court orders, and a failure to respect the authority of the court in making such orders, exemplify the individually focused breach of trust type rationale. The broader concern of discrediting the criminal justice system in providing non-custodial punishments for offenders who then abuse this conditional liberty in the community reflects the need to maintain the confidence of the community in the criminal courts and their processes. At the same time, the traditional purposes or objectives of punishment come into the frame. The enhanced punishment for contravening conditional forms of liberty is regarded as necessary to achieve specific deterrence of individual offenders, better protection of society from the risks of further offences, or in recognising the limitations of prospects for the rehabilitation of such offenders, particularly where there is homologous recidivist offending.

IV Evaluation of the Current Approach to Punishing Offenders on Conditional Liberty and Reform Proposals

We now turn to critically evaluate the respective justifications which have been expressly and implicitly provided for making breach of conditional liberty an aggravating factor in sentencing determinations.

A *Abuse of Freedom/Breach of Trust/Contempt of Court*

The first rationale outlined above for treating a violation of conditional liberty as an aggravating consideration is that it constitutes an abuse of the freedom afforded by the court to the offender. As a result of this breach of the court's trust or contempt of the court's orders, arguably the offender deserves sterner punishment. Intuitively, this has some appeal, but the theory is doctrinally inaccurate in relation to most instances of conditional liberty. In most circumstances, freedom in the community is not a privilege that is provided to

[43] [2010] NSWCCA 182, [24] (Hislop J).

defendants but rather an expectation or a right that they were merely exercising. This is especially the situation when the breach of conditional liberty arises in the context of bail. The presumption of innocence means that people who are charged with criminal offences should not be punished unless and until they are proven guilty. Thus, the default position is that people who are charged with criminal offences are entitled to be free in the community. This is reflected in the respective legislative schemes throughout Australia that regulate bail.[44] The main qualifications to this are certain serious alleged offences where there is a presumption against bail.[45]

Where the breach of conditional liberty relates to an offence committed while undergoing a sanction in the community, such as a community correction order, intensive correction order or suspended sentence, the suggestion that offenders abuse freedom if they commit an offence again seems misplaced. This is because of the principle that prison should only be utilised as a last resort.[46] Thus, offenders undergoing such sanctions are not in any formal sense fortunate to have their liberty. Rather, the offence for which they were sentenced did not merit a full-time prison term and the non-custodial disposition was the proportionate and fair response in all the circumstances.

The same logic applies in relation to probation. Offenders who are released on probation did not have an entitlement to probation or a presumption against probation, rather it was granted because they met the criteria for release into the community as a proportionate response to their offending.

Hence, in all instances, apart from when a defendant is on conditional liberty for an alleged serious offence which has a presumption against bail, it is flawed to contend that the offender has abused their liberty and breached the trust of the court by committing another offence. Even in this context, it is not clear that a heavier penalty or more severe disposition is justified — for two reasons.

[44] *Bail Act 1992* (ACT) ss 6(2), 8–9A; *Bail Act 2013* (NSW) preamble, s 7; *Bail Act 1982* (NT) ss 7, 8; *Bail Act 1980* (Qld) s 9; *Bail Act 1985* (SA) s 4(1); *Bail Act 1994* (Tas) s 8; *Bail Act 1977* (Vic) ss 1B(1)(b), 4; *Bail Act 1982* (WA) ss 5, 11(1).

[45] In contemporary bail law, the presumption against bail is normally expressed as a series of 'show cause' provisions as to why bail should be granted: see, eg, *Bail Act 2013* (NSW) ss 16A–16B.

[46] This is the parsimony principle: *NOM v DPP (Vic)* (2012) 38 VR 618, 640–1 [68] (Redlich and Harper JJA and Curtain AJA), quoting *R v Bell* (Victorian Court of Appeal, Kaye, O'Bryan and Vincent JJ, 9 August 1990) 5 (O'Bryan J). The principle has been recently reaffirmed in Victoria: *Boulton v The Queen* (2014) 46 VR 308, 340 [140] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA) ('*Boulton*'); *Bowden v The Queen* (2013) 44 VR 229, 239 [45] (Redlich and Coghlan JJA and Dixon AJA); *DPP (Vic) v Fucile* (2013) 229 A Crim R 427, 443 [104] (Maxwell P and Weinberg JA). See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.

The first is that the concept of 'an abuse of freedom', while having an emotional overlay, is thin at the logical justificatory level. Sentencing involves the deliberate infliction of hardships on offenders. It is the domain where the community, through the courts, acts in its most coercive manner. Given what is at stake, it is important that all hardships that are imposed on offenders have a rational justification. Emotive phrases such as 'abuse of freedom', 'breach of trust' or 'contempt' are deficient in this regard because they fail to link the concept to a more fundamental criminal law principle. Expressions of this kind are political and rhetorical statements, not legal principles capable of supporting a rational and justifiable decision in law supporting a more severe outcome, namely, imprisonment. Exactly what is meant by 'abusing freedom' or 'breaching trust' in this context? And why does this concept require sterner punishment beyond the mere impulse to punish more severely? Moreover, the concept of abusing freedom or breaching the court's trust is not so self-evidently culpable to justify additional criminal punishment.

The second reason that abusing conditional liberty does not justify a sterner punishment in the form of an aggravating consideration is that often the offender receives punishment for the breach, in addition to the breaching offence. This is considered further below in the context of the concept of double punishment.[47]

B *Discrediting the Criminal Justice System*

The second reason identified for aggravating penalties for offenders who commit offences while on conditional liberty is that it discredits the criminal justice system.[48] This is the most dubious rationale that has been advanced. As noted above, to justify inflicting suffering on offenders, it is necessary to provide a coherent rationale. There is a need for doctrinal and empirical precision in articulating these reasons. Sweeping phrases such as 'discrediting the criminal justice system' are no more than verbiage in search of a logical foundation. Not only is the concept too broad, but there is a total absence of empirical evidence that if offenders commit crime while on conditional liberty, it will discredit the criminal justice system if they go unpunished for this seemingly contemptuous conduct. It is a baseless assumption.

The combination of the credibility of non-custodial sentencing options and the breach of trust involved in committing an offence while at conditional liberty are significant overlapping matters of public policy. Civil society depends,

[47] See below Part V.

[48] See, eg, *Morris* (n 31) 5 (Kirby ACJ, Badgery-Parker and Bruce JJ).

ultimately, on a collective trust that each citizen is, more or less, able to govern themselves in a way that does not breach the law or injure others. It is important that the decision to release a person who has committed an offence does not undermine the perceived authority of the judiciary and the public trust in the institutions of government in releasing offenders back into the community. There is little doubt that when individuals on conditional liberty commit offences, such matters quickly become issues of political force which may be perceived to discredit the criminal justice system, but even if such a perception exists, it cannot ground a justification for an increase in penalty.

C *Specific Deterrence*

As we have seen, specific deterrence is another justification advanced for punishing offenders who breach their conditional liberty more severely. As Bagaric and Alexander explain:

> Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions, thereby convincing them that crime does not pay. In effect, it attempts to dissuade offenders from reoffending by inflicting an unpleasant experience on them (normally imprisonment) which they will seek to avoid in the future.[49]

The aim is to influence the moral choices of the individual by exposing him or her to particular levels and types of punishment in order to generate fear that if the individual chooses to offend again then they would meet with further, and probably a more severe level and type of, punishment. The method of specific individual deterrence may then be described as giving individuals a 'taste of what will happen if they reoffend'.[50] Conditional liberty is a less punitive disposition than imprisonment and hence, theoretically, there is some cogency to the view that if an offender has not been influenced by sanctions involving conditional liberty then a harsher punishment is in order.

[49] Mirko Bagaric and Theo Alexander, 'The Capacity of Criminal Sanctions To Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing' (2012) 36(3) *Criminal Law Journal* 159, 159. See generally Daniel S Nagin, Francis T Cullen and Cheryl Lero Jonson, 'Imprisonment and Reoffending' (2009) 38(1) *Crime and Justice* 115; Donald Ritchie, 'Does Imprisonment Deter? A Review of the Evidence' (Research Paper, Sentencing Advisory Council (Vic), April 2011).

[50] Barbara A Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Open University Press, 1996) 24. Hudson notes that the 'taste of custody' is the most obvious example of this kind of individual deterrence and gives the example of the 'short, sharp shock' regimes employed for juvenile offenders in England and Wales, and 'boot camps' used in the United States of America.

A major criticism of such a rationale for enhancing punishment for breach of conditional liberty is that it would give 'no appearance of consistency, since each sentence would be specially calculated so as to influence the specific offender' involved.[51] Therefore, there is seen to be a direct conflict with the principle of proportionality in that the increasing levels of severity of punishment are directed only at the offender without sufficient regard to the gravity of the particular breaching offences committed by the individual.[52]

Another significant problem with specific deterrence as a coherent principle is that its effectiveness is undermined by the available empirical evidence. In those studies that have considered recidivism, there is virtually no credible evidence that offenders subjected to extended punishment are any more or less likely to reoffend than others convicted of similar offences.[53] Indeed, most studies indicate that longer periods in prison do not reduce offending behaviour of particular offenders.[54] If anything, it is the non-custodial sentences that tend to be associated with lower rates of offending.[55] Notably, Nagin, Cullen and Jonson found that recidivism in offenders who had been imprisoned for offences compared with those who had not was not notably different.[56] If anything, incarceration was more likely to result in subsequent offending,[57] a conclusion later confirmed by a national report to the United States Congress in 2016.[58] Overall, the available empirical research does not support the basic aim

[51] 'Deterrence' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3rd ed, 2009) 40, 41.

[52] See below Part V(B).

[53] See generally Nagin, Cullen and Jonson (n 49); Don Weatherburn, 'The Effect of Prison on Adult Reoffending' (Crime and Justice Bulletin No 143, NSW Bureau of Crime Statistics and Research, August 2010); Ritchie (n 49); Donald P Green and Daniel Winik, 'Using Random Judge Assignments To Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders' (2010) 48(2) *Criminology* 357, 357–8; Franklin E Zimring and Gordon J Hawkins, *Deterrence: The Legal Threat in Crime Control* (University of Chicago Press, 1973) 14. See also New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) 33–4 [2.98]–[2.102].

[54] See Green and Winik (n 53) 358–9.

[55] Karen Gelb, Geoff Fisher and Nina Hudson, Sentencing Advisory Council (Vic), *Reoffending Following Sentencing in the Magistrates' Court of Victoria* (Report, June 2013) xi, 30–1.

[56] Nagin, Cullen and Jonson (n 49) 178.

[57] Ibid 155. See also Ritchie (n 49) 21; Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, 'The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending' (Technical and Background Paper No 33, Australian Institute of Criminology, 2009) 9–10; Weatherburn (n 53) 10.

[58] The report states:

> [A] growing body of work has found that incarceration increases recidivism … For instance, one recent study that uses highly detailed data from Texas … finds that although

of specific individual deterrence for a marginal deterrent effect — that is, a reduction in the level of specific offending by increasing a particular penalty applied to a given offender.

Thus, it is empirically flawed to suggest that aggravating penalties for offenders who breach conditional liberty will make them less likely to reoffend. It is important to note that this empirical evidence has not influenced lawmakers. Therefore, unless the legislative schemes are changed to abolish the sentencing objective of specific deterrence, this rationale can continue to be put forward as a theoretically, but not evidentially, sound basis for aggravating penalty on the basis of breach of conditional liberty.

D *Rehabilitation*

The appeal to rehabilitation as influencing the penalties for offenders who breach liberty is contentious. Broken down, the argument is that offenders who commit offences while on conditional liberty have weaker prospects of rehabilitation than other offenders. More generally, what is being alluded to is that there is a correlation between the number of offences committed by a person and their prospects of rehabilitation. Once again, there is an empirical problem with this argument. There is no empirical data to support the contention that one additional offence meaningfully reduces an offender's prospects of rehabilitation.

In fact, the weight of evidence suggests that rehabilitation per se may be a flawed objective generally as a justifying aim of punishment. Certain rehabilitative techniques have some degree of success for some offenders, but there is no data to show that there are wide-ranging techniques to reform all offenders.[59] Indeed, there is no agreement as to what 'rehabilitation' actually means or

> initial incarceration prevents crime through incapacitation, each additional sentence year causes an increase in future offending that eventually outweighs the incapacitation benefit. Each additional sentence year leads to a 4 to 7 percentage point increase in recidivism after release …
>
> Council of Economic Advisors, Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System* (Report, 23 April 2016) 39, citing Michael Mueller-Smith, 'The Criminal and Labor Market Impacts of Incarceration' (Working Paper, 18 August 2015) 25.

[59] See generally Karen Heseltine, Andrew Day and Rick Sarre, 'Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia' (Research and Public Policy Series No 112, Australian Institute of Criminology, 1 May 2011); Mark W Lipsey and Francis T Cullen, 'The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews' (2007) 3 *Annual Review of Law and Social Science* 297, 307; Michael S King, 'Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience' (2011) 21(1) *Journal of Judicial Administration* 19.

how it can be measured. The last comprehensive report on rehabilitation by the Australian Institute of Criminology is now over a decade old and focused primarily on the administrative changes introduced in prisons since 2004 and the effect this had on the management of prisoners.[60] Although the report was not able to make general conclusions in relation to rehabilitation as a general goal because of the absence of uniform programs and data, it did find that the rate of recidivism of sex offenders who had completed an offender's program was less than half that of those who did not.[61] A review of the literature showed that programs directed at violent offenders were less encouraging, with only modest reductions in subsequent violent offending.[62] Drug and alcohol programs were shown to be somewhat effective in reducing substance abuse and associated offending, but the long-term effectiveness of these programs has not been confirmed.[63] The concerns are that drug and alcohol programs are only effective where there are decisive controls over access to drugs and alcohol, such as in a prison environment or under the intensive and coordinated supervision techniques of the Drug Court.[64]

Thus, there is some support for the view that criminal punishment can assist to reform a portion of offenders who have committed certain kinds of offences, although there is no firm evidence showing that it can work for most offenders. Accordingly, there is an empirical basis for incorporating rehabilitation into the sentencing calculus for some offenders. This applies most clearly to invoking

[60] See Heseltine, Day and Sarre (n 59) ix.

[61] Ibid 13–14.

[62] Ibid 17–18. See also Bagaric and Alexander (n 49) 170–1.

[63] Heseltine, Day and Sarre (n 59) 26–30.

[64] See ibid 27–30. As Bagaric and Alexander explain:

> This assessment is consistent with the findings of Mitchell et al, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison. The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 to 2004. They analysed 66 studies in total. The report concluded that:
>
> > Overall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism.
>
> Bagaric and Alexander (n 49) 171 (citations omitted), citing Ojmarrh Mitchell, David B Wilson and Doris L MacKenzie, 'The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior' (Systematic Review, The Campbell Collaboration, 18 September 2006) 17.
>
> See also Don Weatherburn et al, 'The Long-Term Effect of the NSW Drug Court on Recidivism' (Crime and Justice Bulletin No 232, NSW Bureau of Crime Statistics and Research, September 2020) 1–3, 13–14.

rehabilitation as a mitigating factor, but also potentially for adverting to it as a basis for imposing harsh penalties when rehabilitation is absent or prospects for achieving it are reduced.

This observation, however, raises a significant doctrinal obstacle to relying on rehabilitation as a basis for increasing the penalties of offenders who commit offences while on conditional liberty. It is well-established that the absence of a mitigating factor cannot serve to increase penalty severity.[65] Accordingly, even if offenders who breach conditional liberty have reduced prospects of rehabilitation, this cannot justify increasing their penalty severity beyond a sentence proportionate to the gravity of the breaching offence.

E *Protection of Society*

The need to protect the community is arguably the most important sentencing objective and is thus potentially capable of justifying breach of conditional liberty as an aggravating factor. Community protection is expressly set out as a sentencing objective in all the sentencing statutes throughout Australia,[66] except in Commonwealth matters.[67] At common law, the cardinal status of community protection when contrasted to other sentencing objectives is clear. Justice Brennan stated in *Channon v The Queen*:

> The necessary and *ultimate justification for criminal sanctions is the protection of society* from conduct which the law proscribes. Punishment is the means by which society marks its disapproval of criminal conduct, by which warning is given of the consequences of crime and by which reform of an offender can sometimes be assisted. Criminal sanctions are purposive, and they are not inflicted judicially except for the *purpose of protecting society*; nor to an extent beyond what is necessary to achieve that purpose.[68]

Thus, there is no question that community protection can ground an aggravating factor and there is ostensible appeal to an argument that the community needs to be protected from the risks posed by offenders who breach conditional

[65] See *Siganto v The Queen* (1998) 194 CLR 656, 664 [23], 666 [30], 667 [34] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

[66] *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act 1995* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 2017* (SA) s 10(2)(b); *Sentencing Act 1997* (Tas) s 3(b); *Sentencing Act 1991* (Vic) s 5(1)(e); *Sentencing Act 1995* (WA) s 6(4)(b).

[67] *Crimes Act 1914* (Cth) ss 16A(1)–(2). However, s 16A(2) makes it clear that it is not intended to be exhaustive of the relevant considerations.

[68] (1978) 20 ALR 1, 5 (emphasis added) ('*Channon*'). This passage has been cited with approval: see, eg, *Boulton* (n 46) 326 [68] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

liberty by committing further offences. A person who has already appeared before a court and had orders effectively threatening incarceration should they not desist from further misconduct is clearly on notice and arguably not deterred by that threat should they offend again. However, in order for this rationale to be valid, it is necessary to establish that these offenders present a greater danger to the community than other cohorts of offenders. As a general proposition this cannot be true given that breaches of conditional liberty relate to all offence categories, including property offences; these are typically not the catalyst for the community protection rationale objective.

To the extent that community protection can underpin the conditional liberty aggravating factor, it must relate to offences which pose an unacceptable risk to community safety (notably sexual and violent offences) and where the breach of conditional liberty is assumed to signal a stronger likelihood of reoffending. While there is no empirical evidence to support this contention, it is consistent with prevailing sentencing orthodoxy. However, the extent to which this consideration should influence the sentencing of these offenders is impacted by an analysis of the net or proportionate punishment that is appropriate for these offenders. We now turn to this issue.

V Double Punishment, Proportionality and Reform

We have seen that most of the discrete sentencing justifications for punishing offenders who commit offences on conditional liberty are flawed. To the extent that they have some validity, this is in relation to the community protection and specific deterrence rationales. However, ultimately even these rationales fail in many instances because of a fundamental problem underlying the whole approach to the sentencing of offenders who commit offences while on conditional liberty. This problem is grounded in the concept of double punishment.

Double punishment is a complex doctrine, overlapping with the principle against double jeopardy. The broad legal principle is that a person may not be prosecuted twice for the same offence. The corollary of that is that a person who has already been prosecuted or convicted of an offence may raise that fact as a plea in bar of subsequent prosecution (autrefois acquit; autrefois convict).[69]

[69] *R v Carroll* (2002) 213 CLR 635, 646 [30] (Gleeson CJ and Hayne J), 661–2 [84] (Gaudron and Gummow JJ), 672 [128] (McHugh J); *Connelly v DPP (UK)* [1964] AC 1254, 1305–6 (Lord Morris) ('*Connelly*'); *Rogers v The Queen* (1994) 181 CLR 251, 276–7 (Deane and Gaudron JJ); *Crimes Act 1900* (ACT) s 283; *Criminal Procedure Act 1986* (NSW) s 156; *Criminal Code Act 1983* (NT) ss 18–20, 342(2)(c), 346; *Criminal Code Act 1899* (Qld) ss 17, 598(2)(c)–(e), 602; *Criminal Law Consolidation Act 1935* (SA) s 5I; *Criminal Code Act 1924* (Tas) ss 11, 355(1)(b), 358; *Criminal Procedure Act 2009* (Vic) s 220; *Criminal Procedure Act 2004* (WA) s 126(1)(c).

There are, however, nuances to this rule, which include situations where the same set of facts gives rise to discrete offences — this is often used in crimes involving a course of events, such as sexual offences.[70] Overlapping with this prohibition against prosecution is a doctrine concerned with preventing double punishments for the same crimes — a doctrine that is complex in those cases where multiple offences are enlivened through the same set of facts. It is a frequent source of sentencing error.[71] What is important to note is that double punishment is not only limited in the general law but is also a matter of fundamental concern in human rights and public policy. Indeed, there are distinct prohibitions against double punishment for offences arising under state and federal law,[72] and against double punishment generally in human rights instruments in some jurisdictions.[73] One of the added difficulties in this area has been the advent of legislation effectively permitting double jeopardy in bringing failed prosecutions back to trial in some cases,[74] and divergent authorities on whether or not double punishment has taken place.[75]

To this end, the extent to which the concept of double punishment applies differs depending on which one of three different scenarios is applicable. The first is when the offending that resulted in the breach of liberty is a separate criminal offence (such as committing an indictable offence while on bail). The second is when the breaching offence is not an additional offence but results in an incidental hardship on the offender, such as imprisonment as a result of the revocation of bail, cancellation of parole, or imposition of an intensive correction order. The third situation is when the breaching offence does not result in

[70] See generally *Connelly* (n 69) 1305–30 (Lord Morris).

[71] See, eg, *R v De Simoni* (1981) 147 CLR 383, 394 (Gibbs CJ, Mason J agreeing at 395, Murphy J agreeing at 395); *R v Sherpa* (2001) 34 MVR 345, 348–9 [14] (Ormiston JA).

[72] *Crimes Act 1914* (Cth) s 4C; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 20; *Legislation Interpretation Act 2021* (SA) s 59; *Interpretation of Legislation Act 1984* (Vic) s 51.

[73] *Human Rights Act 2004* (ACT) s 24; *Human Rights Act 2019* (Qld) s 34; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 26.

[74] *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW) sch 1; *Criminal Code Act 1899* (Qld) ch 68; *Criminal Code Act 1924* (Tas) ss 390–7; *Criminal Procedure Act 2009* (Vic) ch 7A.

[75] For cases where double jeopardy was rejected, see, eg, *R v Nor* (2005) 11 VR 390, 399–400 [22]–[23] (Chernov JA); *R v Langdon* (2004) 11 VR 18, 30 [69], 38 [112] (Gillard AJA); *R v Henderson* [1999] 1 VR 830, 835–6 [21]–[22] (Batt JA); *Moore v The Queen* (1995) 15 WAR 87, 91–3 (Franklyn J); *Adler v DPP (NSW)* (2004) 185 FLR 443, 453 [50] (Mason P). For cases where double jeopardy was accepted, see, eg, *R v Garth* (2008) 186 A Crim R 28, 38 [32] (Judd J); *Pearce v The Queen* (1998) 194 CLR 610, 624 [49] (McHugh, Hayne and Callinan JJ); *Environmental Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502, 510–11 (Gleeson CJ).

a tangible hardship to the offender, such as when parole or an intensive correction order is not revoked. We consider these situations in that order.

A *When the Breach of Conditional Liberty Is a Separate Criminal Offence*

In certain jurisdictions, some breaches of conditional liberty are a discrete offence.[76] When this is the situation, the offender is already punished for this breach and hence to aggravate the penalty for the breaching offence potentially violates the proscription against double punishment. This is especially the case given that often a relatively harsh penalty is imposed for these secondary offences.[77] Before expanding on this line of argument more closely, it is illuminating to examine the extent of the issue of secondary offending.

There is no official data on how often offenders commit offences while on conditional liberty and, in particular, how frequently they are sentenced for a secondary offence when they commit an offence while on conditional liberty. However, some insight into these matters is obtained from a study undertaken by the Victorian Sentencing Advisory Council in 2017 which analysed the incidence and sentencing outcomes for secondary offences over the five-year duration between the financial years 2011–12 and 2015–16.[78] The Victorian Sentencing Advisory Council defined a secondary offence in the following manner:

1 a person has been suspected or convicted of a criminal offence;

2 because of that involvement with the criminal justice system, the person is subject to special restrictions or requirements that do not apply to others in the community; and

3 the contravention of those special restrictions or requirements is a discrete offence.[79]

[76] See, eg, McGorrery and Bathy (n 3) ix. The debate regarding the desirability of making these offences secondary offences is set out in this report. Arguments in favour of making breaching offences additional (secondary) offences focused on deterrence, denunciation and community protection: at 51–2.

[77] See ibid 9.

[78] Ibid ix, 4.

[79] Ibid 1. This study included the sentencing outcomes of offenders who commit offences while on bail or parole and also other secondary offences, including breaches of community-based sentences with conditions imposed as part of being convicted of sex offences: at 5. In Victoria, the *Bail Act 1977* (Vic) s 30B, as inserted by the *Bail Amendment Act 2013* (Vic) s 8, makes it an offence to commit an indictable offence while on bail (from 20 December 2013). The

The report examined 20 secondary offences across four categories:

1 bail-related secondary offences (such as failing to answer bail or committing an indictable offence while on bail);

2 sentence-related secondary offences (such as contravening a community-based order or contravening an adjourned undertaking);

3 a parole-related secondary offence (such as breaching a prescribed condition of parole); and

4 sex offender secondary offences (such as failing to comply with reporting obligations).[80]

During this five-year period, 100,860 secondary offences were sentenced in Victorian courts, with 70% being bail-related secondary offences and 25% being sentence-related secondary offences.[81] Overall, the sentencing outcome across all secondary offence categories was moderately severe, with 17% of adult offenders being sentenced to imprisonment for the secondary offence.[82] In a significant number of sentence-related secondary offence cases and parole-related secondary offence cases, the original sentencing order was varied, or the offender was resentenced.[83]

However, it is important to note that not all secondary sentences translated into the offender also having his or her penalty increased for a breaching offence.[84] This is because the nature of the breach that resulted in the secondary offence was often not the commission of another offence. Thus, for example, failing to notify a corrections officer for changing address while on a community-based order or on bail is a breach of the requirements of those respective orders and constitutes a secondary offence, but does not aggravate the penalty for the foundational offence.[85]

maximum penalty is three months' imprisonment or 30 penalty units. The *Corrections Act 1986* (Vic) s 78A, as inserted by the *Corrections Amendment (Breach of Parole) Act 2013* (Vic) s 3, makes it an offence to breach a condition of parole. The maximum penalty is three months' imprisonment, 30 penalty units, or both (from 1 July 2014). A prescribed condition can include committing an imprisonable offence or a number of other situations.

80 McGorrery and Bathy (n 3) ix, 11–46.

81 Ibid ix, 47.

82 Ibid x.

83 See ibid 28, 31, 36.

84 See ibid 28.

85 See ibid 12.

A better gauge of the frequency of sentences being imposed on offenders when there is a breach of conditional liberty which potentially involves double punishment is when the breach of conditional liberty stems from the commission of another crime which is a discrete offence. To this end, the most definitive data relates to the offence of committing an indictable offence while on bail. During the survey period, there were 12,043 offences of committing an indictable offence while on bail.[86] Most of these (11,913) were sentenced in the Magistrates' Court while 130 were in the higher courts — and nearly all of them (apart from 616 of the total) were in the years 2014–15 and 2015–16.[87] The sentencing outcomes were relatively severe. In the Magistrates' Court, 46% of offenders received a term of imprisonment;[88] this figure rose to 68% in the higher courts.[89] The average length of imprisonment received was 34 days in the Magistrates' Court and 36 days in the higher courts.[90] In the Magistrates' Court, all but 32 of the offences were concurrent (483).[91] Full data in this regard was not available for the higher courts.[92]

Two telling points emerge from this Victorian data. The first is that offenders often breach bail (and presumably other orders such as parole) by committing another offence. Second, when breach of conditional liberty is a secondary offence, often harsh punishment is imposed for the secondary offence — approximately 50% of these offences result in imprisonment.[93]

In sentencing for a secondary offence, courts are guided by the same sentencing principles as for the breaching offence. Thus, considerations such as *specific deterrence* and *community protection* inform the sentencing outcomes of these offences. In light of that, we suggest it is excessive and duplicitous to

[86] Ibid 13 tbl 2.

[87] Ibid.

[88] Ibid 15 fig 3.

[89] Ibid 17 tbl 3.

[90] Ibid 19.

[91] Ibid 21.

[92] The data regarding breaching a parole condition were less informative. There are a number of offences which involve breaching parole. There are a number of other ways in which this offence can be committed, including leaving Victoria without permission, breaking any law, not attending in person at a community corrections centre and so on: *Corrections Regulations 2009* (Vic) regs 88A(a)–(c), referencing regs 83A(1)(a), (h)–(i). The remaining nine are optional conditions (including consuming alcohol and contacting prohibited persons) that can be attached to a parole order: reg 88A(d), referencing regs 83B(1)(a), (e)–(g), (i)–(j), (m)–(o). During the survey period, there was a total of 215 proven charges of breaching a condition of parole. Approximately 50% of these resulted in a term of imprisonment. It was noted that of the 56 charges that were sentenced in the Magistrates' Court, 36 involved the condition to not commit an imprisonable offence while on parole: McGorrery and Bathy (n 3) 34–5.

[93] See McGorrery and Bathy (n 3) 15, 19, 34–5.

again reapply these considerations when it comes to sentencing for the foundational offence. Aggravating the penalty of the foundational offence is merely to double down on the same aggravating considerations for identical conduct and hence constitutes double punishment.

An interesting aspect about secondary offences is that the same behaviour is often treated differently in different parts of Australia. In Victoria, committing an indictable offence while on bail or parole is a discrete offence,[94] while this is not the situation in New South Wales. This means that in Victoria, an offender who is on bail and commits an indictable offence will be punished for committing an offence while on bail and may have his or her bail revoked, whereas the same situation in New South Wales would result in the offender having his or her bail revoked but not being punished for the separate offence of committing an offence while on bail. Hence, in jurisdictions apart from Victoria, the argument that aggravating penalty for breach of conditional liberty on bail is double punishment is not as clear-cut. We now consider the situation where an offender has his or her penalty increased because the offence was committed while on conditional liberty, but the breaching offence is not a separate secondary offence.

B *When the Breach of Conditional Liberty Is Not a Separate Criminal Offence and Results in Incidental Punishment*

1 *Proportionality as the Guiding Principle*

Where an offender receives an additional penalty for committing an offence while on conditional liberty, the most common outcome is that this aggravates the penalty for the breaching offence but does not constitute an additional offence. In these instances, the defendant often still incurs an additional hardship in the form of cancellation of the underlying order, such as revocation of bail, parole or an intensive correction order, which results in him or her being sentenced to prison.[95] This incidental hardship can also potentially offend the prohibition against double punishment. The key to this line of reasoning is the premise that incidental hardships constitute punishment which should be factored into the ultimate sanction imposed on offenders. This requires consideration of the principle of proportionality.

[94] Ibid ix, 11–12, citing *Bail Act 1977* (Vic) s 30B.

[95] For example, in NSW, there are provisions that cover breaches of intensive correction orders, community correction orders, conditional release orders and parole orders respectively: *Crimes (Administration of Sentences) Act 1999* (NSW) ss 88, 91, 162–5, 107C–107E, 108C–108E, 169–172A.

In its crudest form, the principle of proportionality is that the punishment must fit the crime. The High Court clearly stated that proportionality is the primary aim of sentencing in the seminal cases of *Veen v The Queen* and *Veen v The Queen [No 2]*.[96] Subsequently, in *Hoare v The Queen*, the majority of the High Court reiterated:

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances …[97]

The primacy of proportionality is reflected in the fact that it cannot be displaced by other sentencing objectives, such as protection of the community.[98] The proportionality principle is given statutory recognition in all Australian jurisdictions through a varying range of expressions that essentially focus on the alignment of punishment with the seriousness of the offence and culpability of the offender.[99]

The principle of proportionality consists of two limbs. Ordinal proportionality is the first limb and relates to comparing the specific crime committed by the offender with the seriousness of other crimes across the span of criminal offences, maximum penalties applicable to the conduct, and mental elements involved in those offences.[100] Secondly, there is cardinal proportionality which

[96] *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J); *Veen [No 2]* (n 10) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

[97] (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis omitted) (citations omitted).

[98] See *Channon* (n 68) 6–7 (Brennan J), 28–9 (Toohey J); *R v Rushby* [1977] 1 NSWLR 594, 598–9 (Street CJ for the Court); *R v Valentini* (1980) 48 FLR 416, 420–1 (Bowen CJ, Muirhead and Evatt JJ). Cf *R v Cuthbert* [1967] 2 NSWR 329, 333 (Herron CJ), where the importance of community protection as an aim of sentencing was emphasised.

[99] The *Sentencing Act 1991* (Vic) s 5(1)(a) provides that one of the purposes of sentencing is to impose 'just' punishment. It further provides that, in sentencing an offender, the court must have regard to the 'gravity of the offence' and 'the offender's culpability and degree of responsibility': ss 5(2)(c)–(d). The *Sentencing Act 1995* (WA) s 6(1) states that the sentence 'must be commensurate with the seriousness of the offence', and the *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a) provides that the punishment must be 'just and appropriate'. In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be 'just in all the circumstances': *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a). In South Australia, 'a court must apply … the common law concepts reflected in … proportionality': *Sentencing Act 2017* (SA) s 10(1)(a). For Commonwealth crimes, the emphasis is upon ensuring the offender is 'adequately punished for the offence': *Crimes Act 1914* (Cth) s 16A(2)(k). The same phrase is used in the NSW legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

[100] Mirko Bagaric, 'Injecting Content into the Mirage That Is Proportionality in Sentencing' (2013) 25(3) *New Zealand Universities Law Review* 411, 424.

involves a consideration of available punishments for the specific crime as compared to the pinnacle level of punishment applicable in the particular jurisdiction in which the offence was committed.[101] Finally, in relation to the quantitative distribution of available punishments for a specific offence, the two limbs of proportionality are considered together to ensure the calibration between crime and punishment within an appropriate range by reference to floor and ceiling limits as to the nature and extent of available sentencing options.[102]

The concept of proportionality as a sentencing principle has been critiqued, notably for the vagaries associated with attempting to align specific crimes and punishments in a transparent and consistent manner when there are wide variations in the understandings, and objective assessments, of offence seriousness by individual judicial officers.[103] There is a philosophical and subjective component involved whenever individuals attempt to make an objective assessment of the seriousness of criminal offending which means that consistency in both interpretation and application of the imprecise concept of proportionality is difficult, if not impossible, to achieve. One of the foremost criticisms of proportionality is that it 'presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment'.[104] This critique highlights the imperative that in order to give substance to proportionality as a key sentencing principle, there must be an objective ranking of all crimes and all punishments, and anchoring of the punishment scales.[105]

Although the force of this critique is recognisable, it is certainly arguable that precision in matching offence seriousness and severity of punishment is not attainable in the contemporary context where proportionality is

[101] Ibid. For further consideration of ordinal and cardinal proportionality, see Andrew von Hirsch, 'Proportionate Sentences: A Desert Perspective' in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press, 2011) 207, 212–13.

[102] Michael Tonry, 'Proportionality, Parsimony and Interchangeability of Punishments' in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press, 2011) 217, 221–2.

[103] Ibid 224–30. Other criticisms are also examined by Tonry, including that proportionality in a 'just deserts' sense cannot be achieved in an 'unjust society': at 230–2; and 'strong proportionality conditions violate notions of parsimony by requiring imposition of unnecessarily severe punishments in individual cases in order to assure formal equivalence of suffering': at 225.

[104] Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers, 2004) 184.

[105] Ibid 185. See also Ian Leader-Elliott, 'Sentencing by Weight: Proposed Changes to the Commonwealth Code's Serious Drug Offences' (2012) 36(5) *Criminal Law Journal* 265, 277–8, quoting George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press, 1993) 43.

characterised as a limiting rather than a determining principle in sentencing.[106] It may be possible to incorporate clearer substantive content into the proportionality principle, but there is no definitive characterisation in the intuitive synthesis approach to determining an appropriate sentencing outcome.[107] Limits are imposed by the proportionality principle in the sense of an appropriate range of punishments but it does not go beyond that frontier.

In assessing punishment severity, the nature and extent of the impact on the life of an offender are primary concerns.[108] As the harshest available punishment, imprisonment through depriving an offender of their liberty and dominion will potentially have harmful and enduring detrimental effects on an offender. Therefore, the length of a prison sentence compared to the maximum available sentence includes important considerations as to the nature and extent of deprivation of liberty necessary to punish an offender's culpability and the mitigating or aggravating effect of all the circumstances surrounding the offence and the offender themselves. Further, in assessing the severity of punishment, the net hardships imposed on an offender must be carefully weighed to ensure a proportionate outcome. Prevailing orthodoxy suggests that this includes not only the immediate sanction determined by a court but also incidental hardships stemming from the criminal activity.[109] This means that adverse consequences meted out to offenders as a result of breaching conditional liberty, such as revocation of bail or parole, should impact on limiting the sentence offenders receive for the breaching offence. Certainly, this is consistent with the manner in which most other incidental hardships (whether imposed by courts or occurring by way of happenstance) are dealt with by the courts. Other common forms of incidental hardships arising from committing an offence include injuries suffered while committing the crime, public opprobrium, loss of employment and deportation.

2 *Incidental Punishment as a Consideration in the Penalty Severity Limb of the Proportionality Thesis*

There are numerous instances of sentences being reduced on account of injuries suffered by offenders during the commission of the offence. In some cases, the

[106] See John L Anderson, 'The Label of Life Imprisonment in Australia: A Principled or Populist Approach to an Ultimate Sentence' (2012) 35(3) *University of New South Wales Law Journal* 747, 754–6; von Hirsch (n 101) 211–13; Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(3) *Melbourne University Law Review* 489, 495–6; *R v Dodd* (1991) 57 A Crim R 349, 354 (Gleeson CJ, Lee CJ at CL and Hunt J).

[107] Bagaric (n 100) 412–14.

[108] Ibid 436, quoting Ryberg (n 104) 102–3.

[109] See below Part V(B)(2).

injuries arose out of the direct conduct of the offender which had the unintentional effect of causing them bodily harm. In *Alameddine v The Queen*, the Court regarded the fact that the offender was injured when his drug-making laboratory exploded as a matter to be taken into account in mitigation.[110] In a similar vein, in *R v Haddara*, the Victorian Court of Appeal held that injuries sustained by an arsonist as a result of the fire he lit mitigated penalty — although ultimately there was no basis for greater mitigation than that accorded by the sentencing judge.[111]

A common non-curial hardship stemming from criminal offending is condemnation and opprobrium. The impact that this should have on the sentence imposed on an offender was considered by several members of the High Court in *Ryan v The Queen*.[112] Justice Kirby and Callinan J stated that public opprobrium was a factor which could be taken into account to reduce the sanction imposed by the court,[113] whereas McHugh J took the opposite approach and rejected the relevance of public opprobrium.[114] Justice Gummow did not canvass the issue, while Hayne J 'substantially' agreed with McHugh J.[115] An extensive analysis of the authorities was also undertaken by the Queensland Court of Appeal in *R v Nuttall; Ex parte Attorney-General (Qld)* ('*Nuttall*').[116] The Court 'assumed' public opprobrium was relevant in light of the fact that it was not submitted that the sentencing judge failed to take it into account, but noted that public humiliation was of little weight given that it was inevitable that

> [t]he attainment of high public office brings with it public exposure and media scrutiny as well as power, fame and prestige. Criminal abuse of the office, if detected, will inevitably attract media attention and result in shame and distress to the offender and his family.[117]

Thus, the balance of authority indicates that public condemnation of an offender can be a mitigating factor but that it generally carries little weight.

There is no settled principle regarding the relevance of employment deprivation to sentence. A number of approaches have been taken. In both

110 [2006] NSWCCA 317, [17]–[27] (Grove J, Kirby J agreeing at [34], Hislop J agreeing at [35]).

111 (1997) 95 A Crim R 108, 113 (Callaway JA, Brooking JA agreeing at 108, Vincent AJA agreeing at 113).

112 (2001) 206 CLR 267 ('*Ryan*').

113 Ibid 303–4 [123] (Kirby J), 318–19 [177] (Callinan J).

114 Ibid 284–5 [52]–[55].

115 Ibid 313–14 [157] (Hayne J).

116 [2011] 2 Qd R 328, 343–6 [59]–[66] (Muir JA, Fraser JA agreeing at 349 [80], Chesterman JA agreeing at 349 [81]) ('*Nuttall*').

117 Ibid 346 [65] (Muir JA).

Kovacevic v Mills[118] and *G v Police*,[119] the sentences were mitigated to avoid damage to the offenders' career prospects. There have also been a number of other instances where sentences have been discounted because of consequential damage to career or prospects.[120] On the other hand, in *R v Boskovitz*[121] and *Brewer v Bayens*,[122] the sentences were imposed regardless of the effects on career or prospects, while in *R v Liddy [No 2]* and *Hook v Ralphs*, the sentences were designed or calculated to diminish the offenders' career and employment prospects.[123] However, more recently in *Nuttall*, Muir JA took the view that '[t]he respondent's loss of employment and lack of job prospects on his release are relevant considerations'.[124]

Most jurisdictions in Australia also factor in the risk of deportation following conviction and sentence into the net punishment imposed on offenders, and hence consider this to be a mitigating factor.[125] The leading Victorian authority on the matter is *Guden v The Queen* where the Court 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.[126]

118 (2000) 76 SASR 404, 420 [79] (Doyle CJ, Mullighan, Bleby and Martin JJ).

119 (1999) 74 SASR 165, 170 [44] (Perry J).

120 See, eg, *Moorhead v Police* (1999) 202 LSJS 488, 489–90 (Doyle CJ); *R v Richards* [1980] 2 Cr App R (S) 119, 121 (Griffiths CJ); *Ryan* (n 112) 318–19 [177] (Callinan J); *Hook v Ralphs* (1987) 45 SASR 529, 543 (von Doussa J) ('*Hook*'); *McDermott v DPP (Cth)* (1990) 49 A Crim R 105, 117 (Gallop J); *McDonald v The Queen* (1994) 48 FCR 555, 563–5 (Burchett and Higgins JJ).

121 [1999] NSWCCA 437, [140], [152]–[154] (Smart AJ, Wood CJ at CL agreeing at [1], Hidden J agreeing at [2]).

122 (2002) 26 WAR 510. The appellant psychologist was convicted of solicitation consequent upon a random police sting operation. A conviction was recorded despite (or regardless of) the likely effects on his career, PhD studies and occupational contributions to the community: at 512 [8], 516 [19] (Burchett AUJ, Wallwork J agreeing at 511 [1], Wheeler J agreeing at 511 [3]).

123 See *R v Liddy [No 2]* (2002) 84 SASR 231, 266 [126]–[127] (Mullighan J), 293 [218]–[219] (Gray J); *Hook* (n 120) 543 (von Doussa J). See also *R v Morris* [1992] 2 VR 192, 197 (Crockett J, Phillips CJ agreeing at 193, Southwell J agreeing at 200).

124 *Nuttall* (n 116) 343 [59].

125 On the basis of failing the 'character test' in the *Migration Act 1958* (Cth) s 501.

126 (2010) 28 VR 288, 294 [25] (Maxwell P, Bongiorno JA and Beach AJA).

The matter has been frequently considered by the Victorian Court of Appeal, which has consistently held that the risk of deportation can mitigate penalty.[127] The same position is taken in Queensland[128] and the Australian Capital Territory.[129] The courts in New South Wales and Western Australia have, however, taken a contrary approach.[130]

Thus, the general approach taken by sentencing courts is that incidental hardships experienced by offenders which arise from the commission of the offence are to be taken into account in determining the appropriate penalty. The incidental hardships generally serve to reduce the severity of the sanction although the weight attributed in mitigation will vary with the particular circumstances. In principle, the same approach should be taken in relation to adverse consequences experienced by offenders who breach conditional liberty. Thus, when the breach of conditional liberty results in outcomes such as revocation of bail, parole, a suspended sentence or an intensive correction order, and the offender is imprisoned, this outcome should be taken into account in sentencing for the breaching offence. How much exactly this should serve to reduce sentence is unclear, however at the threshold, it should logically negate the current aggravating effect that breach of conditional liberty has on sentence determination for the breaching offence. To this end, there has been some acknowledgement of the risk of double punishment in the context of sentencing an offender who has breached parole. In *Hillier v Director of Public Prosecutions (NSW)*, Basten JA observed, in relation to an offence committed on conditional liberty:

> In *Way*, at [92] [sic] this factor was identified as one to be taken into account in determining the appropriate punishment of the offender, rather than the objective seriousness of the offence. At least by implication, it should not be used to increase the otherwise appropriate range, based on the objective seriousness of the offence. Compared with a criminal record, there is a greater risk of double

[127] See, eg, *Valayamkandathil v The Queen* [2010] VSCA 260, [25] (Neave JA); *DPP (Vic) v Yildirim* [2011] VSCA 219, [26] (Warren CJ); *DPP (Cth) v Peng* [2014] VSCA 128, [23] (Nettle and Redlich JJA); *Tan v The Queen* (2011) 35 VR 109, 140 [126] (Redlich JA); *Darcie v The Queen* [2012] VSCA 11, [30] (Williams AJA); *DPP (Vic) v Zhuang* (2015) 250 A Crim R 282, 301–2 [54] (Redlich, Priest and Beach JJA); *Konamala v The Queen* [2016] VSCA 48, [35]–[36] (Maxwell P, Redlich and Priest JJA); *Schneider v The Queen* [2016] VSCA 76, [25]–[26] (Priest JA).

[128] *R v Abdi* (2016) 263 A Crim R 38, 50 [47] (Philip McMurdo JA); *R v Norris; Ex parte A-G (Qld)* [2018] 3 Qd R 420, 434 [41] (Gotterson JA).

[129] *R v Aniezue* [2016] ACTSC 82, [64]–[67] (Refshauge J).

[130] See, eg, *Ponniah v The Queen* [2011] WASCA 105, [48] (Mazza J); *Hickling v Western Australia* (2016) 260 A Crim R 33, 45 [60] (Mazza JA and Mitchell J); *Kristensen v The Queen* [2018] NSWCCA 189, [34] (Payne JA), [43] (RA Hulme J). See also *He v The Queen* [2016] NSWCCA 220, [23] (RA Hulme J).

> punishment in respect of breach of parole. That breach may itself be dealt with by an order revoking conditional liberty, with the result that the offender will continue to serve in custody the sentence imposed for the earlier offence.[131]

The sentiment underlying this approach should be recognised as a discrete sentencing principle in all cases where the breach of conditional liberty results in incidental hardships, especially in the form of imprisonment, being imposed on the offender.

3 *When the Breach of Conditional Liberty Is Not a Separate Criminal Offence and Does Not Result in Incidental Punishment*

In circumstances where incidental punishment does not result and the breach of conditional liberty is not a separate offence, it is less objectionable to regard the breach as an aggravating factor in sentencing for the breaching offence. Consistent with current sentencing orthodoxy, this characterisation of the breach may be justifiable by reference to the objectives of specific deterrence and community protection, but this should be confined to situations where the offence is one which diminishes community safety. There must be a basis for assuming that the offender is likely to recidivate in a way which will likely cause more harm to, and suffering for, community members.

VI Conclusion

Committing offences while on conditional liberty is an aggravating sentencing consideration. While this approach is well-established, the rationale has not been carefully and persuasively articulated. In this article, we contend that in most instances involving a breach of conditional liberty, it is inappropriate to aggravate the penalty. The main reason for this is that it violates the prohibition against double punishment.

As we have seen, there are a number of adverse consequences to which an offender can be subjected if they subsequently reappear before the courts for an offence committed while on conditional liberty. The first is that the breach is an aggravating factor at the sentencing stage of the breaching offence, which is the key focus of this article. Second, it can trigger the revocation of the bail, parole or other correctional order which imposes the restriction on the liberty of an offender. Third, in some instances, it can constitute a distinct statutory offence which compounds pre-existing factors. We have carefully analysed the doctrinal soundness of the first consequence, noting that the second and third outcomes impact on our analysis.

[131] *Hillier* (n 31) 574 [30].

It is contended that when the breach constitutes a secondary offence for which the offender is charged and convicted, this is a clear-cut instance of double punishment. When the breach involves the imposition of an associated penalty, such as a sentence of imprisonment due to, say, the revocation of bail, parole or an intensive correction order, this too involves an additional punishment. Admittedly, there is a difference between the adverse consequences in these circumstances and when the breach of the conditional liberty constitutes a secondary offence, given that in the first scenario there is a direct additional punishment imposed by a court. In the second scenario, the additional punishment arises indirectly and sometimes not through a court-imposed sanction. However, in this scenario, the additional punishment should also be factored into the overall hardship imposed on the offender. Accordingly, it is excessive and likely to result in disproportionate punishment to aggravate the penalty for the foundational offence on the basis that it involved a breach of conditional liberty. The only scenario where it is appropriate for such aggravation to occur is when the offender receives no incidental tangible additional punishment for the breach of conditional liberty. Even in these cases, the additional punishment should not be significant unless it is clear that it is necessary for the interests of community protection.