Mirko Bagaric,* *John Anderson*** *and Brendon Murphy****

A PRINCIPLED APPROACH TO DEAD TIME IN THE SENTENCING CALCULUS

Abstract

Prison is the harshest sanction in our system of law. People sometimes serve prison terms for alleged offences of which they are ultimately acquitted, or their conviction is quashed on appeal. This has been described as 'dead time'. In some Australian jurisdictions, a quantified credit for the period served as dead time is applied if that person is subsequently imprisoned for another offence. This approach is, however, nationally inconsistent as offenders in some jurisdictions receive no such credit although discretion may be exercised to treat this 'dead time' as a subjective mitigatory consideration. In particular, there is a divergence between how sentencing courts treat dead time in Australia's largest jurisdictions — New South Wales and Victoria. It is untenable that the common law should remain unclear when dealing with issues that affect the liberty of citizens. We argue that sentencing courts should adopt the principle of always granting specified credit for dead time, in the absence of exceptional circumstances.

I Introduction

The western legal tradition places a strong emphasis on respecting the right to individual liberty.[1] This is reflected, in part, by the heavy burden of proof (beyond reasonable doubt) that must be satisfied before people can be found guilty of a crime and hence be subjected to the harshest sanction in our system of

* Professor, Swinburne Law School, Swinburne University of Technology, Victoria. Email: mbagaric@swin.edu.au.

** Professor, School of Law and Justice, University of Newcastle, New South Wales. Email: John.Anderson@newcastle.edu.au.

*** Associate Professor, Thomas More Law School, Australian Catholic University, New South Wales. Email: Brendon.murphy@acu.edu.au.

1 Perhaps the strongest expression of the importance of this principle is by John Stuart Mill, 'On Liberty' in Mary Warnock (ed), *Utilitarianism* (Fontana Press, 1985) 126. See also John Locke, *Two Treatises of Government*, ed Peter Laslett (Cambridge University Press, rev ed, 1988); Sir John Fortescue, *On the Laws and Governance of England*, ed Shelley Lockwood (Cambridge University Press, 1997); Charles Montesquieu, *The Spirit of the Laws*, eds Anne Cohler, Basia Miller and Harold Stone (Cambridge University Press, 1989).

law — imprisonment. Criminal justice is an imperfect system, however. Sometimes, people are remanded in prison after having bail refused for crimes for which they are ultimately not convicted. Also, people may be wrongly convicted and are ultimately acquitted through the court appeal processes or following an inquiry. Given backlogs in many courts and the time required to exhaust all avenues of appeal, this may result in a person being imprisoned for years. The time that accused persons spend in prison for offences for which they are ultimately acquitted or have convictions overturned on appeal has been described as 'dead time'.[2] It is difficult to prevent this injustice because of the desirability of imprisoning people accused of very serious crimes at the moment they are charged — to prevent them reoffending, fleeing the jurisdiction, or because there are other unacceptable risks that must be addressed to protect certain people or the community generally.[3] This dynamic raises the crucial problem of what to do when a person has served dead time.

This imperfection in our criminal justice system is arguably exacerbated by the fact that accused persons who have served dead time often receive no quantified credit in recompense, if later they are sentenced to prison for an unrelated offence. Thus, for example, if a person is remanded in prison for two years for aggravated burglary and is ultimately acquitted of that offence, and several years later is sentenced to three years prison for an unrelated subsequent armed robbery offence, the two years dead time which have already been served will not necessarily be deducted from the latter prison term.[4]

This situation is complicated by the fact that dead time is not dealt with uniformly throughout Australia in legislation or at common law. In New South Wales ('NSW'), the courts do not grant quantified credit for dead time. To this end, it has been contended that dead time does not equate to 'credit in the bank' and 'reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters'.[5] Whereas in Victoria, for example, the courts, as a matter of discretion, often grant quantified credit for dead time, recognising the ostensible 'grave injustice' of wrongly imprisoning an accused.[6]

---

2 See further the definition of 'dead time' in Part II(B) below.

3 As noted below, serving time on remand is itself a punishment. It has a utilitarian justification but can only form part of a proportionate sanction after a conviction has been secured.

4 See further the definition of 'dead time' in Part II(B) below.

5 *Hampton v The Queen* (2014) 243 A Crim R 193, [26], [30] ('*Hampton*'). See also *R v Niass* (New South Wales Court of Criminal Appeal, Gleeson and Lee CJJ, Allen J, 16 November 1988) ('*Niass*'); *SY v The Queen* [2020] NSWCCA 320 ('*SY*'); *Dib v The King* [2023] NSWCCA 243, [33]–[52] (Simpson AJA, Garling and Ierace JJ agreeing) ('*Dib*').

6 *Karpinski v The Queen* (2011) 32 VR 85 ('*Karpinski*'); *R v Kotzmann* [1999] 2 VR 123 ('*Kotzmann*').

Given the fundamental importance of personal liberty and the imperative for a uniform common law throughout Australia,[7] it is not satisfactory that there are inconsistent approaches to dead time in Australia, and that the issue has not been subjected to detailed jurisprudential consideration.

In this article, we contend that a consistent approach to dead time should be taken throughout Australia. It is acknowledged that sentencing laws differ across the Australian jurisdictions. However, to the extent that differences exist, this is by reason of diverse statutory provisions in each jurisdiction. In circumstances where sentencing law stems from the common law, there is no basis for jurisdictional disparity. The High Court has unequivocally underlined the need for a uniform common law.[8] This is especially so regarding matters which impact on fundamental rights, such as individual liberty. The manner in which dead time is dealt with in each Australian jurisdiction stems from the common law. This provides a compelling basis for making the principle coherent and consistent throughout Australia. If this is not achieved by a decision of the High Court, each Australian legislature should pass uniform legislation on the matter. In terms of the substantive principle which should be adopted, we argue that dead time should always be credited for offenders, unless exceptional circumstances exist. Central to our reasoning is the jurisprudential principle that punishment should only be imposed on wrongdoers, hence not crediting dead time in full is morally equivalent to condoning punishment of the innocent.[9] The availability of credit, we contend, should only be discounted in exceptional circumstances, such as where there is evidence to prove that an offender deliberately committed a subsequent crime intending to use prison credit time as a 'get out of jail free' card.[10]

The focus of this article is to evaluate the current manner in which dead time is treated by the courts, with a view to recommendations for reform. There are obviously other ways in which dead time could be avoided, reduced or remediated. For example, bail laws could be relaxed; courts could be better resourced to reduce the time between arrest and trial; or wrongly convicted people could be financially

---

7 The High Court has consistently maintained that the common law must be the same throughout Australia. See eg: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

8 As noted below in Part II(C), this has been expressly underlined by appeal courts regarding the need for uniformity in the approach to dead time.

9 This is discussed further in Part III(C) below.

10 An example of this situation is provided in *Dib* (n 5) where the applicant had served over 3 years 8 months imprisonment for a murder conviction which was quashed on appeal and a verdict of acquittal entered in 2016. The applicant then became involved in a conspiracy to import a commercial quantity of a border-controlled drug (MDMA) in 2017, motivated by his wrongful incarceration for murder and to pay his family back for the financial support amounting 'to a little under $800,000' that they had provided to him in relation to that matter: see at [15]–[18] (Simpson AJA).

compensated for their time in prison.[11] These possible solutions are more ambitious and involve more extensive reform (often requiring considerable additional financial resourcing by governments) in comparison to change through the courts. Moreover, there does not seem to be any momentum towards more extensive solutions. Over the past five years Australian remand numbers have increased considerably,[12] and there has been no attempt to change the discretionary and obscure manner in which ex gratia payments are made to people who have been wrongly imprisoned.[13] In our view, there are sound principled arguments for financially compensating people who have been wrongly imprisoned, but political and economic considerations seem to provide compelling obstacles and largely insurmountable barriers to this approach.[14] Accordingly, this article focuses on remediating dead time served by people who face punishment for a subsequent and unrelated serious offence. This reform is inexpensive, and hence in our view is pragmatically achievable through the weight of a persuasive doctrinal argument.

In the next part of the article, we provide a brief overview of the sentencing system and discuss the manner in which dead time for a subsequent and unrelated conviction is dealt with throughout Australia. This is followed in Part III by an evaluation of the respective and differing approaches to dead time. In Part IV, we set out the principles which should be applied to govern how dead time for a subsequent and unrelated conviction is dealt with in the sentencing calculus. These principles are summarised in the concluding remarks.

II Overview of Australian Sentencing Law and the Approach to Dead Time

A *Overview of Sentencing Law and Decision-Making*

Before turning to how dead time is considered by Australian sentencing courts, we provide a brief overview of the sentencing system and sentencing decision-making methodology to provide a general context.

---

11 We thank the anonymous reviewer for this observation.

12 The number of prisoners on remand has increased from 14,635 in June 2019 to 17,625 in June 2024: Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2024* (Catalogue No 4512.0, 19 September 2024).

13 For discussion regarding the obscure and discretionary nature of ex gratia payments for wrongful conviction and imprisonment, see: Adrian Hoel, 'Compensation for Wrongful Conviction' (Paper No 356, Australian Institute of Criminology, May 2008); Rachel Dioso-Villa, 'Without Legal Obligation: Compensating the Wrongfully Convicted in Australia' (2012) 75(3) *Albany Law Review* 1329; Rachel Dioso-Villa, 'Out of Grace: Inequity in Post-Exoneration Remedies for Wrongful Conviction' (2014) 37(1) *UNSW Law Journal* 349.

14 To clarify, there would be no need to credit dead time if compensation was provided to those who were wrongly imprisoned, as the dead time credit approach presupposes a subsequent unrelated conviction and sentence to a term of imprisonment.

Australian sentencing law is a collection of rules and principles derived from legislation and the common law.[15] The various states have their own sentencing legislation dealing with many aspects of sentencing, including the purposes, relevant factors and processes.[16] There are numerous commonalities and, although different penal cultures and approaches to punishment can be identified, all Australian jurisdictions have similar objectives[17] in seeking to achieve proportionality in sentencing as the primary sentencing principle.[18] Typically, the nature and extent of any sentencing option determined to be imposed in a particular case will be arrived at through judicial synthesis of various relevant factors, principles and guideposts.[19] These will include: construction and determination of the objective seriousness of the offence;[20] consideration of applicable mitigating and aggravating factors;[21] application of relevant sentencing purposes, such as protection of the community, deterrence and rehabilitation of the offender,[22] and sentencing principles, notably proportionality, totality for multiple offences, parity for multiple co-offenders and parsimony;[23] and consideration of relevant guideposts, including the maximum penalty and any minimum or standard sentencing requirements.[24]

---

15 See, eg: Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010); Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 10th ed, 2022).

16 Mackenzie, Stobbs and O'Leary (n 15) 16–21; Bagaric, Alexander and Edney (n 15) 2–13.

17 *Crimes (Sentencing) Act 2005* (ACT) s 7(1) ('*Sentencing Act* (ACT)'); *Crimes Act 1914* (Cth) ss 16A(1)–(2) ('*Crimes Act* (Cth)'); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A ('*Sentencing Procedure Act* (NSW)'); *Sentencing Act* 1995 (NT) s 5(1) ('*Sentencing Act* (NT)'); *Penalties and Sentences Act 1992* (Qld) s 9 ('*Penalties and Sentences Act* (Qld)'); *Sentencing Act 2017* (SA) ss 9–10 ('*Sentencing Act* (SA)'); *Sentencing Act 1997* (Tas) s 3 ('*Sentencing Act* (Tas)'); *Sentencing Act 1991* (Vic) s 5(1) ('*Sentencing Act* (Vic)'); *Sentencing Act 1995* (WA) s 6 ('*Sentencing Act* (WA)').

18 *Veen v The Queen* (1979) 143 CLR 458 ('*Veen*'); *Veen v The Queen [No 2]* (1988) 164 CLR 465 ('*Veen [No 2]*'); *Hoare v The Queen* (1989) 167 CLR 348, 354 ('*Hoare*'); *R v Scott* [2005] NSWCCA 152, [15]; *Boulton v The Queen* (2014) 46 VR 308, [64]–[72]. Cf *Sentencing Act* (SA) (n 17) s 3, where the primary sentencing purpose is stated as being 'to protect the safety of the community' and 'proportionality' is stated as a general principle of sentencing among others that must be applied in determining a sentence for an offence: at s 10.

19 Bagaric, Alexander and Edney (n 15) 5–11.

20 Ibid 102–9, 203–5.

21 Ibid ch 9.

22 Ibid ch 7.

23 Ibid ch 6, 540–8, 664–8, 710–35.

24 Mackenzie, Stobbs and O'Leary (n 15) 26–66; Bagaric, Alexander and Edney (n 15) chs 4, 7. In relation to legislative guideposts, see: *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*'); *Muldrock v The Queen* (2011) 244 CLR 120; standard non-parole periods in *Sentencing Procedure Act* (NSW) (n 17) ss 54A–54D (Table); and the standard sentencing scheme in *Sentencing Act* (Vic) (n 17) ss 5A–5B.

Hundreds of mitigating and aggravating circumstances can be found in national jurisprudence, and the judicial task is to sift through and identify all those relevant to a particular case and attribute weight to them in reaching a final sentencing outcome.[25] In undertaking this complex and important task, judicial officers use an approach known as 'instinctive synthesis', which originated from the decision of the Full Court of the Supreme Court of Victoria in *R v Williscroft*, where the majority stated:

> ultimately, every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process.[26]

Fundamentally, this entails sentencing judges identifying and weighing, in a single step, all relevant objective and subjective factors in the case before the court, the relevant purposes and principles of sentencing, applicable legislative guideposts, and any sentencing tariffs or ranges established in previous cases for the offence(s) under consideration before reaching a determination as to the nature and duration of punishment to be imposed. This intuitive process will usually be undertaken without judicial officers expressly stating the definitive weight they assign to any relevant factor or consideration in the particular case.[27]

The High Court has emphasised that there is no objectively correct sentence in this process.[28] The 'instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ'.[29] The result of implementing such a methodology is that the sentencing judges will turn their consideration to an 'available range' of sentences relative to a specific offence category committed by a particular offender. In this way, sentencing courts are seeking to promote 'individualised justice'.[30]

In circumstances where an offender has spent time in prison prior to the sentencing, courts ordinarily factor this into the sentencing calculus. The manner in which

---

25 Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identified 229 factors while Roger Douglas, *Guilty, Your Worship: A Study of Victoria's Magistrates' Courts* (Latrobe University, 1980) identified 292 relevant sentencing factors. For an overview of the operation of mitigating and aggravating factors, see: Mackenzie, Stobbs and O'Leary (n 15) 76–103; John Anderson et al, *Criminal Law Perspectives: From Principles to Practice* (Cambridge University Press, 2021) 113–15.

26 [1975] VR 292, 300 (Adams and Crockett JJ). See also Mackenzie, Stobbs and O'Leary (n 15), 28–30; Bagaric, Alexander and Edney (n 15) 39–57; Anderson et al (n 25) 107–10.

27 The only two exceptions are pleading guilty and cooperating with authorities: see Mackenzie, Stobbs and O'Leary (n 15) 89–94; Bagaric, Alexander and Edney (n 15) 370–91.

28 *Markarian* (n 24).

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

30 Ibid.

courts factor this into the ultimate sentence is influenced significantly by whether this prison time was spent in relation to the offence for which the offender is being sentenced, or for an unrelated offence. This is a pivotal distinction, which we will now discuss in more detail.

B *The Definition of Dead Time and the Contrast with Pre-Sentence Detention*

Many offenders sentenced to imprisonment are held in custody prior to being found guilty and sentenced for the offence they have allegedly committed.[31] This usually occurs when offenders are apprehended on suspicion of committing a crime, charged, and then denied bail.[32] When accused are denied bail, they are placed in prison on remand, pending the outcome of the charges. If they are ultimately found guilty of the crime for which they had been on remand and sentenced to imprisonment, the period of time spent in prison awaiting sentencing is termed 'pre-sentence detention'. This is typically deducted from the prison term imposed.[33] Alternatively, it may be taken into account by the court, which may backdate the commencement date of the sentence to the time when the offender first entered into custody for the relevant offence or offences.[34] Thus, offenders are generally given credit for pre-sentence detention. This outcome follows common law principles and statutory provisions in some Australian jurisdictions, although there are differences in how this outcome is achieved.

In Victoria, for example, the *Sentencing Act 1991* (Vic) s 18(1) provides that the time an offender spends in custody after being charged for an offence and before being sentenced for that offence 'must' be taken into account and ordered as time already served under the sentence of imprisonment. Courts have a discretion to order otherwise and not credit the pre-sentence detention, but this cannot be done without good reason. The extreme nature of an event which would result in this outcome was discussed in *R v Foster*:

> In my opinion, a court might, other things being equal, properly 'otherwise order' within s18(1) of the *Sentencing Act 1991* as to a certain period where an offender had, through his or her own deliberate and obstructive action, caused himself or herself to

---

31 In fact, well over one-third (15,937 of 41,929) of all prisoners in Australia have not been sentenced: see Australian Bureau of Statistics, *Prisoners in Australia, 2023* (Catalogue No 4517.0, 25 January 2024). See also NSW Bureau of Crimes Statistics and Research, *New South Wales Custody Statistics: Quarterly Update December 2023* (Report, 8 February 2024), where it was revealed that the number of adult prisoners on remand in NSW is now the highest on record with 5,055 people (or 42% of the prison population) in unsentenced detention in December 2023.

32 Indeed, depending on the type of charge, it is common for bail legislation to require bail to be refused, unless the accused can show cause why their detention is not justified: see, eg, *Bail Act 2013* (NSW) ss 16A–16B.

33 See, eg, *Sentencing Procedure Act* (NSW) s 24(a). See also Bagaric, Alexander and Edney (n 15) 767–8.

34 See, eg, *Sentencing Procedure Act* (NSW) s 47(2). See also Bagaric, Alexander and Edney (n 15) 767–8.

> be detained in custody longer by the length of that period than he or she need have been. The extra detention would be, as it were, self-inflicted.[35]

In a similar vein, s 159A of the *Penalties and Sentences Act 1992* (Qld) provides that

> [i]f an offender is sentenced to a term of imprisonment for an offence, any time that the offender was held in custody in relation to proceedings for the offence and for no other reason must be taken to be imprisonment already served under the sentence, unless the sentencing court otherwise orders.[36]

Similarly, in Tasmania, the relevant provision requires sentencing courts take into account pre-sentence custody 'in relation to proceedings for, or arising from, that offence',[37] while in the Australian Capital Territory ('ACT'), it is 'any period during which the offender has already been held in custody in relation to the offence'.[38]

In NSW, the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a sentencing court with the discretion to determine 'when' a sentence is to commence.[39] A sentencing court has the option of ordering a sentence to commence before or after the date on which the sentence of imprisonment is imposed.[40] If a sentencing court orders a sentence to commence before that date, it 'must take into account any time for which the offender has been held in custody in relation to the offence or, in the case of an aggregate sentence of imprisonment any of the offences to which the sentence relates'.[41] The position in South Australia is similar to NSW, although it is expressed in terms of allowing a court to take time in custody prior to sentence into account — the word used is 'may' rather than 'must'.[42] The relevant provision permits that time in custody be taken into account by a sentencing court by making an 'appropriate reduction in the term of the sentence'[43] or directing when a sentence is determined to have commenced.[44]

---

35 [2000] VSCA 187, [38].

36 See also *R v Wilson* (2022) 10 QR 88.

37 *Sentencing Act* (Tas) (n 17) s 16(1).

38 *Sentencing Act* (ACT) (n 17) s 63(2).

39 *Sentencing Procedure Act* (NSW) (n 17) ss 24(a), 47.

40 *Sentencing Procedure Act* (NSW) (n 17) ss 47(2)(a) or (b).

41 *Sentencing Procedure Act* (NSW) (n 17) s 47(3). See also *Taha v The Queen* [2022] NSWCCA 46.

42 *Sentencing Act 2017* (SA) s 44(2).

43 Ibid s 44(2)(a).

44 Ibid s 44(2)(b)(i)–(ii). See also *R v Tsonis* (2018) 131 SASR 416; *GG v Police* [2023] SASCA 38. The position in Western Australia and the Northern Territory is somewhat similar in providing a sentencing court with the discretion to take into account time served by an offender on remand: *Sentencing Act* (WA) (n 17) s 87(1)(a)–(b); *Sentencing Act* (NT) (n 17) ss 5(2)(k), 63(4), (5). In relation to federal offences, *Crimes Act* (Cth) (n 17) s 16E(2) does not expressly give credit for pre-sentence detention, and instead applies relevant state and territory law to federal sentences.

An anomaly exists in relation to dead time. While pre-sentence detention always attracts credit for time served in relation to sentencing for the particular offence or offences to which that detention relates, the same approach is not followed for unrelated offences, resulting in dead time. Dead time differs from pre-sentence detention in that the time served in prison prior to sentencing does not relate to the offence for which an offender is actually sentenced. The archetypal example of dead time is when an offender is acquitted of an offence for which they have been on remand and served time in prison, is released, but later sentenced to a term of imprisonment for another unrelated crime. In *Karpinski v The Queen* ('*Karpinski*'), Tate JA stated:

> The notion of 'dead time' is not susceptible to any exact definition. The expression was used by Maxwell P and Weinberg JA in *Warwick v R*:
>
> > 'dead time' — that is, the time spent in custody in respect of matters of which the appellant was later acquitted or in relation to which his sentence was reduced…
>
> The expression 'dead time' is perhaps particularly justified when, as here, it relates to time spent in custody on remand for an offence where a nolle prosequi is entered, or a charge is withdrawn, and during which the appellant is neither serving another sentence, nor on remand for another offence for which he or she is ultimately tried.[45]

The *Victorian Sentencing Manual* defines dead time as time spent on remand:

- for charges that are discontinued or withdrawn; or
- during which the accused was not serving another sentence or was not on remand for another offence for which they were ultimately tried; or
- on charges of which the accused was later acquitted.[46]

Unlike pre-sentence detention, there is no rule that offenders will ordinarily receive a sentencing credit for dead time. In fact, as we discuss more fully below,[47] in some jurisdictions the default position is the opposite to pre-sentence detention — credit is usually not accorded for dead time.

---

45 *Karpinski* (n 6) [28]–[29] (Tate JA, Mandie JA agreeing at [9]) (emphasis added) (citations omitted).

46 Judicial College of Victoria, *Victorian Sentencing Manual* (6 November 2024) [8.6.2]. In NSW, there is no specific definition or reference to 'dead time' in the Judicial Commission of NSW, *Sentencing Bench Book* (August 2024), however there is reference to 'time spent in custody in relation to another matter for which the offender is acquitted or discharged' along with the decisions in the cases of *Niass* (n 5) and *Hampton* (n 5) as time which is usually regarded as 'extraneous to the exercise of sentencing discretion' and 'there is nothing requiring a judge to take custody for an unrelated offence into account': at [12-510].

47 See Part II(C) below.

C *The Approach to Dead Time in the Sentencing Calculus*

There is no clear principle relating to how a sentencing court should deal with dead time.[48] In fact, there are clear jurisdictional differences. In Victoria, the prevailing approach stems from the decision in *R v Renzella* ('*Renzella*'),[49] where Winneke P, Charles and Callaway JJA (in a joint judgment) followed Brooking JA in *R v Heaney*[50] in stating that there is a common law discretion to credit dead time. Their Honours stated that pre-sentence detention unrelated to the offence for which an offender is being sentenced 'is to be taken into account in the exercise of the court's discretion. It should ordinarily be taken into account at the first opportunity … and not left to the court imposing a later sentence'.[51]

Renzella is a well-established authority on this principle in Victoria and has been consistently applied and approved in that state, without reservation.[52] The only caveat was obiter comments by Weinberg JA in *Karpinski*, who stated:

> Since *Renzella*, there has been a steady growth in reliance upon so-called 'dead time' as a mitigating factor. In my view, however, *Renzella* 'dead time' is often now invoked in circumstances where its application is difficult to justify, either as a matter of logic, or in principle. … Any accused who has been wrongly imprisoned is, of course, the victim of a grave injustice. It does not follow, however, that it is society's duty to ameliorate that injustice by giving the accused credit for the time spent in custody when he is sentenced at a later time for entirely unrelated offending.[53]

However, his Honour did not press the point:

> Despite my misgivings as to the current state of the law on this subject, I agree that the weight of authority requires that the appellant receive some credit for at least part of the time that he spent in custody on the charge of attempted murder. I agree with the order proposed by Tate JA.[54]

To the extent that a common thread can be drawn from the Victorian authorities regarding the approach to dead time; the decision is a matter of discretion with a weak starting assumption that dead time should generally be credited in full.[55] It is

48 *Karpinski* (n 6); *R v Renzella* [1997] 2 VR 88 ('*Renzella*'); *DPP (Vic) v Moustafa* [2018] VSCA 331; *Warwick v The Queen* [2010] VSCA 166, [17].

49 *Renzella* (n 48).

50 (Victorian Court of Appeal, Brooking JA, Hampel AJA and Winneke P, 27 March 1996).

51 *Renzella* (n 48) 95.

52 See, eg: *Kotzmann* (n 6); *R v Ciantar* (2006) 16 VR 26; *Akoka v R* [2017] VSCA 214; *DPP (Vic) v Hudgson* [2016] VSCA 254.

53 *Karpinski* (n 6) [5]–[7].

54 Ibid [5]–[7], [8].

55 *Kheir v The Queen* [2012] VSCA 13, [16]–[18].

important to emphasise that this assumption is weak. In the comparatively recent case of *Mokbel v The King*, the defendant was initially not granted any credit for over five years of dead time he had previously served when he was sentenced to 30 years imprisonment with a non-parole period of 22 years for drug offences.[56] This is despite the fact that most of that dead time was served in super-maximum detention. On appeal, the sentence was reduced to 26 years with a minimum of 20 years. The appeal court reduced the sentence on a number of grounds, including the expungement of a serious conviction, the appellant being assaulted in prison, and recognition that some dead time should have been credited.[57] The appeal court did not state a specific quantity of dead time which was credited, but logically it was somewhat less than the five years previously served by the offender.

While the '*Renzella* discretion' is well-established in Victoria, it has had only limited consideration in other jurisdictions, and not all with approval.[58] Courts in other Australian jurisdictions have taken a different approach to dead time.[59] In NSW, it has been held that 'bare reliance on a period in custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters'.[60] This was most recently confirmed in the leading and lengthy judgment of Simpson AJA in the Court of Criminal Appeal in the case of *Dib v The King* ('*Dib*') where her Honour, after a consideration of various relevant authorities, concluded:

> It is thus well — and consistently — established that, in this State, offenders will not be given quantified reductions in sentence to take account of periods spent in custody other than those referable to the offence or offences for which sentence is to be imposed and neither will sentences be backdated to achieve the same result.[61]

Simpson AJA went on to examine whether there was a common law principle of sentencing, the '*Renzella* discretion', established in the series of cases decided in the Victorian Court of Appeal in this regard. Ultimately, her Honour found that such a principle had not been established, with the most that can be shown being 'in some cases (*Kotzmann* being an example) some recognition has been given to periods of custody entirely unrelated to the offence or offences for which sentence is to be passed.'[62] Further, all appellate court decisions considered from other jurisdictions,

---

56 *Mokbel v The King* (2023) 375 FLR 290.

57 Ibid [72].

58 See, eg: for the ACT, *McIver v The King* (2023) 20 ACTLR 303 ('*McIver*'); *R v Crawford No 1* [2020] ACTSC 245; *Singh v Wilson* [2019] ACTSC 199; for NSW, *Dib* (n 5); for the NT *R v Lovegrove* [2018] NTSC 2; *MWL v The Queen* [2016] NTCCA 6; for SA *Police v Elmes* [2016] SASC 188; for WA *Evans v WA* (2020) 55 WAR 310.

59 See *Niass* (n 5); *Hampton* (n 5) [25]–[36], where the New South Wales Court of Criminal Appeal expressly declined to follow the approach taken in Victoria.

60 *Hampton* (n 5) [30].

61 *Dib* (n 5) [52] (Simpson AJA, Garling J agreeing at [150] and Ierace J agreeing at [151]).

62 Ibid [80]–[81] (Simpson AJA, Garling agreeing at [150] and Ierace JJ agreeing at [151]).

including Queensland, South Australia, Tasmania and Western Australia demonstrated that there was no common law principle. Such cases nearly all concerned 'doubly warranted' custody, that is, 'partly attributable to the offence for which the offender was to be sentenced, and partly attributable to other offences or charges' in a continuous timeframe.[63] Overall, her Honour observed:

> At most it may be seen that, in some circumstances, appellate courts in some jurisdictions (notably Tasmania) have exercised a discretion to make some allowance for pre-sentence custody unrelated to the offence for which the sentence is to be passed …[64]

Careful consideration was given by her Honour to the federal context given that the appellant in this case had been convicted of a serious federal drug offence. In particular, her Honour observed that the High Court in *Hili v The Queen*[65] and later in *The Queen v Pham*[66] emphasised the need for sentencing consistency throughout Australia in relation to sentencing federal offenders. This required state courts

> to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong … in the case of federal offences it is implicit in Pt 1B of the *Crimes Act* that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth.[67]

Ultimately, this led her Honour to scrutinise whether the approach to dead time taken by the Victorian Court of Appeal constituted a 'sentencing practice', such that consideration should be given to following this approach in the interests of consistency and fairness in the sentencing process for offenders across the country. On balance, her Honour found that a 'relevant practice' had not been established and concluded:

> The decisions in *Kotzmann* and *Karpinski* show that the Victorian Court is prepared to consider making an allowance in a subsequent sentence to take account of a period of unrelated custody. In NSW that simply cannot happen.[68]

In *Dib,* the original sentencing judge expressly took into account what she described as 'the significant period of uncredited custody' (served in relation to a murder for which the offender was ultimately acquitted on appeal) as part of the offender's subjective circumstances for conspiracy to import a commercial quantity of a

63 Ibid [69] (Simpson AJA, Garling agreeing at [150] and Ierace JJ agreeing at [151]).

64 Ibid [82], citing *Carr v R* [1993] TASSC 20; *Geale v Tasmania* (2009) 18 Tas R 338.

65 (2010) 242 CLR 520.

66 (2015) 256 CLR 550 ('*Pham*').

67 *Dib* (n 5) [101] (Simpson AJA), quoting *Pham* (n 66) [18]–[23].

68 *Dib* (n 5) [102].

border-controlled drug.[69] A specific quantified reduction in the sentence was not applied, although the dead time had been calculated at over 3 years and 8 months.[70] This approach was confirmed as 'in accordance with established authority in this State'[71] and shows that there is some discretion available to take account of dead time as a subjective matter in the overall instinctive synthesis approach to sentencing an offender, but it is not to be taken into account as a form of quantified credit.[72] Accordingly, while some weight might be accorded to dead time in the sentencing calculus, it is never to be regarded as specific credit 'in the bank' that can be utilised as of right to reduce any future sentence of imprisonment imposed for a subsequent and unrelated offence.

A similar approach has been taken by the South Australian courts. Chief Justice Kourakis in the Full Court of the Supreme Court decision, *R v Sprecher*, stated:

> It is well accepted that a sentencing court may, and generally should, take into account periods of remand in custody related to the offending for which he or she is being sentenced. Moreover, the period spent on remand may be taken into account even if it is referrable to both the offence for which the defendant falls to be sentenced and other offending. However, there must be some connection between the period spent on remand and the offences and the sentence under consideration. In *R v Arts and Briggs* Callaway JA identified a limitation on the extent to which a sentencing court will take into account a period of remand in custody when he remarked:
>
> > There are, of course, many cases where a person cannot be given credit for pre-sentence detention. He or she may be on remand for several months and then acquitted. The time spent on remand cannot be regarded as a bank balance on which to draw in relation to offences unconnected with the reason for custody, but that is not the case here.
>
> Callaway JA went on refer to the judgment of Lord Bingham of Cornhill CJ in *R v Governor of Brockhill Prison; ex parte Evans* where Lord Bingham referred to a practice of English courts 'to assume that all periods of custody before sentence, other than custody wholly unrelated to the offences for which sentence is passed, will count against the period of the sentence to be served'.
>
> In *R v Hughey* this Court endorsed the approach that time spent on remand is not to be regarded as a bank balance on which a defendant could draw.[73]

---

69 Ibid [23].

70 Ibid [15].

71 Ibid [23].

72 See also *R v Evans* (New South Wales Court of Criminal Appeal, Gleeson CJ, Allen and Mathews JJ, 21 May 1992); *R v Karageorge* [1999] NSWCCA 213; *Rafaieh v R* [2018] NSWCCA 72, [74].

73 (2015) 123 SASR 15, 21–2 [30]–[31] (Kourakis CJ, Gray J agreeing at [39] and Stanley J agreeing at [40]) (emphasis omitted) (citations omitted). See also *R v Galgey* [2010] SASC 134; *R v Hughey* [2007] SASC 452, [6]–[7].

Most recently, the *Renzella* discretion was considered by the ACT Court of Appeal in *McIver v The King*.[74] In this case, the Court,[75] interpreting and applying section 63 of the *Crimes (Sentencing) Act 2005* (ACT), unanimously held that a period of pre-sentence custody is to be taken into account and the sentence backdated when it is referable only to the offence for which the offender is being sentenced.[76] Furthermore, where it is not referable, it can only be taken into account 'provided that the period of custody for the unrelated offending is continuous with the period of custody for which the offender is being sentenced'.[77] This is what has been described in other jurisdictions as 'doubly warranted' custody. It was accepted that section 63 did not provide an exclusive statement in this regard, so the ACT Court of Appeal then turned to consider the alternative approach raised by the *Renzella* discretion and later decision of the Victorian Court of Appeal in *Karpinski*. In doing so, it was also noted that the NSW courts had declined to follow that line of authority and rather drew a sharp distinction between time on remand for the current offence and time served solely for unrelated offending.[78] The core of the NSW approach was observed to be related to 'public policy concerns that weigh against consideration of unrelated offending for which an offender is ultimately acquitted as "credit in the bank", which may then be deducted from the sentence imposed in respect of any future offending'.[79] These concerns were considered to be 'well-founded' with the Court ultimately deciding that

> although pre-sentence custody for unrelated offending may be taken into account when considering the offender's subjective case and issues of totality, we do not consider that time spent by an offender in custody for wholly unrelated offending should be taken into account in and of itself as 'time served'.[80]

Accordingly, there are some similarities to the NSW approach, in that the ACT Court of Appeal has confirmed a prohibition on quantified 'credit in the bank' for time served in relation to unrelated offending; however, at the same time they have specified a more detailed discretionary approach to the use of dead time in the sentencing synthesis concluding that

> time spent in custody for unrelated offending may be relevant to other aspects of the sentencing exercise. In particular, such custody may be relevant to an assessment of the offender's subjective case, to the application of principles of totality, or may

74 *McIver* (n 58).

75 Comprising Loukas-Karlsson, Baker and Bromwich JJ.

76 *McIver* (n 58).

77 Ibid [90].

78 Ibid [96]–[100] with reference particularly to *SY* (n 5) and *Dib* (n 5).

79 *McIver* (n 58) [101].

80 Ibid [105]. The persuasiveness of these public policy concerns is discussed in greater detail in Part III(E) below.

> otherwise be relevant to an assessment of the weight to be given to the different purposes of sentencing.[81]

In the final analysis, discretion in the ACT has broadened by incorporating the principle of totality and the weighing of the related sentencing purposes into the offender's subjective case, allowing full account of dead time to be taken in the sentencing calculus.

Overall, it is apparent that the differences in the way appellate courts treat dead time throughout Australia are significant, resulting in an inconsistent and confusing situation for the national sentencing landscape. We now turn to evaluate the respective competing approaches.

III Evaluation of the Competing Approaches to Dead Time

A *The Link Between the Offence and the Sentence is Not Cardinal*

As we have seen, there are legislative provisions and a principle that offenders should get credit for time spent in prison for the offence for which they are being sentenced. There is, however, no established principle that offenders should get credit for time spent in prison for any other offence for which they are not being sentenced.

The only difference between the approach to pre-sentence detention for prison time served for the offence for which the offender is being sentenced, and for time served for another offence is the presence of a direct nexus between the incarceration and the crime. There is no doubt that in the case of dead time, there is no direct nexus between the crime for which the offender is sentenced and the one which underpinned the detention. However, it is not clear that this distinction is anything more than a descriptive acknowledgement of the background in which the sentencing calculus is to be undertaken. It is arguable that where there has been punishment in the form of imprisonment — whether due to remand for a particular alleged offence, or for other alleged offences for which prosecution was ultimately discontinued or led to an acquittal through trial or appeal — there is still a specific and quantifiable punishment suffered by the person, which should be credited in any subsequent sentencing process, regardless of an unequivocal connection to the offence.

B *Punishment by its Nature to be Legitimate Must be for a Crime*

The concept which underpins crediting of pre-sentence detention is the reality that the offender has been subjected to harsh punishment by the state and that for punishment to be justified it must be for a crime proven to the requisite standard of proof. The need for a link between punishment and guilt for a crime is an indisputable aspect of (legitimate) punishment. This is evident from the definition of

---

81 Ibid [106].

legitimate punishment that has been advanced by many leading penal scholars and philosophers throughout the ages.

Thomas Hobbes provides that punishment is an

> Evill inflicted by publique Authority, on him that hath done, or omitted that which is *Judged by the same Authority to be a Transgression of the Law*; to the end that the will of men may thereby the better be disposed to obedience… [T]he aym of Punishment is not a revenge, but terrour.[82]

Ted Honderich defines punishment as 'an authority's infliction of a penalty, something involving deprivation or distress, on an offender, *someone found to have broken a rule, for an offence*, an act of the kind prohibited by the rule'.[83]

According to the English legal philosopher Herbert Hart, the features of punishment are that:

(i) It must involve pain or other consequences normally considered unpleasant.
(ii) It must be for *an offence against legal rules*.
(iii) It must be of an *actual or supposed offender for his offence*.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[84]

Herbert Morris defines punishment as 'the imposition upon a person who is believed to be at fault of something commonly believed to be a deprivation where that deprivation is justified by the person's guilty behaviour'.[85] Antony Duff defines punishment as 'the infliction of suffering on a member of the community *who has broken its laws*';[86] and similarly John McTaggart defines punishment as 'the infliction of pain on a person *because he has done wrong*'.[87]

---

82 Thomas Hobbes, *Leviathan* (Penguin Books, rev ed, 1968) 353, 355 (emphasis altered).

83 Ted Honderich, *Punishment: The Supposed Justifications* (Penguin Books, 1984) 15, 19 (emphasis added).

84 HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968) 4–5 (emphasis added). See also Antony Flew, 'The Justification of Punishment' (1954) 29(3) *Journal of the Royal Institute of Philosophy* 291, 293–4.

85 Herbert Morris, 'Persons and Punishment' in S E Grupp (ed), *Theories of Punishment* (Indiana University Press, 1971) 76, 83.

86 RA Duff, *Trials and Punishments* (Cambridge University Press, 1986) 267 (emphasis added). Duff also states that punishment is suffering imposed on an offender for an offence by a duly constituted authority: at 151.

87 John McTaggart Ellis McTaggart, *Studies in Hegelian Cosmology* (Cambridge University Press, 1901) 129 (emphasis added).

Thus, an indispensable aspect of *legitimate* state-imposed punishment is that it is imposed because a person has committed an offence, determined by due process, and in accordance with lawful authority. If the nexus between punishment and a wrong is broken, then clearly the individual has been subjected to an injustice, in the form of a state-imposed sanction without lawful conviction. It is this reality that underpins the need to credit pre-sentence detention. On a closer examination, it is strongly arguable that the same principle justifies credit for dead time.

C *To Not Credit Unjustified Punishment is the Moral Equivalent of Condoning Punishment of the Innocent*

It is important to emphasise that the proscription against punishing the innocent is a fundamental bulwark of justice and a central distinction between the rule of law and tyranny. The principle is so forceful, that arguably it is absolute — subject to no exceptions. It is so powerful that it forms one of the reasons that, at the philosophical level, utilitarianism is no longer the most influential theory of punishment.[88] Retributivists forcefully argued that utilitarianism justifies punishing the innocent where this would maximise net happiness (for example, by framing people whom the community wanted punished), and hence any theory that justifies such repugnant outcomes must be flawed.[89]

Logically, the principle against punishing the innocent applies no less in circumstances where the prison time served relates to an offence for which the accused was not convicted instead of an offence for which the accused is sentenced. If it is accepted that it is an injustice to not accord pre-sentence detention credit, then it is equally an injustice to refuse to remedy the injustice if the opportunity arises. This is especially important given that the legal system typically accords no form of compensation (monetary or otherwise) for people who have been wrongly imprisoned.[90] In fact, failing to remedy the injustice of punishing the innocent is arguably even a graver injustice than improperly imprisoning a person in the first place. In cases where dead time arises, the wrongful imprisonment was not by design — it was an institutional error, a misjudgement regarding the legal guilt of the accused to the standard of proof beyond reasonable doubt. By contrast, the decision to not grant

88 Mirko Bagaric and Kumar Amarasekara, 'The Errors of Retributivism' (2000) 24(1) *Melbourne University Law Review* 124.

89 HJ McCloskey, *Meta-ethics and Normative Ethics* (Martinus Nijhoff, 1969) 180.

90 The main exception to this is when the defendant can establish the tort of malicious prosecution in relation to the imprisonment, which is a very difficult threshold to reach. See, eg: *Wood v New South Wales* [2018] NSWSC 1247 (Fullerton J); *Spedding v New South Wales* [2022] NSWSC 1627 (Harrison J); *New South Wales v Spedding* [2023] NSWCA 180. As noted in the introduction to this article, other rare exceptions are where a wrongfully convicted person reaches a settlement with the state for an ex gratia payment of compensation (eg Lindy Chamberlain, Andrew Mallard). For an example of relevant legislation see *Government Sector Finance Act 2018* (NSW) s 5.7, which provides statutory power to Ministers to make 'act of grace' payments in certain and special circumstances.

credit for dead time is a calculated institutional choice not to act in a normatively correct and appropriate manner.

Thus, to not credit unjustified punishment in full is to morally condone punishing the innocent.

D *The Principle of Proportionality also Commands Credit for Dead Time*

Failure to grant credit for dead time also involves the violation of another cardinal legal and sentencing principle, namely the principle of proportionality. This is the established view that wrongdoers should receive punishment commensurate with the seriousness of their offending. In short, it is a principle that 'the punishment must fit the crime'. The High Court in *Hoare v The Queen* stated:

> 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.[91]

In fact, in *Veen v The Queen*[92] and *Veen v The Queen [No 2]*,[93] the High Court stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection (absent a clear legislative intention to the contrary), which, at various times, has also been declared as the most important objective of sentencing.[94] Proportionality has also been given statutory recognition in all Australian jurisdictions.[95]

---

91 *Hoare* (n 18) 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (emphasis altered) (citations omitted).

92 *Veen* (n 18) 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J).

93 *Veen [No 2]* (n 18) 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

94 See, eg, *Channon v The Queen* (1978) 20 ALR 1. See also above n 18, in relation to *Sentencing Act* (SA) s 3.

95 The *Sentencing Act* (Vic) (n 17) 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: at ss 5(2)(c)–(d). The *Sentencing Act* (WA) (n 17) s 6(1) states that the sentence must be 'commensurate with the seriousness of the offence', and the *Sentencing Act* (ACT) (n 17) 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* (NT) (n 17) s 5(1)(a); *Penalties and Sentences Act* (Qld) (n 17) s 9(1)(a). In South Australia, 'proportionality' is specifically recognised in s 10 of the *Sentencing Act* (SA) (n 17) as a general principle of sentencing which a court must apply in determining a sentence for an offence. The need for a sentencing court to ensure that the offender is 'adequately punished' is also fundamental to the sentencing of offenders for Commonwealth crimes: see *Crimes Act* (Cth) (n 17) s 16A(2)(k). The same phrase is used in the New South Wales legislation: *Crimes (Sentencing Procedure) Act* (NSW) (n 17) s 3A(a).

More fully, proportionality has two limbs. The first is the seriousness of the crime, and the second is the harshness of the sanction.[96] Further, the principle has a quantitative component — the two limbs must be matched.[97] In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.[98]

The proportionality principle is a universal principle of justice. As Richard Fox notes, the notion that the response must be commensurate to the harm caused, or sought to be prevented, is at the core of the criminal defences of self-defence and provocation.[99] It is also at the foundation of civil law damages for injury or death, which aim to compensate for the actual loss suffered; and equitable remedies, which are proportional to the detriment sought to be avoided.[100]

While in criminal law proportionality normally operates to require punishment, the principle is not a one-way directive. The requirement that the response be commensurate with the harm caused also operates to command redress for those who have been unjustly punished. The other side of the 'punishment must fit the crime' coin is the requirement that some form of redress or compensation must be accorded for punishment inflicted in the absence of a crime.

Thus, the need to credit dead time stems from the operation of two important principles: the proscription against punishing the innocent; and the proportionality principle.

E *Dead Time as a Prison Bank Balance: No Pure Causal Link Between Offence and Punishment Even for Offences Attracting Pre-Sentence Detention*

In order to make out the argument more fully that dead time should be credited, it is necessary to debunk the reasons that have been advanced for not crediting this time. To this end, it emerges that there is a notable absence of considered arguments; rather, there are a number of cursory observations that have been advanced to justify not permitting the adjustment of sentences for dead time. That may be so because, ultimately, the question of crediting dead time is a question of public policy, which is perhaps best addressed by parliament rather than the courts.

---

96 Richard G Fox, 'The Meaning of Proportion in Sentencing' (1994) 19(1) *Melbourne University Law Review* 489, 491.

97 Ibid.

98 Ibid.

99 Although it is appropriate to acknowledge that since Fox made this observation, provocation has been abolished as a defence to murder in most Australian jurisdictions: Paul Fairall and Malcolm Barrett, *Criminal Defences in Australia* (5th ed, 2016). In NSW note that the partial defence of 'extreme provocation' is available to a charge of murder: see *Crimes Act 1900* (NSW) s 23.

100 Fox (n 96) 491. This article also provides a good historical overview of the proportionality principle: see R G Fox, 'The Killings of Bobby Veen: The High Court on Proportionality in Sentencing' (1988) 12(1) *Criminal Law Journal* 339, 350–2.

The view that dead time cannot be used as a 'bank balance on which to draw in relation to offences unconnected with the reason for custody'[101] is not a legitimate basis for not crediting dead time. This is because this view is not an argument; it is simply a comment which lacks an underlying justification. There is no logical or normative framework within which this comment is couched to give it coherency and persuasion. It is simply a superficial statement which has a veneer of plausibility because of its link to the broader principle that the punishment should fit the crime, but which does not withstand closer intellectual scrutiny.

The strongest basis for arguing that dead time should not be treated as a bank balance is to highlight the absence of a causal nexus between the events: the crime for which the person was imprisoned and the crime for which the person was sentenced. However, the distinction between the approaches for crediting pre-sentence detention and dead time couched in terms of a causal nexus between the relevant crimes is not as sharp as has been asserted in the jurisprudence.

It is not accurate to assert that pre-sentence detention is appropriate for crimes which are directly connected to the sentence *because* of this connection. There are often reasons unrelated to the immediate crime that resulted in the pre-sentence detention of the offender. The offending is simply part of the broader backdrop to the detention in many instances. The most common situation when pre-sentence detention arises is when an offender has been remanded in custody for a crime of which the offender is ultimately convicted. The reason for being placed on remand is the refusal of bail. The nature of the offence is only one consideration that informs the bail determination.[102] It is not correct to assert that the offence committed is the sole, or sometimes even the main, reason for a denial of bail and hence that any sentence should begin at that point in time.

While suspicion of the commission of a crime is a necessary element of a bail determination, there are other considerations that are relevant. Other important considerations include whether the offender is at meaningful risk of reoffending, or not appearing at court. Thus, in circumstances where an offender has served pre-sentence detention, important causal reasons for this include not only the offence, but also an assessment that the offender is likely to reoffend or not appear in court in relation to the offence. Hence, it could be argued that pre-sentence detention should not always be credited because the cause of the detention was the offender's own character and (negative) attitude towards possible bail conditions. This argument ultimately breaks down because the key reason for crediting pre-sentence detention is the need to acknowledge the fact that punishment can only be justified if it stems from the commission of a crime. If punishment commenced before a finding of guilt for a particular crime, this should be remedied by means of granting pre-sentence detention credit for that crime or — if a finding of guilty never occurred for that crime — other crimes. Ultimately, every episode of involuntary deprivation

101 See above Part II(C) citing *R v Sprecher* (2015) 123 SASR 15 [30].

102 See, eg: *Bail Act 2013* (NSW) ss 17–20; *Bail Act 1977* (Vic) pt 2; *Bail Act 1985* (SA) s 10(1).

of liberty imposed through the coercive power of the state should be viewed in the same manner when an actual sentence is being formulated by a sentencing court.

F *Application of the Dead Time Principle for Sanctions other than Prison*

By way of clarity, it is worthwhile noting that the principle of dead time could be extended beyond imprisonment, to also apply to other forms of punishment, such as community corrections orders or home detention. All forms of punishment involve hardship, hence, where a sanction has been imposed unjustly, it follows that if the opportunity arises it should be remedied. Accordingly, the reformed dead time principle we suggest in this article should apply to sanctions other than imprisonment.

Prison is the harshest sanction in our system of law. Hence, it is in this context where the principle would apply most frequently and would be the easiest to implement. Prison is also the sanction which will most commonly and neatly attract the proposed approach to dead time. This is because cases which result in prison are most frequently appealed, and it is easy to calculate the appropriate credit which should be accorded — that is, the credit matches the time wrongly served in prison. However, this does not logically entail that our proposed reform is only apposite to imprisonment.

We acknowledge there is no obvious or mechanical formula which could be applied to determine how much credit should be accorded in circumstances when the relevant sanctions are of a different nature, for example, where the wrongful conviction attracted a community-based order and the new sentence is a term of imprisonment. This is because there is no meaningful formula for measuring equivalence between sanctions.[103] The lack of objective precision in this regard should not prevent application of the dead time principle in the context of all sanctions. As we have seen, sentencing — largely due to the instinctive synthesis — by its nature involves a considerable degree of discretion and individualised assessment of each case. This same standard and approach is apposite in relation to our proposed dead time principle when the respective sanctions are different in nature. Thus, by way of example, it would not be inappropriate to accord a day's prison credit for every two days an offender had unjustly been placed on a community corrections order.[104]

---

103 For a discussion regarding the equivalence between criminal sanctions, see Mirko Bagaric, 'New Criminal Sanctions: Inflicting Pain Through the Denial of Employment and Education' [2001] *Criminal Law Review* 184.

104 Another equivalence-related issue which could arise in relation to our proposed reform is how to deal with situations where mitigating or aggravating factors were present in relation to the previous sentencing exercise, but are no longer relevant in relation to the later sentence. This situation is more straightforward. The focus of the dead time principle is on the nature and severity of the sanction which was unjustly imposed, as opposed to the sentencing factors resulting in the sanction. Accordingly, in applying the dead time principle it would not be relevant to determine the reasons underpinning the earlier sentence. We thank the anonymous reviewer for this point.

IV Reform Proposals and Concluding Remarks

There is no settled common law principle regarding how dead time should be dealt with in the sentencing calculus. In particular, there is a discord between the approaches taken in NSW and Victoria. It is unsatisfactory that there is such a divergence of approaches in relation to crediting prison time in the two largest Australian jurisdictions, given the profound impact that prison has on the lives of prisoners.

It bears repeating that prison is the harshest sanction in our system of law. It involves a total denial of liberty and deprives people of nearly everything that is meaningful in their lives. People who have spent time in prison for offences for which they are ultimately not convicted have suffered a gross injustice and hardship. They are usually not afforded a remedy, or compensated for this in any manner. The only practical manner in which most offenders can be 'compensated' for dead time is if the offender has this time quantified and credited against any future sentence.

To not credit dead time in these circumstances fails to acknowledge the stringency of the principle that the innocent should not be punished and fails to recognise the grave punishment that is inherent in a term of imprisonment. The underlying norm in this case is the entrenched value of protecting the innocent from arbitrary, improper or defective use of state power. Dead time emerges as a class of sanction that is the by-product of an imperfect system that has the effect of incarcerating the innocent and tries to provide a remedy for that effect.

The fact a person has accrued dead time means that they have been wrongly imprisoned. To punish the innocent is a repugnant act. To refuse to remedy this act, should the opportunity avail, exacerbates this normative wrongdoing. The fact that dead time does not relate directly to the offence for which an offender is being sentenced should not deflect the need to remedy an earlier injustice. The direct connection to an offence and time served is arguably not a paramount consideration in the final analysis. The need to credit dead time also follows from fairness considerations and the practical application of the proportionality principle. Legislative provisions to give effect to this reform should be formulated to clearly align dead time with pre-sentence detention in the sentencing calculus, especially if the High Court is not presented with an opportunity to resolve the current differences and confusion apparent in the common law throughout Australia.

The law should be reformed so that dead time is always credited to offenders in the absence of exceptional circumstances. To this end, the only exception we would make to the principle is that dead time should not be credited if an offender commits a crime with the express expectation of impunity (at least for the time served) for the offence. The reason for this exception, is that no legal principle should operate in a manner which could potentially encourage the commission of crime. As this would relate to a question of fact relevant to sentencing, such an exception would ordinarily require adducing evidence by the prosecution in the course of the proceedings and

be specifically considered by the court, in accordance with the rules of evidence.[105] Such evidence would then allow the court to determine the motivation and context of the crime in deciding whether the exception is established.[106]

The reform proposed in this article logically stems from the theoretical arguments we have put forward in support of crediting dead time — whether the earlier detention relates to an offence committed before or after the sentence is a matter of happenstance rather than doctrinal relevance. This approach is amenable to integration into the sentencing synthesis as a consistent principle. Further, it is time that can usually be numerically quantified, and so should be a specific consideration in the sentencing calculus, in the same way as quantified pre-sentence detention (relating to the crime for which the offender is being sentenced) and other quantified sentencing factors, such as the discount for a guilty plea.[107] Thus, the reform proposal is not only normatively and jurisprudentially desirable but also pragmatically readily achievable.

105 See *Evidence Act 1995* (Cth) s 4(2).

106 In those jurisdictions where the uniform evidence provisions apply, those considerations are specifically included. See *Evidence Act 1995* (Cth) s 4; *Evidence Act 2011* (ACT) s 4; *Evidence Act 1995* (NSW) s 4; *Evidence (National Uniform Legislation) Act 2011* (NT) s 4; *Evidence Act 2001* (Tas) s 4; *Evidence Act 2008* (Vic) s 4.

107 See above n 27.