Sentencing Discounts for Delay

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The Victorian jury study aimed to ascertain jurors’ views of sentencing severity and to compare the views of judges and jurors on the relevance of aggravating and mitigating factors. A surprising finding from the analysis of the sentencing remarks from the trials in the study is that delay was the third most common mitigating factor. This article suggests that because delay’s relevance as mitigating factor may be not immediately apparent to the public, the reasons why it attracts a reduced sentence should be clearly explained by sentencers.

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INTRODUCTION

The Victorian jury sentencing project is a study of jurors’ views of sentencing in that state. One of its aims is to ascertain jurors’ views of the relevance and importance of aggravating and mitigating factors in order to determine which are the most relevant and to compare jurors’ views of aggravating and mitigating factors with those of the judges presiding in the County Court trials included in the study. An analysis of the judges’ sentencing remarks carried out for the purpose of this comparison revealed that delay is one of the three most common mitigating factors relied upon by the judges. Delay is not a mitigating factor that bears on harm or culpability. Rather, it is a mitigating factor that is a “system consideration”, similar to a guilty plea, and one which may, at first glance, strike a lay person as being of questionable relevance to sentence.

Delay appears to be an endemic problem in Victoria at a number of stages of the criminal justice process. In its 2013-14 Annual Report, the County Court noted the increasing pressure on the Courts’ limited resources which had resulted in increasing delays. The County Court also noted concerns that these delays had not only affected
victims and accused people but had also undermined the level of public confidence in
the administration of justice.¹

While some delays could be due to the actions of defendants who may have absconded
or who may not wish to bring matters to a head, other delays could be due to the failures
of law enforcement authorities, prosecution bodies and the courts themselves to process
cases expeditiously, perhaps because of a lack of resources or other reasons not
attributable to the defendant. However, this article is not concerned with why delays
have occurred; rather, its focus is on how sentencing judges respond to delay as a
relevant factor in imposing sentence. It examines the following issues:

- What does the law say about delay as a mitigating factor?
- How lengthy were the delays and what were the reasons for them?
- When delay was relied upon by sentencing judges as a mitigating factor, did
  judges explain why it was to be treated as mitigating?
- What was the response of interviewed jurors to this factor in cases where the
  judge had relied upon delay as a mitigating factor?

The article begins with a review of appellate decisions on the legal relevance of delay
as a mitigating factor, followed by a discussion of the research method and analysis.
The results section begins first with a discussion of the analysis of the sentencing
remarks and secondly, the interviews with the jurors. The article concludes with a
discussion of the implications of these findings.

THE LEGAL RELEVANCE OF DELAY AS A MITIGATING FACTOR

The relevance of delay to the judge’s sentence is well established by appellate guidance
in Australia.² The justification for taking it into account rests upon the twin
considerations of fairness and rehabilitation. The relevant principles can be stated quite

¹ County Court of Victoria, 2013-2014 Annual Report, 10. There have also been concerns about delay
in hearing appeals: Sentencing Advisory Council, Victoria, Sentencing Appeals in Victoria: A

² Arie Freiberg, Fox and Freiberg’s Sentencing (Thomson Reuters, 3rd ed, 2014) 429-433; Mirko
Stephen Odgers, Sentence (Longueville, 2nd ed, 2013) 339-343; R v Merrett (2007) 14 VR 392, [34]-
succinctly. Marked delay in itself is not mitigatory but it can be taken into account in combination with other sentencing factors favourable to the offender:

- It is mitigating if it is undue or unreasonable, not attributable to the accused and causes anxiety and significant stress because this is punishment in itself which fairness dictates should reduce the penalty imposed by the court (the unfairness limb).  

- It is also mitigating if, during the delay, the offender has shown evidence of rehabilitation such as undertaking sustained counselling or treatment (the rehabilitation limb).  This is mitigating because evidence of rehabilitation will greatly reduce, if not extinguish, the need for special deterrence. Mere abstinence from offending is not usually enough to engage this limb.

- Where offences closely related in time have been committed in two states and there has been a lengthy postponement of trial because the offender was serving an interstate sentence, both limbs of delay may be activated. Fairness to the offender dictates that weight be given to the fact that the crime is now stale (not only because of the stress and anxiety about outstanding charges but also because if the offences had been dealt with together the offender would have had the benefit of the principle of totality).

- If the offender was a juvenile at the time of the offence but because of delay appears before an adult court, the fact of changed jurisdiction with a more rigorous sentencing regime will be mitigating on grounds of fairness.

- If the offender is elderly by the time the offence comes to court, it may mean that the offender is less able to re-offend and so specific deterrence can be

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3 As to evidentiary requirements see Tones v The Queen [2017 VSCA 118, [38]-[39]; Freiberg, n 3, 430. Anxiety and distress brought about entirely by the offender’s refusal to co-operate with the prosecution until a plea of guilty on the first day of the trial is not mitigating: Arthars v The Queen (2013) 39 VR 613, [30].

4 There are two aspects to the rehabilitation limb —remorse and reformation — and both limbs must be demonstrated to be given full weight. Less than full weight will be given to this limb where reliance is merely placed on abstinence from further offending: Tones v The Queen [2017] VSCA 118, [41]-[42].

5 B v The Queen [2001] WASCA 40, [8].

6 Mill v The Queen (1988) 166 CLR 59, 64.

7 R v Boland (2007) 17 VR 300, [16]. Nigel Walker has suggested that mitigation in this case could be explained on the basis that a child is regarded as not fully responsible: Aggravation, Mitigation and Mercy in English Justice (Blackstone Press, 1999) 209.
given less weight\textsuperscript{8} in accordance with the principles relating to old age as a mitigating factor.

In some circumstances delay is not mitigating or is given little weight:

- If delay is due to the offender absconding, successful efforts at rehabilitation in the intervening period will be given less weight.\textsuperscript{9}

- It is only the suspense or uncertainty caused by delay following arrest or charge that is relevant, rather than delay between commission of the offence and arrest or charge.\textsuperscript{10} It follows that fairness does not require a delayed complaint in cases of child sexual assault to be mitigating.\textsuperscript{11}

- If delay is due to the complexity of the investigation and trial it is not ordinarily mitigating.\textsuperscript{12}

Clearly the reasons for delay are relevant, including the extent to which the offender had control over the length of the delay, and the sentencing court should be in a position to appreciate the reasons for the delay from the sentencing submissions.\textsuperscript{13} However, while the reasons for the delay are relevant, the absence of an explanation for prosecution tardiness does not matter. It is the effect of the delay on the offender which is important.\textsuperscript{14}

It is sometimes said that punishment for a stale offence is in itself a mitigating factor irrespective of fairness, stress and anxiety or rehabilitation — but this seems hard to justify on principled grounds. It is also said that where undue delay is caused by prosecution dilatoriness, the court may use a sentencing discount to express its

\textsuperscript{8} R v Law (1995) 84 A Crim R 142, 144. This is because of the relevance of old age rather than delay. So, if health or life expectancy make imprisonment more onerous, this is also mitigating: R v MWH [2001] VCA 196, [18].

\textsuperscript{9} R v Thompson (1988) 37 A Crim R 97, 100; R v Berry [2007] VSCA 219, [31]-[36].

\textsuperscript{10} R v Spiers [2008] NSWCCA 107, [37]-[38].


\textsuperscript{12} Giourtalis v The Queen [2013] NSWCCA 216, [1789]-1792.

\textsuperscript{13} Khoury v The Queen (2011) 209 A Crim R 509; [2011] NSWCCA 118, [53].

\textsuperscript{14} R v Merrett (2007) 14 VR 392, [35]; explained in Arthars v The Queen (2013) 39 VR 613, [27].
disapproval. This discount has also been justified in terms of fairness; it is unfair if the prosecution contends that the offence is serious and yet at the same time has allowed years to pass before bringing the matter before the court. Whether this applies irrespective of evidence of stress or rehabilitation is not clear.

**METHOD AND ANALYSIS**

At Stage 1 of this study, jurors were recruited from 124 trials in the County Court of Victoria. When a guilty verdict was returned, jurors were invited to participate in the study by completing a survey which began with a question about the sentence they thought should be imposed, followed by a question about the purpose of that sentence and general questions about sentencing practice, punitiveness and confidence measures and demographic questions. Previous articles have reported on the comparison of the judge’s sentence with the juror’s preferred sentence and the purposes of sentences from the judges’ and jurors’ perspectives.

At Stage 2, after imposing sentence, judges were asked to complete a Judge’s ranking form for aggravating and mitigating factors. This form listed eight aggravating and ten mitigating factors (not including delay), followed in each case by a question asking the judge to list any relevant additional matters that increased or reduced the severity of the offence. We received 39 ranking forms from judges relating to 36 trials and sentencing remarks for 122 of the trials in the study relating to sentences for 140 offenders.

Jurors who had agreed to participate in Stage 2 were sent a second survey together with the judge’s sentencing remarks and a sentencing booklet which included some

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15 *R v Scook* [2008] WASCA 114 at [64] cited in *Giourtalis v The Queen* [2013] NSWCCA 216, [1790]; see also *Crawley v The Queen* (1981) 36 ALR 241, 244, 248 and 255, where the Crown’s failure to have an appeal dismissed for want of prosecution led to an unreasonable lapse of time and the imposition of a non-custodial sentence.


information about sentencing principles and sentencing factors. The second survey asked jurors about aggravating and mitigating factors using the same lists given to the judges. Additional questions were asked which are not relevant to this article. At Stage 3, 50 of the Stage 2 jurors were interviewed in a semi-structured interview which included questions about the aggravating and mitigating factors which arose in the case.\textsuperscript{19}

Because we received so few ranking forms from judges, we supplemented them by completing ranking forms for the missing sentenced offenders using the sentencing remarks. We also checked these ranking forms with the help of an N-Vivo analysis before entering the results into SPSS.

**RESULTS**

An earlier article has compared the weight given by judges and jurors for the eight aggravating and ten mitigating factors listed in Survey 2 and the Judge’s Ranking Form.\textsuperscript{20} As explained above, delay was not specifically listed as a factor, but both judges and jurors were asked to list any other factors that did arise.

**How often was delay relied upon by judges?**

In the 39 ranking forms that were completed by the judges, delay was listed as an “other” mitigating factor in just four cases (involving two judges). However, an examination of the sentencing remarks from the cases where judges had completed a form, revealed that delay was actually relied upon as a mitigating factor for an additional 10 sentenced offenders. Analysis of the sentencing remarks for the 140 sentenced offenders showed that delay was a mitigating factor in the sentences of 64 offenders (or 46% of offenders sentenced). It is likely that judges failed to include delay as a mitigating factor on the form in the 10 cases where the sentencing remarks indicated it was mitigating because the question was directed at mitigating factors

\textsuperscript{19} Stage 2 respondents were also invited to complete a third survey 6 months after returning Survey 2 containing questions not relevant to this article.

\textsuperscript{20} K Warner, C Spiranovic, J Davis, and A Freiberg, “Aggravating and Mitigating Factors: Comparing the Views of Judges and Jurors” [under review].
which “reduced the seriousness of the offence” rather than mitigating factors which are system considerations such as delay, a guilty plea, or informing.

Figure 1 shows that delay was the third most common mitigating factor arising in the sentences imposed by judges in this study after good prospects of rehabilitation and good character.

**Figure 1: Percentage of Judge Sentences in which Mitigating factors given weight by Judges**

![Figure 1: Percentage of Judge Sentences in which Mitigating factors given weight by Judges](image)

Note: Percentages for each factor are based on a total of 140 sentences. As multiple factors may be given weight in any one sentence, the totals for percentages will not add to 100.

Figure 2 shows how much weight was given to delay for the 71 sentences where this factor arose. The cases which we coded as giving “a lot of weight” to mitigation were those where the judge had said such things as: delay must be given “substantial mitigatory weight”; or that it had a “significant role to play in the sentencing exercise”; or was a “powerful mitigatory circumstance”; “the most significant mitigating factor in the case”; or a “mitigatory circumstance of considerable moment”. Cases were coded as giving “a little weight” where the judge said, for example, “I do not consider the issue of delay between the date of the offence and the trial to carry much weight in the sentencing decision.”
Figure 2: Weight given to delay as a mitigating factor by judges.

Length and reasons for delay

The sentences in which delay arose as a sentencing factor occurred in a cross-section of offences: 40% were sex offences (more than half of which were child sexual assault offences); a third were offences of violence; and the remainder were drug offences, property offences and culpable driving. The length of delay varied from 2 years to 50 years, but when child sexual assault cases were excluded, the median length of delay was 4 years. The different reasons for delay reflected the reasons mentioned in the case law: delayed complaint; interstate imprisonment; complexity of the matter; offender absconding; defendant illness/pregnancy; mistrials and retrials, court backlogs and other delays in bringing the matter to trial.

Did judges explain why delay was mitigating?

In most cases, the reasons for the delay were explained. However, reasons did not always explain why delay was mitigating. In twelve cases (or about one in five) there was no explanation of why delay was mitigating. In many others the explanation was very brief, for example in one case where three offenders had to wait five years for the matter to be concluded, the judge merely said: “With each of you endeavouring to get
on with your lives and your family during the long and prolonged period, this delay provides a powerful mitigating circumstance.”

In a few cases judges gave a lengthy explanation setting out the grounds on which delay was or was not mitigating, and occasionally cases were cited in support. Much more commonly a short and succinct explanation was given. This usually referred to the stress caused by having the matter hanging over the offender’s head for a significant period of time (mentioned in three quarters of cases in which delay was mitigating), or to a demonstration of rehabilitation during the period of delay, or to the fact that offenders had not re-offended in that period (in a third of cases). In one case the judge took into account “the fact of delay itself” as well as stress caused by the delay. In another case, delay was mitigating because it denied the offender the chance of a concurrent sentence. Losing the benefit of the totality principle was also adverted to for three offenders where there had been intervening interstate sentences. And in one case the fact that the offender would have been dealt with in the Children’s Court if the matter had come to light immediately was the basis for reducing the sentence because of delay.

It was rare for judges to take the explanation of why the delay was mitigating one step further to spell out why it was that the stress of having a matter hanging over the offender’s head should be allowed to reduce the sentence. But there were a few exceptions. Where there was a five year delay in dealing with allegations of family violence and it was accepted that the delay was a most powerful matter in mitigation, the judge not only detailed the effect the delay had on the offender and his new partner in terms of being plagued by uncertainty and the difficulty of moving on, but also added: “So that would have been a penalty, it seems to me, in itself over the last handful

21 Case 18: coded as “a lot of weight”.
22 Cases 16, 55, 110 and 125.
23 Case 115. The judge made it clear that these “two aspects of the delay” were mitigating.
24 Case 22.
25 Case 16, Case 123A and Case 123B.
26 Case 100.
of years”. In a dangerous driving case where there was a three year delay and evidence of a great deal of stress and anxiety resulted in the need for the offender to obtain professional treatment, the judge commented: “That in itself is a form of punishment.”

And in a case where there was a two year delay, which included an irregularity in the conduct of the trial leading to the offender’s conviction being set aside and a retrial, the sentencing judge at the second trial accepted that the period between the two trials was akin to a sentence of imprisonment. There were a few cases where fairness was mentioned, but in the majority of cases where the stress of delay was relied upon, the reason why this should be mitigating was not further explained.

While appellate decisions often explain why it is that rehabilitation during the period of delay is relevant as a mitigating factor (namely, because it allows the court to give less weight to specific deterrence, or that it was in the community interest that the sentence be tailored to ensure as much as possible that the offender has the opportunity to complete the process of rehabilitation), this was rarely done in the sentencing remarks. In some cases, the fact that the offender had not re-offended since the commission of the offence was the only explanation for delay being mitigating. There were two sets of sentencing remarks where the relevance of delay under the rehabilitation limb was explained by quoting the following words of Chernov JA in *R v Cockrell*:

First, and perhaps foremost, though there has been a relatively lengthy process of rehabilitation since the offending, being a process in which the community has a vested interest, the sentence should not jeopardise the continued development of this process but should be tailored to ensure as much as possible that the offender has the opportunity to complete the process of rehabilitation.

Occasionally the relevance of rehabilitation during delay was explained less directly. For example, in a case of child sexual assault where there was a delay of 10 years since

27 Case 126.
28 Case 54.
29 Case 23.
30 Case 55A and 55B, Case 123A and 123B.
the offender was interviewed, partly due to an interstate sentence for more or less contemporaneous but subsequent offending, the judge said:32

There has been a very long delay. In the meantime, you have rehabilitated yourself. There have been interstate sentences in the meantime, as was the case in *Todd*, and this case calls for what His Honour Lawrence Street described as what might otherwise be thought to be an undue level of leniency, such as to justify in this case the total suspension of the sentence.

An earlier paragraph had dealt with specific deterrence and explained that it needed little weight because the offender had rehabilitated himself. But the link was not explicitly made with specific deterrence in the discussion of delay.

**Delayed complaint cases**

In almost all of the sentences for child sexual assault in the study, there was a significant delay between the commission of the offence and making a complaint to the police. In many of these cases, there were additional delays in finally dealing with the matter. Appellate guidance suggests that while fairness does not require delay between the commission of the offence and complaint to be mitigating in cases of child sexual assault, the rehabilitation limb of delay may be relevant.33

There were a few child sexual assault cases in the study where no weight was given by the sentencing judge to the fact of a delay due to delayed complaint and other cases where delay between commission of the offence and complaint was excluded from the period taken into account on grounds of fairness. However, more commonly it was unclear which aspect of the delay was taken into account in cases where weight was given to delay under the fairness limb. For example, in Case 3, where there was a delay of 17 years due to a delayed complaint and an additional delay of three years between charge and sentence, the judge merely concluded: “Thus delay is a matter that I have taken into account in arriving at the appropriate sentence”.34 Similarly, in Case 117 there was a delay of 44 years before a complaint was made and a further delay of almost 32 Case 16.


34 Case 3.
4 years until sentence. Delay was a mitigating factor but it was unclear whether this related to the period between commission and complaint.

Case 13 also exemplifies this lack of clarity as well as a generous approach to the rehabilitation limb. The offender was being sentenced for sexual penetration of child under 16 (a student who was under the offender’s care and supervision). The judge merely said that “the delay in these matters being reported and brought to trial means that you are being sentenced for crimes committed over 7 years ago and you have not reoffended in that time.”

In general, sentencing judges appeared to take a tolerant approach to reducing sentence on grounds of delay in child sexual assault cases, even though it was often acknowledged that delayed complaints were typical for these offences. For example, in one case the judge explained that it was difficult to regard delay in an offence coming to light as mitigating where a child is manipulated to a point where she is unlikely to report it. However, he gave weight to the fear that she might one day report the offences because of a letter she had written containing allegations, and to the two-year delay since the matters were reported to the police.

**What did interviewed jurors say about delay?**

As explained, the Stage 2 Survey did not pick up jurors’ responses to delay as a mitigating factor. However, the interviews provided an opportunity to explore their views. Of the 50 interviews with jurors, 15 were cases where the sentencing judge mentioned delay as a mitigating factor. In ten of these cases, the relevance of delay was discussed with the juror: four jurors readily agreed that some weight should have been given to this factor; two conceded it was relevant after discussion; two were sceptical; and two disagreed with the judge that the delay should be given mitigatory weight. It is conceded that responses from just ten interviews is a small number from which to draw conclusions. However, the range of different views provides a starting point for further investigation of lay views in relation to this factor.

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35 Case 13.

36 The Royal Commission into Institutional Responses to Child Sexual Abuse has noted that the average delay in reporting offences is about 20 years or more, *Interim Report Volume 1*, 2014, 95.

37 Case 25.
Jurors agreeing that delay was mitigating.

In Case 3, a case of child sexual assault, the offences occurred some 14 years before a complaint was made to the police and more than a further three years before the offender was finally sentenced. The judge gave some weight to the delay. Juror 25 was one of the very few jurors who added delay as a mitigating factor in the Stage 2 survey. In discussing the sentence in her interview, she said she was glad the judge had taken delay into account. When asked why she thought delay was relevant, she responded, echoing the words of the sentencing judge, “I think it is hanging over that person’s head, like their life is basically not in the balance, but it’s on hold waiting to see what [will happen].” Case 16, discussed above, was one of the cases where the sentencing judge gave a lot of weight to delay. Juror 113, one of the jurors in this case, explained his choice of a wholly suspended sentence on the basis of the long delay (in this case it was ten years since the offender was interviewed in relation to the offence).

Juror 487 also thought the delay in his case (four years between complaint to the police and sentence) should have been taken into account but only as “a minor consideration”. He added:

I think it’s fair enough … that time period being drawn out over a number of years, I mean in many ways that’s a sentence in itself …. So I think that not having that closure is punishment in its own but … I would not put it down as a major factor.38

In Case 49, the judge treated a delay of two and a quarter years as mitigating on grounds of the anxiety it caused and evidence of rehabilitation, which Juror 367 unreservedly endorsed in her interview.

Jurors conceding that delay was mitigating

There were two jurors whose initial response was to reject delay as a mitigating factor but who, after some discussion, accepted that it was appropriate to reduce the sentence on the basis of delay. Juror 458, from a violent home invasion trial, was asked whether it was mitigating that it was close to five years since the offending. At first, he said, “I don’t think time should play any part in the sentencing. It doesn’t matter how long ago it was really”. But when it was explained that the courts commonly take into account

38 Case 64.
the stress and uncertainty caused by delay and that the judge had done so in this case saying, “I take the uncertainty and stress of the delay into account in some moderation of your sentence”, Juror 458 said, “Well if she says that then she’s the expert and I ... am happy with that.”

The offender in Case 22 was convicted of arson while in prison under sentence and the judge took into account in his favour that he had lost the benefit of a concurrent sentence owing to a long delay occasioned by a complicated and lengthy police investigation and court backlogs. He was sentenced to a shorter term because of the delay. At first Juror 184 disagreed that delay should be mitigating because “if he had ... pleaded guilty he wouldn’t have had all that time waiting.” But after some discussion, he said, “Well I suppose yes, you would have to say it should be taken into consideration then.”

**Jurors sceptical that delay was mitigating**

In Case 13, where there was a delayed complaint, Juror 108 said: “In some degree it’s not [mitigating]. I mean she had to get to a point where she was able to bring it forward, ... and I can imagine it would have been an incredibly hard thing to do.” And he added, “I can understand the mitigation in that this was nearly a decade ago that that this happened. But it still happened.” When it was pointed out that the judge had explained that the offender had not re-offended so that the delay could indicate rehabilitation, Juror 108 responded that he had not thought of that but said, “It could also mean that [any offending] has not come out yet”.

Case 46 was a marital rape, where the rape was not reported for two years and there was also a delay of 4 years between the reporting and sentence. Juror 357 explained that she understood that the period of delay in complaining was not relevant because at the trial the jury heard expert evidence to the effect that delay in reporting in the context of an abusive relationship is common. As to the delay of four years between reporting and sentence, which the sentencing judge took into account as mitigating because of strain and uncertainty, Juror 357 said:

Yes, but certainly — there seems to be things in life where there is some uncertainty, until things get resolved — whether it’s being on a hospital waiting list to have your operation of your hip or something else, we’ve got this anxiety of waiting.
**Jurors who disagreed that delay was mitigating**

In Case 7, there was a five year delay between the offender’s arrest and the time when his crime of possessing the proceeds of crime was dealt with, a delay which the trial judge treated as “an important consideration”. Juror 63 had “very little time” for the argument that the delay was mitigating, explaining that “I see that as more of a case where he had five years … with his family. Well you know, it’s five years that he spent in part rehabilitating his image for when he did end up in court.” He was also unsympathetic to the argument in relation to delay because he considered the offender should have pleaded guilty at an early stage as he had no real defence to the charges.

Case 1 was a case of drug importation. The judge said:

> I have taken into account the delay in the matter in two respects: one, the effect it has had on you because it has been hanging over your head for a period of approximately four and a half years and, two, you have demonstrated through the period, because you haven’t re offended, that you have some prospects of rehabilitation.

Juror 6 was not persuaded this should be mitigating. As to the fact that the matter was hanging over the offender’s head, he said:

> [h]e was free to move around Australia so his lifestyle probably didn’t suffer too much, he was allowed to go back and run his grocery store in Footscray. … I don’t think they [he and his co-offender] would have been that anxious about it, they probably said, oh well if it happens, it happens, if it doesn’t it doesn’t.

And as to the demonstration of rehabilitation, he said: “No, I disagree with that, he was just keeping his nose clean because he didn’t want to go back to the judge with something else hanging over his head.”

**DISCUSSION**

Jurors rarely identified delay as a mitigating factor in the surveys. This could be because they did not regard delay as a mitigating factor, or it was overlooked, or because, in response to wording of the survey question, they only added mitigating factors which related to the offence. Judges, however, relied upon delay as a mitigating factor in 46% of the sentences in the study. Based on an analysis of the sentencing remarks, it was one of the most common mitigating factors. And it was given ‘a lot of weight’ in a significant proportion of cases in which it arose. This was a surprising finding. Treating delay as a mitigating factor is well supported by appellate decisions
in Australia. In fact, there are a myriad of appellate decisions discussing the relevance of this factor and it is included in doctrinal accounts of sentencing law. However, there appears little in the way of critical evaluation of the theoretical foundations for this particular factor to determine whether the guiding principles extracted from the decisional law can be linked to retributive or utilitarian purposes of punishment or to a valued social consideration which would constitute a respectable rationale for acceptance as a relevant sentencing factor. There are good reasons (coherence, consistency and so on) for suggesting that aggravating and mitigating factors should be capable of analysis in this way.

Despite support for it in decisional law, delay is not mentioned as a mitigating factor in any of the statutory lists of mitigating factors in Australia, even in New South Wales, where there is a list of 13 mitigating factors in the *Crimes (Sentencing Procedure) Act 1999*, s 21A(3). Nor does it seem to have been referred to in empirical studies of aggravating and mitigating factors. It is of note that delay is not referred to in a Sentencing Advisory Council study of sentencing factors in the sentencing remarks of 178 aggravated burglary cases in Victoria. In a well-known English study of mitigating factors based upon observations of sentencing hearings in 132 cases in the Crown Court and interviews with forty judges, delay was not included in the list of mitigating factors cited by sentencers. And in a study of public opinion in England and Wales of aggravating and mitigating factors, delay was not included in the list of

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39 See note 1.


41 It is mentioned as a mitigating factor in a limited way in the *Sentencing Act 2002* (NZ), s 9(2)(fb) if the failure of the prosecution to comply with a procedural requirement has an adverse effect on the offender.


43 Jessica Jacobson and Mike Hough, “Personal Mitigation: An Empirical Analysis” in Julian Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146-167, 150. However, “court processes have been stressful/long running” was identified as a potential mitigating factor, 149.
13 mitigating factors.\textsuperscript{44} It is not mentioned in the mitigating factors in Sentencing Guidelines Council’s \textit{Overarching Principles}\textsuperscript{45} and more recent English sentencing texts do not seem to refer to it.\textsuperscript{46}

This study provided an opportunity to examine how delay is used as a mitigating factor by sentencing judges in Victoria and to gauge jurors’ reactions to this factor in the limited number of interviews (ten) where this was discussed. A few jurors strongly supported delay as a mitigating factor and others did so after some discussion. However, two remained sceptical and two were not persuaded. While little can be inferred from this, it does support our suggestion that delay does not immediately resonate with lay persons as a compelling mitigating factor.

Jurors’ reactions to delay in cases of sexual assault were interesting. Juror 108 and Juror 357 understood that delay was a common occurrence in such cases and should not lead to mitigation of sentence. This was particularly the case for Juror 357, who was impressed with the expert evidence in the case explaining the delayed complaint. In contrast, Juror 25 regarded delayed complaint as a mitigating factor in Case 3, where the sentencing judge had not distinguished between delay caused by a delayed complaint and delay between reporting and sentence. Nor had the judge explained why little if any weight is given to delayed complaint in child sexual assault cases.

\textbf{To what extent should judges explain why factors are aggravating or mitigating?}

Analysis of sentencing remarks showed that reasons were not always given for relying upon delay and that in most cases where there was some explanation, it was quite perfunctory, even in cases where delay was a “powerful mitigating circumstance” or


\textsuperscript{46} An exception is Walker, n 8, 205-209 where there is an interesting theoretical discussion of staleness as a mitigating factor in a chapter titled, “Unfashionable Mitigations”.
the “most significant mitigating circumstance”. In a few cases there was a lengthy discussion about delay with reference to appellate decisions on the issue.

What is the best approach to crafting sentencing reasons in relation to delay? Judges are not expected to refer to every single factor that they have taken into account in imposing sentence,\(^\text{47}\) although appellate guidance advises that sentencing remarks should refer to “circumstances which the judge regards as aggravating or mitigating”.\(^\text{48}\) As the Court of Appeal of Victoria has observed:\(^\text{49}\)

> Accessible reasoning is necessary in the interests of victims, the parties, appeal courts and the public. Each must be able to understand, from the sentencing remarks, what are the principal factors that have influenced the sentencing decision.

In terms of delay, that Court has said that sentencing judges need not refer to each of the limbs of delay when stating that delay has been treated as a mitigating factor. However, if one limb is referred to, it is an error not to refer to the other limb if it is relevant.\(^\text{50}\) Moreover, if the rehabilitation limb is relied upon, the sentencing judge should make it clear whether more than abstinence from offending is being relied upon.\(^\text{51}\) In a case dealing with a series of child sexual assaults which occurred 25 years before sentence was imposed, the sentencing judge’s reasons in relation to delay were described by the Court of Appeal as “exemplary”.\(^\text{52}\) The sentencing judge had given several reasons explaining why delay was a mitigating factor, including: the fact that the offender was unlikely to ever re-offend because he had undergone a comprehensive rehabilitation program; had not re-offended for 22 years; and was no longer diagnosable as a paedophile.

\(^{47}\) *Giakas v The Queen* [1988] VR 973 at 977.

\(^{48}\) *Koumis v The Queen* (2008) 18 VR 434 at [63].


\(^{50}\) *Rodriguez v The Queen* (2013) 40 VR 436, [38]-[41].

\(^{51}\) *Tones v The Queen* [2017] VSCA 118, [43]-[46].

\(^{52}\) *Beyer v The Queen* [2011] VSCA 15, [24].
Appellate guidance does not go so far as requiring the judge to spell out why a particular factor, such as delay, is mitigating. However, our interviews with a small number of jurors support the suggestion that delay can be a factor which strikes lay persons as questionable. Some can be persuaded to accept that it is a mitigating factor with some prodding and others remain unsure. It is a factor that would benefit from having the principles underlying it clearly explained so that its relevance could be appreciated. It can be argued that the coherence of sentencing would be enhanced if there were a clear statement of the reasons why a particular factor is mitigating (or aggravating) and that helping members of the community, offenders and victims to understand why a particular factor is taken into account could improve confidence in sentencing.53 Victims in particular could benefit from a deeper elaboration of sentencing remarks on delay. It was sometimes acknowledged in the sentencing remarks that the reasons for a delayed complaint were understandable and, very occasionally, that delay can also adversely affect the victim. A more “victim-sensitive” approach would mention this more frequently, distinguishing between elements of delay and avoiding remarks such as the comment directed to the offender “you were not informed of these offences until 2011” which could be misconstrued by the victim as suggesting the offender was unaware of the offences until then. In two cases,54 Vincent JA has recognised the importance of ensuring that the response of the courts to child sexual abuse cases facilitates, rather than impedes, the social and personal recovery of victims and has emphasised the importance of “vindication of the victim” in cases of this kind. Dealing with delay in a sensitive way that acknowledges the victim’s perspective would assist in the process of the victim’s “social rehabilitation”.

Increasing demands on sentencers may not be in the interests of efficiency and dealing with cases more expeditiously. Nevertheless, there are good grounds for arguing that reasons should be succinctly explained. There is no need for citation of authorities but merely a clear explanation of the grounds on which delay is mitigating and the reasons why this factor justifies reducing the sentence. When there are different reasons for various parts of delay like a delayed complaint, an interstate sentence or delays in

53 The Honourable Murray Gleeson has argued that the general acceptability of judicial decisions is promoted by the obligation to explain them: M Gleeson, “Judicial Accountability” (1995) 2 Judicial Review 117, 122.

proceedings, these should be dealt with separately if some aspects of the delay are mitigating but others are not. When the issue is more technical, such as an interstate sentence and the loss of the opportunity for a concurrent sentence or the benefit of the totality principle, this should be explained in a way that is readily understandable by a lay audience.

Another advantage of succinctly explaining the reasons why a factor is mitigating (or aggravating) is that it focuses the court’s attention on the justification for regarding it as relevant so that it can be clearly related to a sentencing objective or principle rather than glossing over its relevance. This makes the sentencing process more transparent and by clarifying the relevance of factor, consistency is encouraged. While this article did not aim to evaluate the merits of a sentencing judge’s reliance on delay or to assess compliance with appellate authority, it did appear that many judges applied the principles generously, not requiring much in the way of evidence of stress and anxiety or rehabilitation. This is most probably because submissions from the bar table went unchallenged by the prosecution. In the interests of parsimonious sentencing this may not be a bad thing. The counter argument is that a better approach is to reduce overall levels of severity rather than compromising principle.55 This latter point raises the debate about whether or not sentencing factors should have a principled rationale.

**CONCLUSION**

The fact that delay was found to be such a common mitigating factor raises questions about whether the criminal justice system is able to deliver justice in a timely fashion — and these questions can undermine public confidence in the system. Delay appears to be an ongoing problem, despite criminal justice reforms which have attempted to improve efficiency and reduce delays. Coupled with the likelihood of a continuing stream of historical sexual abuse cases, prompted by the publicity given to the Royal Commission into historical sexual abuse, it is likely that delay will continue to be commonly raised as a mitigating factor in sentencing submissions.

Four main points have emerged from this examination of delay as a mitigating factor. First, its prevalence as a mitigating factor suggests that it deserves more critical attention at a theoretical level. This would help inform reviews of sentencing factors

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55 Ashworth, n 41, 37.
and the work of sentencing councils and appeal courts in preparing sentencing guidelines. Secondly, sentencing remarks should clearly and succinctly explain the judge’s reasoning in relation to delay; this includes both identifying which parts of the period between commission of the offence and the sentence are relevant, and explaining which limb of delay is relevant. And because delay is a mitigating factor which does not relate to offence seriousness, the law’s reasons for accepting it as a mitigating factor may not be readily apparent to members of the public or crime victims, so this too should be explained. Thirdly, in cases of delayed complaint particularly, judges should be mindful of the effect of their remarks about the relevance of delay on the victim and endeavour to avoid the retraumatising potential of the criminal justice system. Finally, courts should continue their efforts to make reasons for sentence more accessible to members of the public.

The importance of communicating and engaging with members of the public is being increasingly recognised by the judiciary, particularly in the context of sentencing. In her retirement address Marilyn Warren, Chief Justice of Victoria remarked in relation to reasons for sentence:57

It is up to us to write more simply and briefly with accompanying summaries and all published in an accessible way on the internet and through social media. This is an achievable goal which will help community understanding of what we do and why.

The sentences in our study were all for County Court trials in 2013 and 2014. Only a third of these were published online in Austlii or Jade. In many cases the remarks were lengthy. While this article has argued for reasons in relation to delay to be explained in more detail, this does not mean that the remarks themselves need to be longer. Keeping the public in mind, as well as the parties, the victim and the appeal court, the sentencing remarks could be more succinct and written in more accessible language.

Acknowledgments:

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56 Secondary victimisation is a well-established notion in victimology, although empirical research on it is inconclusive: Jo-Anne Wemmers, “Victims Experiences in the Criminal Justice System and their Recovery from Crime” (2013) 19 International Review of Victimology 221.

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