

Anusha Kenny and Natalia Antolak-Saper***

THE ROLE OF TRAUMA AS A MITIGATING FACTOR IN THE SENTENCING OF OFFENDERS: THE VICTORIAN EXPERIENCE

ABSTRACT

Within the criminal justice system, research indicates that a significant majority of offenders — over 90% — have endured some form of trauma. This article critically examines how trauma is considered as a mitigating factor in the sentencing process within the State of Victoria. While Victorian sentencing principles recognise the relevance of an offender’s personal circumstances, there remains a lack of clarity regarding which principles are most applicable when assessing the impact of trauma. Further, the process of weighing trauma in accordance with the doctrine of instinctive synthesis poses substantial challenges for sentencing judges. This article examines the intersection of trauma and sentencing, proposing a more nuanced and principled approach that integrates contemporary understandings of trauma into legal decision-making. By advancing a framework for consistent and fair consideration of trauma, the criminal justice system can enhance its commitment to justice and rehabilitation, ultimately fostering more equitable sentencing outcomes.

* Policy Advisor and Lawyer.

** Associate Professor, Monash Law School, Monash University. The authors would like to thank Dr Jamie Walvisch and the participants of the 2024 Criminal Law Workshop for their thoughtful comments on a draft version of this article. The authors would also like to acknowledge the helpful comments of the anonymous reviewers.

I INTRODUCTION

Trauma has been described as ‘pain, horror and fear living inside people’.¹ It is a pervasive experience, with research indicating that over 90% of imprisoned offenders have encountered some form of trauma.² Yet despite its prevalence, there remains considerable uncertainty about how trauma should be understood and applied within the legal framework of sentencing.

For the purposes of this article, the term ‘trauma’ is not defined simply as the experience of adverse life events such as poverty, neglect, or exposure to violence, but rather as the enduring psychological impact such experiences can produce. These impacts may include impairments in impulse control, affect regulation,³ decision-making capacity, and moral reasoning, each of which can diminish the offender’s moral culpability. Mitigation, therefore, is not justified by adversity in the abstract, but by evidence of its effect on the offender’s psychological functioning and capacity to comply with the law. This interpretive framework aligns with emerging trauma-informed jurisprudence, which places emphasis on demonstrable harm over categorical disadvantage.

Using the State of Victoria as an example, this article critically examines the legal implications of recognising trauma as a mitigating factor. While the existing sentencing framework acknowledges the relevance of an offender’s personal circumstances,⁴ there remains considerable ambiguity as to which sentencing principles

¹ Interview with Bessel van der Kolk (Rich Simon, Psychotherapy Networker, 12 August 2014) <https://www.psychotherapynetworker.org/article/video-when-it-trauma-bessel-van-der-kolk-explains/?srsltid=AfmBOopxQZIlvO9-ElbTbvDtNKd_aQyx1YIDaN5atT3m8yIz3yWjOsW> (‘Interview with Bessel van der Kolk’). Bessel van der Kolk is a leading psychiatrist and internationally recognised expert in the field of trauma research. He is the founder and medical director of the Trauma Research Foundation and was formerly a professor of psychiatry at Boston University School of Medicine. With over four decades of clinical and research experience, van der Kolk has significantly advanced the understanding of how trauma affects the brain, body, and behaviour. His seminal work, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Viking Penguin, 2014) (‘*The Body Keeps the Score*’), is widely regarded as one of the most influential texts on trauma and is frequently cited across both clinical and legal contexts for its insights into the long-term impacts of traumatic experiences.

² Victoria Jackson et al, ‘Trauma-Informed Sentencing of Serious Violent Offenders: An Exploration of Judicial Dispositions with a Gendered Perspective’ (2021) 28(5) *Psychiatry, Psychology and Law* 748, 748.

³ ‘Affect regulation’ refers to the processes by which individuals monitor, evaluate, and modify their emotional states to achieve adaptive functioning or meet situational demands. See, e.g., James J Gross (ed), *Handbook of Emotion Regulation* (The Guilford Press, 2nd ed, 2014).

⁴ *Sentencing Act 1991* (Vic) s 5(1)(a) (‘*Sentencing Act*’); *R v McKee* (2003) 138 A Crim R 88, 92 [10] (Buchanan JA), 94 [21] (Vincent JA) (‘*McKee*’). See also Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 310.

are most applicable in assessing the impact of trauma, and how much weight should be assigned to the impact of trauma under the doctrine of instinctive synthesis.⁵ Clarifying these doctrinal uncertainties is essential, as a trauma-informed approach to sentencing — particularly one that addresses the criminogenic risks associated with unresolved trauma — has the potential to reduce individual recidivism and disrupt cycles of intergenerational criminality.⁶

While Victoria's approach to trauma in sentencing is not unique, its approach is marked by a more structured articulation of principles and openness to complex psychological evidence. However, the intersection of trauma and sentencing is a live and evolving issue across all jurisdictions. For example, in New South Wales, the *Bugmy Bar Book* serves as a comprehensive and practical resource for courts, legal practitioners, and support services in considering trauma-related factors in sentencing, particularly for Aboriginal and Torres Strait Islander peoples.⁷ The Northern Territory and Western Australia have also seen judicial recognition of trauma as a factor relevant to moral culpability and just punishment. For example, in *Joran v The King*,⁸ the Northern Territory Court of Criminal Appeal acknowledged the significance of childhood deprivation and a psychiatric diagnosis of Complex Post-Traumatic Stress Disorder ('C-PTSD') in the assessment of moral culpability.⁹ In *Kelly v Western Australia*,¹⁰ the Western Australian Court of Appeal found that a history of profound childhood deprivation and complex trauma could diminish culpability.¹¹ While jurisdictional nuance can exist in evidentiary standards and the prominence of trauma-informed resources, these developments collectively underscore a national shift toward recognising the pervasive role of trauma in shaping offending behaviour and sentencing outcomes. The insights offered in this article therefore have broader relevance.

Drawing on an expanding body of research on trauma, particularly its causes and effects, this article examines how such insights can meaningfully inform sentencing practices. It places particular emphasis on cases involving survivors of Australia's Stolen Generations and their descendants, highlighting how these experiences of trauma are considered — or overlooked — in judicial decision-making.

Part II of this article provides a focused definition of trauma in the legal context and explores various forms of trauma, such as intergenerational trauma and systemic

⁵ For further discussion on instinctive synthesis, see *Markarian v The Queen* (2005) 228 CLR 357, 378 [51] (McHugh J) ('*Markarian*').

⁶ Katherine J McLachlan, *Trauma-Informed Criminal Justice: Towards a More Compassionate Criminal Justice System* (Springer, 2024) 171.

⁷ See 'Bugmy Bar Book', *Bugmy Bar Book* (Web Page, 2025) <<https://bugmybarbook.org.au>> ('*Bugmy Bar Book*').

⁸ [2024] NTCCA 1.

⁹ *Ibid* [69]–[70] (Barr J).

¹⁰ [2024] WASCA 116.

¹¹ *Ibid* [367] (Mazza and Hall JJA)

discrimination, which have significant legal ramifications. It discusses the complex psychological and physiological effects of trauma that may impact an offender's behaviour and culpability. Part III delves into Victorian sentencing principles that allow for the consideration of trauma, examining key case studies involving offenders of Aboriginal heritage or those with a history of childhood trauma. The analysis in Part IV explores justifications for mitigating sentences based on trauma, particularly in terms of reducing moral culpability. It also addresses critical challenges in this area, such as the potential for inconsistency, personal bias, and the moral dilemma faced by judges in assessing trauma.

While this article emphasises trauma as a potential mitigating factor, it is recognised that trauma is not inherently or exclusively mitigating. The psychological and behavioural effects of trauma may, in some cases, contribute to risk factors that complicate rehabilitation or heighten community protection concerns. Where trauma manifests in persistent antisocial behaviour, impaired emotional regulation, or diminished responsiveness to intervention, it may assume an aggravating or ambiguous role in sentencing. This does not detract from the central argument advanced here, but rather supports the need for a nuanced, evidence-based assessment of its relevance on a case-by-case basis.

This article therefore advocates for a more structured and principled approach to the consideration of trauma in sentencing, emphasising the need for clear judicial guidance and consistent application. Central to this framework is the recommendation for enhanced judicial education, ensuring that judges are equipped with the knowledge and tools necessary to understand the complexities of trauma and to apply this understanding effectively and fairly in sentencing decisions.¹²

II WHAT IS TRAUMA?

A Broad Definition

The concept of trauma has evolved beyond its original association with physical injury to encompass various non-physical experiences that have significant psychological and emotional effects.¹³ A term that is inherently difficult to define, trauma is

¹² A number of alternative mechanisms can also support trauma-informed and culturally responsive justice practices, including truth-telling processes, formal apologies, and Aboriginal Community Justice Reports. See: Thalia Anthony and Larissa Behrendt, *Aboriginal Community Justice Reports Program: Preliminary Findings* (Report, November 2023); Andrew Day and Katherine McLachlan, *A Trauma-Informed Approach to Supporting New Professionals in the Criminal Justice System: A Literature Review* (Report, July 2024).

¹³ Lucy Bond and Stef Craps, *Trauma* (Routledge, 2020) 5.

slippery: blurring the boundaries between mind and body, memory and forgetting, speech and silence. It traverses the internal and the external, the private and the public, the individual and the collective. Trauma is dynamic: its parameters are endlessly shifting as it moves across disciplines and institutions, ages and cultures. Trauma is contested: its rhetoric, its origins, its symptoms, and its treatment have been subject to more than 150 years of controversy and debate.¹⁴

Trauma has been described as ‘a wound lived out day-to-day’,¹⁵ and an experience that continues to trouble the present. These definitions indicate that although trauma is a broad concept, it refers to significant negative experiences and their sequelae. This article will use the term ‘trauma’ as shorthand for a range of adverse experiences, whether stemming from a singular event, or deriving from cumulative negative experiences that, over time, can have a corrosive and traumatic effect on individuals.¹⁶

In the legal context, trauma is relevant when it influences behaviour, particularly in criminal offending. In sentencing remarks, judges may adopt other phrases to describe these experiences, including ‘deprived background’,¹⁷ ‘traumatic background’,¹⁸ ‘social deprivation’,¹⁹ and ‘adverse childhood experiences’.²⁰ Alternatively, particular sources of trauma, such as the experience of abuse or other experiences of victimisation, may be expressly referred to.²¹ This article focuses on how these experiences, whether acute (like direct abuse) or insidious (such as long-term discrimination or systemic inequality), affect an offender’s behaviour and decision-making.²² An understanding of these concepts can clarify how trauma may be considered a mitigating factor in sentencing. For this reason, the next section discusses the sources of trauma, its effect and impact.

¹⁴ Ibid.

¹⁵ Interview with Bessel van der Kolk (n 1).

¹⁶ This use of the term is consistent with its contemporary meaning, as evidenced by: *Macquarie Dictionary* (online at 2 August 2025) ‘trauma’; Bond and Craps (n 13) 5; Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (Norton Professional Books, 2000) 5.

¹⁷ See, e.g.: *Bugmy v The Queen* (2013) 249 CLR 571, 583 [5] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (‘*Bugmy*’); *Honeysett v The Queen* (2018) 56 VR 375, 383 [35] (Priest, Beach and Hargrave JJA) (‘*Honeysett*’).

¹⁸ See, e.g., *Ryder v The Queen* (2016) 256 A Crim R 115, 121 [9] (Whelan JA and Cavanough AJA).

¹⁹ See, e.g.: *R v Wordie* [2003] VSCA 107, [27] (Cummins AJA); *DPP (Vic) v Perry* (2016) 50 VR 686, 721 [136] (Maxwell ACJ, Redlich and Whelan JJA).

²⁰ See, e.g., *Cross v The Queen* [2019] VSCA 310, [42] (Priest and Weinberg JJA).

²¹ See, e.g., *R v AWF* (2000) 2 VR 1, 8–9 [28] (Chernov JA) (‘*AWF*’).

²² Kevin L Nadal, *Microaggressions and Traumatic Stress: Theory, Research, and Clinical Treatment* (American Psychological Association, 2018) 39–47.

B Sources of Trauma

1 Traumatic Events

There is an infinite range of experiences that could have a traumatic effect on a given individual. Generally, trauma is caused by an experience that an individual is exposed to, either in childhood or adulthood. Traumatic events are characterised by ‘a sense of horror, helplessness, serious injury, or the threat of serious injury or death’.²³ They can be caused by intentional or unintentional acts of individuals (sometimes referred to as ‘interpersonal’²⁴ or ‘complex trauma’),²⁵ or by external events or circumstances, such as war, natural disasters, or accidents. An individual does not need to be directly exposed to the traumatic event for it to have had a traumatic effect. Indirect exposure — such as being a witness to a traumatic event or having a close family member directly involved in a traumatic event — may have a traumatic effect on an individual.²⁶

Traumatic experiences during childhood can have particularly pernicious effects on individuals’ long-term wellbeing.²⁷ Trauma rewires the developmental brain ‘from a “learning” brain to a “survival” brain’.²⁸ Adverse childhood experiences such as the experience of physical, sexual or emotional abuse during childhood can have a considerable ongoing effect on an individual’s life trajectory. This can include

²³ Centers for Disease Control and Prevention, *Helping Patients Cope with a Traumatic Event* (Factsheet, 15 October 2021). See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, 2022).

²⁴ Melissa J Hagan, Annmarie C Hulette and Alicia F Lieberman ‘Symptoms of Dissociation in a High-Risk Sample of Young Children Exposed to Interpersonal Trauma: Prevalence, Correlates, and Contributors’ (2015) 28(3) *Journal of Traumatic Stress* 258, 258.

²⁵ Rachel Wamser-Nanney and Brian R Vandenberg, ‘Empirical Support for the Definition of a Complex Trauma Event in Children and Adolescents’ (2013) 26(6) *Journal of Traumatic Stress* 671, 671.

²⁶ Centers for Disease Control and Prevention (n 23).

²⁷ See Divna Haslam et al, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Report, 2023). For a longitudinal study of the effects of a specific childhood trauma on health, see Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations Aged 50 and Over: Updated Analyses for 2018–19* (Report, 2021).

²⁸ Cathy Kezelman et al, *The Cost of Unresolved Childhood Trauma and Abuse in Adults in Australia* (Report, 2015) 14.

an increased likelihood of future contact with the criminal justice system,²⁹ the development of mental illness,³⁰ and decreased life expectancy.³¹

If trauma is not addressed or treated, it can result in ‘interrupted neurological, social and emotional development’.³² Unresolved trauma can also contribute to maladaptive coping mechanisms and can be exacerbated by traumatic experiences in adulthood.³³ Experiences of trauma can be compounded by the impact of specific trauma such as intergenerational trauma or discrimination.

2 *Contested Forms of Trauma: Intergenerational Trauma*

‘Intergenerational trauma’ generally refers to the ways in which trauma experienced in one generation affects the health and wellbeing of their descendants.³⁴ At the core of intergenerational or historical trauma is the reverberation of victimisation, where the effects of personal trauma extend beyond the primary victim and have profound effects on the lives of those connected to the primary victim, most notably their spouses and offspring.³⁵

There is extensive literature documenting the intergenerational effects of traumatic experiences in various populations, including the offspring of survivors of sexual

²⁹ Catia Malvaso et al, *Adverse Childhood Experiences and Trauma among Young People in the Youth Justice System* (Report No 651, June 2022); Nina Papalia et al, ‘Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes’ (2018) 23(4) *Child Maltreatment* 399, 411.

³⁰ Elizabeth Oddone, Mark L Genuis and Claudio Violato, ‘A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse’ (2001) 135(1) *The Journal of Psychology* 17, 19–21.

³¹ Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (Child Family Community Australia Paper No 11, 2013).

³² Katherine J McLachlan, ‘Using a Trauma-Informed Practice Framework to Examine How South Australian Judges Respond to Trauma in the Lives of Aboriginal Defendants’ (2022) 11(2) *Journal of Qualitative Criminal Justice and Criminology* 181, 183.

³³ Marylene Cloitre et al, ‘A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity’ (2009) 22(5) *Journal of Traumatic Stress* 399, 405–6.

³⁴ Cindy C Sangalang and Cindy Vang, ‘Intergenerational Trauma in Refugee Families: A Systematic Review’ (2017) 19(3) *Journal of Immigrant and Minority Health* 745, 745; Rachel Dekel and Hadass Goldblatt, ‘Is There Intergenerational Transmission of Trauma? The Case of Combat Veterans’ Children’ (2008) 78(3) *American Journal of Orthopsychiatry* 281, 281.

³⁵ Patrick J Morrisette and Michelle Naden, ‘An Interactional View of Traumatic Stress among First Nations Counselors’ (1998) 9(3) *Journal of Family Psychotherapy* 43, 45.

abuse, armed conflict, genocide, and displacement from one's homeland.³⁶ There has been close attention paid to the traumatic effects of the Holocaust on survivors and their descendants. It has been shown that the negative effects of intergenerational trauma can include a range of psychiatric symptoms, as well as greater vulnerability to stress.³⁷

The mode of transmission of trauma between generations has been theorised to be interpersonal (such as through the communication style of the parents, the parent-child attachment style, family communication, the effect of parents' silence on their children, parental overprotection, or child maltreatment),³⁸ or otherwise biological or epigenetic.³⁹ Transmission of this trauma is unintentional.⁴⁰

The ongoing effects of colonisation, current and past government policies, and systemic racism are linked to the intergenerational trauma experienced by, for example, Indigenous peoples in Australia and other jurisdictions.⁴¹ In Australia, the question of intergenerational trauma generally arises in the context of sentencing Indigenous persons, but is rarely explicitly addressed.⁴² It is notable that there are

³⁶ See, e.g.: Brent Bezo and Stefania Maggi, 'Living in "Survival Mode": Intergenerational Transmission of Trauma from the Holodomor Genocide of 1932–1933 in Ukraine' [2015] (134) *Social Science and Medicine* 87, 87; Luciana Lorens Braga, Marcelo Feijó Mello and José Paulo Fiks, 'Transgenerational Transmission of Trauma and Resilience: A Qualitative Study with Brazilian Offspring of Holocaust Survivors' (2012) 12(1) *BMC Psychiatry* 134, 134; Rachel Lev-Wiesel, 'Intergenerational Transmission of Trauma across Three Generations: A Preliminary Study' (2007) 6(1) *Qualitative Social Work* 75, 75.

³⁷ Rachel Yehuda et al, 'Influences of Maternal and Paternal PTSD on Epigenetic Regulation of the Glucocorticoid Receptor Gene in Holocaust Survivor Offspring' (2014) 171(8) *American Journal of Psychiatry* 872, 876.

³⁸ Sophie Isobel et al, 'Preventing Intergenerational Trauma Transmission: A Critical Interpretive Synthesis' (2018) 28(7–8) *Journal of Clinical Nursing* 1100, 1101.

³⁹ See, e.g., Natan P F Kellermann, 'Epigenetic Transmission of Holocaust Trauma: Can Nightmares Be Inherited?' (2013) 50(1) *Israel Journal of Psychiatry and Related Sciences* 33, 34.

⁴⁰ Linda O'Neill et al, 'Hidden Burdens: A Review of Intergenerational, Historical and Complex Trauma, Implications for Indigenous Families' (2018) 11(2) *Journal of Child and Adolescent Trauma* 173, 173.

⁴¹ Leilani Darwin et al, *Intergenerational Trauma and Mental Health* (Report, Australian Institute of Health and Welfare, 26 May 2023); Nola Purdie, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 1st ed, 2010); Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62(3) *International Social Work* 1522.

⁴² Few cases explicitly reference 'intergenerational trauma', but key cases considering the legacies of colonisation and sentencing are: *Bugmy* (n 17); *Munda v Western Australia* (2013) 249 CLR 600 ('*Munda*'); *DPP (Vic) v Poole (a pseudonym)* [2020] VCC 340 ('*Poole*'); *DPP (Vic) v Lindsay* [2021] VCC 636. Judge Johns has repeatedly acknowledged the role of trauma in shaping offending behaviour in his Honour's sentencing

far fewer references to intergenerational trauma in sentencing remarks in Australia than there are references to more widely acknowledged forms of trauma, such as child sexual abuse. This is unlikely to be due to fewer offenders carrying intergenerational trauma than other forms of trauma,⁴³ but is more likely to be explained by other barriers to raising this issue before the courts, such as the difficulty of adducing evidence of this form of trauma.⁴⁴

Intergenerational trauma is somewhat contested in the courts, as it is difficult to provide concrete evidence of its effects in the same ways that it is possible to link an offender's primary experience of trauma to their offending behaviour. Identifying the presence of intergenerational trauma is a complex exercise that generally requires specialist investigation and expert evidence. For example, adducing evidence about an offender's connection to the Stolen Generations requires careful, culturally sensitive conversations and rapport building with the offender. Further, such an investigation needs to explore the ways in which this trauma has affected the life of the individual.⁴⁵

3 *Contested Forms of Trauma: Discrimination*

There is emerging evidence that more insidious forms of trauma, such as ongoing exposure to social inequality,⁴⁶ racism,⁴⁷ or everyday sexism,⁴⁸ can also have adverse effects on mental health and can lead to Post-Traumatic Stress Disorder ('PTSD') symptoms. In addition, negative events or interactions that are perceived

remarks in the Koori Court Division of the County Court of Victoria. See, e.g.: *DPP (Vic) v Thorpe-Young* [2023] VCC 2473; *Poole* (n 42); *DPP v Atkinson* [2024] VCC 738. There has also been at least one case in Victoria involving the sentencing of a child survivor of the holocaust: see the case of 'E' in Vicki Gordon, *The Experience of Being a Hidden Child Survivor of the Holocaust* (PhD thesis, Melbourne University, 2002) 278–9.

⁴³ Sue Gerhardt, *Why Love Matters: How Affection Shapes a Baby's Brain* (Routledge, 2nd ed, 2015) 209.

⁴⁴ *Bugmy* (n 17). See also: *Honeysett* (n 17); Maria Tumarkin, *Axiomatic* (Brow Books, 2018) 41–58.

⁴⁵ See also: Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation during the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50, 70; Alister McKeich, 'The Inequality of Incarceration: Addressing the Impacts of Colonisation through the Judiciary (Australia v Canada)' (Essay, Melbourne University, 2018).

⁴⁶ See, e.g., Roman Pabayo et al, 'Income Inequality among American States and the Conditional Risk of Post-Traumatic Stress Disorder' (2017) 52(9) *Social Psychiatry and Psychiatric Epidemiology* 1195, 1195.

⁴⁷ See, e.g., Monnica T Williams et al, 'Assessing Racial Trauma within a DSM–5 Framework: The UConn Racial/Ethnic Stress & Trauma Survey' (2018) 3(4) *Practice Innovations* 242.

⁴⁸ See, e.g., Susan H Berg, 'Everyday Sexism and Posttraumatic Stress Disorder in Women: A Correlational Study' (2006) 12(10) *Violence Against Women* 970.

as discriminatory that might not in and of themselves constitute a traumatic event may, in cumulation, result in outcomes that mirror those of trauma.⁴⁹ Although the relationship between collective trauma, discrimination, and psychological distress is complex, for the purpose of this article, it is sufficient to say that for some individuals, the experience of discrimination stressors can compound or precipitate psychological distress.⁵⁰ These experiences can be referred to as ‘microaggressions’, and can be particularly difficult to identify, due to the subtle and imperceptible nature of their existence.⁵¹ For those who do not experience discrimination, it may be difficult to believe that the discrimination exists, and that it can have such pernicious effects.

C Effects of Trauma and its Legal Implications

The effects of trauma can be as varied as the sources of trauma. Traumatic experiences can elicit a range of cognitive, emotional, physical, and behavioural responses from individuals. Common immediate responses include shock, numbness, dissociation, nausea, memory loss, and withdrawal. These effects, and others, can persist beyond the immediate or short-term experience of the trauma. Contemporary trauma research increasingly recognises that individuals may encode, process, and recall traumatic events in varied and often non-linear ways. Rather than a uniform ‘repression’ of trauma, empirical studies indicate a spectrum of cognitive and emotional responses. According to Judith Herman, traumatic memories are often stored in sensory and emotional fragments rather than coherent narratives.⁵² Similarly, Bessel van der Kolk observes that trauma may alter the functioning of brain regions responsible for memory integration, resulting in partial, distorted, or delayed recollection.⁵³ While some individuals may suppress or avoid traumatic memories, this is neither inevitable nor universal. Therefore, when trauma is raised in sentencing, its psychological impact should be assessed through a case-specific, evidence-based approach informed by contemporary clinical insights.

Longer-term effects of trauma can vary greatly between individuals. Longer-term issues that have been linked to trauma include poor concentration, unwanted memories, depression, volatile emotions, hyperarousal, gastrointestinal problems, and increased substance use or abuse.⁵⁴ Notably, intentional acts by other human beings that threaten the life or bodily integrity of children, or their primary support

⁴⁹ Kimberly Matheson et al, ‘Traumatic Experiences, Perceived Discrimination, and Psychological Distress among Members of Various Socially Marginalized Groups’ [2019] (10) *Frontiers in Psychology* 1, 1, 14.

⁵⁰ *Ibid* 14.

⁵¹ Derald Wing Sue, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (John Wiley and Sons, 2010) 14–15.

⁵² See Judith L Herman, *Trauma and Recovery* (Basic Books, 1992).

⁵³ See *The Body Keeps the Score* (n 1).

⁵⁴ Bessel A van der Kolk, ‘The Body Keeps the Score: Memory and the Evolving Psychology of Posttraumatic Stress’ (1994) 1(5) *Harvard Review of Psychiatry* 253.

systems and caregivers, have particularly severe and wide-ranging adverse effects on children's psychosocial functioning and neurodevelopment.⁵⁵

No two individuals will have the exact same response to a traumatic event, due to a range of variable factors. Studies on the longitudinal outcomes for people who have shared exposure to traumatic events, such as research on survivors of the Holocaust, have shown that there are a range of variables that may influence why some individuals are more resilient than others.⁵⁶ These include: (1) neurobiological factors (such as stress regulation and genetic predisposition); (2) secure attachment in early childhood; (3) the presence of supportive social networks; (4) access to stable environments; (5) cognitive and emotional skills (such as self-regulation, optimism, and problem-solving); and (6) cultural identity or community belonging, particularly for Indigenous and minority populations.⁵⁷

Trauma research suggests that for those who experience ongoing effects of trauma, there are a few commonalities in the manifestation of these effects. A feeling of a fundamental lack of safety is pervasive and common to many trauma survivors.⁵⁸ Survivors may experience trauma so overwhelming that the human capacity to 'perceive, register, know, transmit, record and remember'⁵⁹ is impaired, triggering an archaic 'survival brain' response based on ancient emotions involved with real and perceived threat.⁶⁰ This can also be described as the fight, flight or freeze response, which can be triggered in seemingly unrelated situations. Therefore, a traumatised person may react with anger or violence to situations or people that

⁵⁵ Wendy D'Andrea et al, 'Understanding Interpersonal Trauma in Children: Why We Need a Developmentally Appropriate Trauma Diagnosis' (2012) 82(2) *American Journal of Orthopsychiatry* 187, 194–5; Joseph Spinazzola et al, 'When Nowhere Is Safe: Interpersonal Trauma and Attachment Adversity as Antecedents of Post-traumatic Stress Disorder and Developmental Trauma Disorder' (2018) 31(5) *Journal of Traumatic Stress* 631, 634–40.

⁵⁶ See, e.g., Rachel Lev-Wiesel and Marianne Amir, 'Posttraumatic Stress Disorder Symptoms, Psychological Distress, Personal Resources, and Quality of Life in Four Groups of Holocaust Child Survivors' (2000) 39(4) *Family Process* 445, 447–9.

⁵⁷ See, e.g.: Michael Ungar, 'The Social Ecology of Resilience: Addressing Contextual and Cultural Ambiguity of a Nascent Construct' (2011) 81(1) *American Journal of Orthopsychiatry* 1; Suniya S Luthar, Dante Cicchetti and Bronwyn Becker, 'The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work' (2000) 71(3) *Child Development* 543.

⁵⁸ *The Body Keeps the Score* (n 1) 66–8.

⁵⁹ Dori Laub, 'Testimonies in the Treatment of Genocidal Trauma' (2002) 4(1) *Journal of Applied Psychoanalytic Studies* 63, 64. See also Dori Laub and Susanna Lee, 'Thanatos and Massive Psychic Trauma: The Impact of Death Instinct on Knowing, Remembering, and Forgetting' (2003) 51(2) *Journal of the American Psychoanalytic Association* 433, 434.

⁶⁰ Allan N Schore, 'Relational Trauma and the Developing Right Brain: An Interface of Psychoanalytic Self Psychology and Neuroscience' (2009) 1159(1) *Annals of the New York Academy of Sciences* 189, 198.

may not be objectively threatening.⁶¹ In the key cases concerning trauma, there are several offence circumstances that suggest that this may have been in play.⁶² Unsurprisingly, many of the most prevalent ongoing effects of trauma are likely to create a propensity towards behaviours that may lead some survivors into contact with the criminal law.⁶³

1 *Narrative Incoherence*

A traumatised person can experience a collapsing of past and present.⁶⁴ Such a person may have difficulties in conducting narrative interviews as a means of researching the effects of trauma.⁶⁵ This is due to a ‘crisis of testimony’, which can occur when the interviewer and the interviewee do not have shared experiences,⁶⁶ or where the speaker describes ‘extraordinary testimony’ that is beyond the scope of what the listener has thus far known to be true.⁶⁷

In the context of the criminal law, the difficulty faced by traumatised individuals in conveying their experiences through language can prevent their full participation in their sentencing hearing. In addition to the crisis of testimony, the failure of the courts to listen not only to the content provided, but to the silences in testimony, can lead to an unbridgeable distance between the sentenced and sentencer.

2 *Clinical Diagnoses: PTSD*

The effects of trauma may lead an individual to develop symptoms that fit the diagnostic criteria for PTSD or another psychiatric condition with overlapping

⁶¹ *The Body Keeps the Score* (n 1) 66–8.

⁶² For example, the case of *R v Fuller-Cust* (2002) 6 VR 496 contains reference to prior offending triggered by inappropriate comments from a social worker to the offender: at 501 [11] (Batt JA). See also: *Bugmy* (n 17); *Munda* (n 42).

⁶³ Child abuse and neglect, poverty, sexual molestation, and witnessing violence are, among others, the most common risk factors for post-traumatic reactions, aggression, and antisocial behaviour: Vittoria Ardino, ‘Offending Behaviour: The Role of Trauma and PTSD’ (2012) 3(1) *European Journal of Psychotraumatology* 1, 1.

⁶⁴ *The Body Keeps the Score* (n 1) 15–16.

⁶⁵ *Ibid.*

⁶⁶ The notion of a ‘crisis of testimony’ was raised in Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Routledge, 1992). A German researcher also raised the notion of a ‘crisis of testimony’ in relation to narrative interviews between a non-Jewish sociologist and Jewish victims of the Shoah (Holocaust): Birgit Schreiber, ‘Jewish Hidden Children in Germany: Qualitative Analysis of Narrated Lifestories’ (Paper presented at the 25th Silver Jubilee Annual Scientific Meeting of the International Society of Political Psychology, Berlin, 16–19 July 2002).

⁶⁷ This notion is often applied to testimony of the Holocaust: Jonas Ahlskog, ‘The Crisis of Testimony in Historiography’ (2018) 12(1) *Journal of the Philosophy of History* 48, 48–50.

features, such as depression. PTSD was recognised for the first time in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders*,⁶⁸ largely due to research conducted on the effects of the Vietnam War on soldiers. The American Psychiatric Association's classification of PTSD gave medical legitimacy to trauma patients, raising the public profile of the pathology,⁶⁹ and leading to funding of research on the condition.⁷⁰

There is considerable ongoing debate over the conceptualisation of trauma responses as PTSD. There are various other proposed diagnoses, such as C-PTSD, and a developmental trauma diagnosis for children who have experienced trauma.⁷¹ While psychiatric diagnoses such as PTSD have gained recognition, the broader conceptualisation of trauma remains contested.⁷² The criminal law must be responsive to these evolving understandings to ensure that trauma is consistently and fairly considered as a mitigating factor.

3 *Ongoing Stressors, Trauma and Effects on Physical Health*

There is strong evidence that trauma can have detrimental effects on an individual's physical health.⁷³ In addition, as noted above, childhood trauma (or adverse childhood experiences) has been linked to a range of adverse health outcomes, including higher rates of chronic disease and lowered life expectancy. Research on members of the Stolen Generations has found increased rates of adverse health outcomes.⁷⁴

⁶⁸ *The Body Keeps the Score* (n 1) 29, citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 3rd ed, 1980).

⁶⁹ Bond and Craps (n 13) 7.

⁷⁰ *The Body Keeps the Score* (n 1) 19.

⁷¹ Complex Post-Traumatic Stress Disorder ('C-PTSD') is formally recognised in the World Health Organization's ICD-11 as a distinct diagnostic entity. It is characterised by the core symptoms of PTSD, along with persistent disturbances in self-organisation, including affect dysregulation, negative self-concept, and relational difficulties. See: World Health Organization, *International Classification of Diseases: 11th Revision (ICD-11)* <<https://icd.who.int/browse/2025-01/mms/en#585833559>>; Bessel A van der Kolk and Lisa M Najavits, 'Interview: What Is PTSD Really? Surprises, Twists of History, and the Politics of Diagnosis and Treatment' (2013) 69(5) *Journal of Clinical Psychology* 516, 518.

⁷² World Health Organization, *International Classification of Diseases: 11th Revision (ICD-11)* <<https://icd.who.int/browse/2025-01/mms/en#585833559>>; Anushka Pai, Alina M Suris and Carol S North, 'Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations' (2017) 7(1) *Behavioural Sciences* 1, 1, 5.

⁷³ *The Body Keeps the Score* (n 1) 266–7; James W Hopper et al, 'Preliminary Evidence of Parasympathetic Influence on Basal Heart Rate in Posttraumatic Stress Disorder' (2006) 60(1) *Journal of Psychosomatic Research* 83, 88–9; Arie Y Shalev et al, 'Auditory Startle Response in Trauma Survivors with Posttraumatic Stress Disorder: A Prospective Study' (2000) 157(2) *American Journal of Psychiatry* 255, 255.

⁷⁴ Australian Institute of Health and Welfare (n 27) iv–v.

Research on African American populations has found adverse health outcomes when compared with white Americans, even when controlling for the health effects of socio-economic status.⁷⁵ The effect on the bodies of marginalised people who are exposed to constant large and small stressors, including racism and microaggressions, has been described as ‘weathering’.⁷⁶ Trauma can have lasting effects on an individual’s physical health, which may indirectly affect behaviour and sentencing considerations. Understanding these impacts is crucial for judges when assessing the broader context of an offender’s life and the appropriate weight to give to trauma in sentencing.

III THE RELEVANCE OF TRAUMA TO SENTENCING

A *A Legislative Framework*

In all Australian jurisdictions, sentencing is guided by principles drawn from statute and case law.⁷⁷ In Victoria, the *Sentencing Act 1991* (Vic) (*‘Sentencing Act’*) provides the statutory framework for sentencing. Part 2 of the *Sentencing Act* outlines the governing principles of sentencing in Victoria, restating principles established at common law. Section 5(2) states that in sentencing an offender, a court *must* have regard to a range of factors, including but not limited to:

- the maximum penalty prescribed for the offence;⁷⁸
- current sentencing practices;⁷⁹
- the nature and gravity of the offence;⁸⁰
- the offender’s culpability and degree of responsibility for the offence;⁸¹
- the impact of the offence on any victim of the offence;⁸²
- the offender’s previous character;⁸³ and
- the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.⁸⁴

⁷⁵ See, e.g., National Academies of Sciences, Engineering and Medicine, *Communities in Action: Pathways to Health Equity* (National Academies Press, 2017) 33–7.

⁷⁶ Arline T Geronimus et al, ‘“Weathering” and Age Patterns of Allostatic Load Scores among Blacks and Whites in the United States’ (2006) 96(5) *American Journal of Public Health* 826, 826; Patia Braithwaite, ‘Biological Weathering and Its Deadly Effect on Black Mothers’, *Self* (Web Page, 30 September 2019) <<https://www.self.com/story/weathering-and-its-deadly-effect-on-black-mothers>>.

⁷⁷ Sentencing Advisory Council, *Sentencing Guidance in Victoria* (Report, June 2016) 10 [2.2].

⁷⁸ *Sentencing Act* (n 4) s 5(2)(a).

⁷⁹ *Ibid* s 5(2)(b).

⁸⁰ *Ibid* s 5(2)(c).

⁸¹ *Ibid* s 5(2)(d).

⁸² *Ibid* s 5(2)(daa).

⁸³ *Ibid* s 5(2)(f).

⁸⁴ *Ibid* s 5(2)(g).

This broad statutory mandate allows for the personal circumstances of the offender, such as prior experiences of trauma, to be presented as relevant evidence by both the prosecution and the defence.

An offender's prior history of trauma will be of greater relevance if it can be established that there is a nexus between the trauma and the relevant offending.⁸⁵ That is to say, if the trauma had a 'causal relationship' with the offending,⁸⁶ it will be of particular relevance to sentencing.

This section examines in detail those Victorian sentencing principles that facilitate the consideration of trauma. It draws on several case studies of sources of trauma, with a particular focus on the sentencing of offenders who have suffered childhood neglect and/or are of Aboriginal heritage. Here, justifications for mitigating an offender's sentence because of their experience of trauma are examined with a specific focus on how trauma reduces an offender's moral culpability demonstrating the need for a principled approach to integrating trauma into sentencing.

B *The Relevance of Trauma to Sentencing*

1 *Key Principles*

In Victoria, the court must apply an 'instinctive synthesis' in arriving at sentence. The methodology of 'instinctive synthesis' was described in *Markarian v The Queen* in the following way:

[T]he method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.⁸⁷

It is accepted that the individual circumstances of an offender are always relevant to sentencing.⁸⁸ The consideration of an offender's background, including trauma, is always relevant as it may provide critical context for the offending and affect the determination of appropriate sentencing measures.⁸⁹

Where there is evidence of a traumatic event or events in an offender's past, the relevance of this evidence will depend on the circumstances of each case.⁹⁰ Nevertheless, the key principles guiding the sentencing synthesis were distilled in

⁸⁵ *DPP (Vic) v Terrick* (2009) 24 VR 457, 468 [46] (Maxwell P, Redlich JA and Robson AJA) ('*Terrick*').

⁸⁶ *DPP (Vic) v Green* [2020] VSCA 23, 31 [96] (Maxwell P, Priest and Kaye JJA).

⁸⁷ *Markarian* (n 5) 378 [51] (McHugh J).

⁸⁸ *Sentencing Act* (n 4) s 5(1)(a); *McKee* (n 4) 92, 94.

⁸⁹ *Terrick* (n 85) 469 [47].

⁹⁰ *Ibid* 468 [46].

the 2009 Victorian Court of Appeal case of *DPP (Vic) v Terrick* ('*Terrick*').⁹¹ In *Terrick*, the Victorian Director of Public Prosecutions appealed against sentences imposed on three co-offenders who were involved in an unprovoked and random attack that resulted in catastrophic injuries to the victim.⁹² The appeal was made on the basis of manifest inadequacy. A question of principle for the Court was the extent to which an offender's disadvantaged background will mitigate their offending.⁹³ In making its finding, the Court outlined key propositions, emphasising that while the same sentencing principles apply to all offenders regardless of race, a different outcome may be warranted if evidence shows that trauma, particularly related to Aboriginality, had a specific impact on the offender's behaviour.⁹⁴

The second principle discussed in *Terrick* emphasised that an offender's background is 'explanatory' rather than excusatory.⁹⁵ Evidence of an offender's background can provide an explanation of the context and antecedents to the offending. This is because social, environmental and cultural factors might, as noted in *Terrick*, 'identify influences which had contributed to the commission of the offence; or reveal circumstances relevant to the nature of the sentence which should be imposed'.⁹⁶ This statement should not be taken to mean, however, that background circumstances of trauma can never play a mitigatory role in the sentencing process. Clearly, background circumstances of trauma can be relevant in a range of ways that serve to temper the sentence imposed on an offender. This may occur through the enlivening of the *R v Verdins* ('*Verdins*') principles (where there is a diagnosed mental condition),⁹⁷ through evidence that suggests reduced moral culpability of the offender,⁹⁸ or through the application of mercy by the sentencing court.

In *Terrick*, the Court held that an 'offender's background may explain the offending conduct, though whether it provides an excuse is a separate question'.⁹⁹ However, in many cases, the idea of a 'separate question' as to whether an offender's traumatic background could be 'excusatory' has been precluded.¹⁰⁰ Further, the notion that trauma is explanatory, not excusatory can be misleading,¹⁰¹ as it gives the impression that evidence of trauma can never be more than 'explanatory', and that

⁹¹ Ibid.

⁹² Ibid 459 [2].

⁹³ Ibid 459 [3].

⁹⁴ Ibid 469 [47]–[50].

⁹⁵ Ibid 468 [46].

⁹⁶ Ibid 470 [51]. See also *R v Wright* [1998] VSCA 84, [5] (Maxwell P, Kaye, Niall, Forrest and Emerton JJA).

⁹⁷ (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA) ('*Verdins*').

⁹⁸ *DPP (Vic) v Herrmann* (2021) 290 A Crim R 110, 123–4 [58]–[77] ('*Herrmann*').

⁹⁹ *Terrick* (n 85) 469 [47].

¹⁰⁰ See, e.g., *AWF* (n 21).

¹⁰¹ Ibid 4 [5], 10 [33]–[34].

there is little overlap between the legal categories of ‘explanation’ and ‘excuse’.¹⁰² However, this article contends that such an interpretation is overly simplistic and fails to engage with the complex legal, philosophical, and moral issues raised by evidence of trauma. The criminal law fundamentally holds individuals accountable as rational agents, but trauma complicates this assumption by showing how past adverse experiences can limit free agency.

C *Trauma and the Purposes of Sentencing*

The current purposes of sentencing in Victoria are just punishment, deterrence (both specific and general), rehabilitation, denunciation, and community protection.¹⁰³ The High Court of Australia described the purposes of sentencing and their application in the following way:

[P]rotection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.¹⁰⁴

When sentencing offenders with a history of trauma, it is important to recognise the distinct challenges and limitations that trauma imposes on the various sentencing purposes. While trauma may necessitate adjustments to how certain purposes are applied — such as rehabilitation, denunciation, community protection, and just punishment — the purpose of deterrence is uniquely compromised when applied to trauma-affected individuals.

Rehabilitation remains a viable and necessary goal in sentencing offenders with trauma. The rehabilitative approach seeks to address the underlying causes of criminal behaviour (including unresolved trauma) and offers therapeutic interventions aimed at reintegrating offenders into society. Research indicates that trauma-informed rehabilitative programs can significantly reduce the likelihood of reoffending by helping offenders develop healthier coping mechanisms and address the root psychological issues that contributed to their criminal conduct.¹⁰⁵

¹⁰² There is a well-established body of literature that explores the distinction between justifications and excuses or broader explanatory accounts of offending: see, e.g., Kent Greenawalt, ‘Distinguishing Justifications from Excuses’ (1986) 49(3) *Law and Contemporary Problems* 89.

¹⁰³ *Sentencing Act* (n 4) ss 5(1)(a)–(e).

¹⁰⁴ *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) (*‘Veen’*).

¹⁰⁵ Trauma-informed rehabilitative programs within the criminal justice system are distinguished by their explicit recognition of the role that trauma plays in shaping behaviour, psychological functioning, and treatment engagement. These programs are guided by principles developed by the Substance Abuse and Mental Health Services Administration, including safety, trustworthiness, choice, collaboration,

Similarly, the principle of denunciation can still be applied effectively in cases involving trauma-affected offenders. Denunciation serves the societal function of expressing moral condemnation of criminal behaviour, signalling to both the offender and the public that such conduct is unacceptable. Even when trauma is present, the court can emphasise the seriousness of the offence and the harm caused to the victim and society, without necessarily overlooking the influence of trauma on the offender's actions. In this way, the court maintains the public's confidence in the justice system by upholding shared moral standards.

The need to protect the community also remains a crucial sentencing purpose, even when the offender has experienced trauma. Protecting society from individuals who pose a risk of harm is a fundamental role of the criminal justice system, and this principle does not lose relevance in cases of trauma. Sentencing may still involve incapacitation — through imprisonment or other measures — to safeguard the public, especially if the offender's trauma-related behaviour presents a persistent risk of harm. Importantly, though, a trauma-informed approach should be adopted alongside this principle, ensuring that the offender's psychological needs are addressed, which can ultimately contribute to long-term community protection through reduced recidivism.

Further, just punishment can still be applied to individuals with trauma, ensuring that the sentence reflects the gravity of the offence while considering the offender's culpability. The principle of proportionality allows the court to balance the seriousness of the crime with the offender's personal circumstances, including the impact of trauma.¹⁰⁶ This ensures that the punishment is fair, without disproportionately penalising the offender for actions that may have been influenced by their traumatic experiences.

However, the principle of deterrence stands apart as the most difficult to reconcile with trauma. Deterrence assumes that individuals make rational decisions to commit or refrain from criminal behaviour based on their assessment of the likely consequences. Yet, trauma — particularly when unresolved — impairs cognitive functioning and decision-making processes, often rendering the threat of punishment ineffective as a deterrent.¹⁰⁷ Trauma-affected individuals may act impulsively or out of survival instincts, without fully considering the legal consequences of their actions. In such cases, the deterrent effect of punishment is significantly weakened, if not entirely nullified, as these individuals do not respond to punishment in the

and empowerment. Importantly, empirical research confirms that trauma-informed practices are more than theoretical ideals — they produce measurable benefits: Jill S Levenson, David S Prescott and Gwenda M Willis, 'Trauma-Informed Treatment Practices in Criminal Justice Settings' in Elizabeth Jeglic and Cynthia Calkins (eds), *Handbook of Issues in Criminal Justice Reform in the United States* (Springer Nature, 2022) 483, 491–5.

¹⁰⁶ *Hoare v The Queen* (1989) 167 CLR 348, 354.

¹⁰⁷ Russell A Barkley, *Attention-Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment* (The Guilford Press, 4th ed, 2014) 220–8.

same way that a person without trauma might. Further, the application of deterrence often leads to harsher sentences, particularly when general deterrence is emphasised.¹⁰⁸ When applied to trauma-affected individuals, this approach overlooks the root causes of the person's offending behaviour and prioritises punitive measures over rehabilitative or restorative ones. Therefore, while other sentencing purposes can be adapted or maintained in cases involving trauma, deterrence remains fundamentally undermined by the very nature of trauma's effects on the human mind. For this reason, the next section considers the application of deterrence to trauma-affected offenders, illustrating unjust outcomes, particularly in matters where moral culpability is to be diminished. Further, the reliance on deterrence in sentencing trauma-affected offenders often leads to inconsistent and arbitrary outcomes. Judges are tasked with balancing sentencing principles without clear guidelines on how to weigh trauma as a mitigating factor. This lack of consistency undermines the integrity of the sentencing process and erodes public confidence in the legal system.

1 *Deterrence*

Deterrence is one of the primary purposes of sentencing, particularly in systems that focus on punishment and prevention of future crimes. The purpose of deterrence assumes that the imposition of penalties will discourage not only the convicted individual from reoffending (specific deterrence), but also the broader community from committing similar offences (general deterrence). However, the effectiveness of deterrence relies on the assumption that potential offenders weigh the consequences of their actions before committing a crime.

In practice, this assumption does not hold true for trauma survivors. As discussed above, the psychological effects of trauma can undermine an individual's capacity for rational thought and their ability to foresee or understand the consequences of their actions. For instance, individuals with trauma-related conditions, such as PTSD, may exhibit impulsive or aggressive behaviours as coping mechanisms, behaviours that are not easily dissuaded by the threat of punishment.

Where an offender is shown to be suffering from a mental disorder, abnormality, or impairment of mental functioning arising from trauma, the *Verdins* principles may guide the court's consideration of how that condition should be taken into account in sentencing. In *Verdins*, the Victorian Court of Appeal outlined six general principles relating to how an offender's mental illness may be relevant to the sentencing exercise. In relation to deterrence, the Court held that whether general and/or specific deterrence should be 'moderated or eliminated', depends on 'the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both'.¹⁰⁹ However, the application of the *Verdins* principles is dependent on whether the offender has a 'mental disorder

¹⁰⁸ Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 11th ed, 2025) 234.

¹⁰⁹ *Verdins* (n 97) 276 [32].

or abnormality or an impairment of mental function'.¹¹⁰ For example, in *R v AWF* (*AWF*), Ormiston JA stated that

[i]f there is evidence to link [traumatic background circumstances] to a condition or state of mind which is a proper basis for viewing the criminality of the offender as less serious or for saying that specific or general deterrence (or both) should have a smaller part to play in the sentencing process, then that condition will have a greater relevance and significance.¹¹¹

This requirement for a link between the trauma and an offender's mental health may be appropriate for some forms of manifestations of trauma, but will exclude those offenders who are suffering from a trauma that simply does not manifest itself in a mental impairment.

Outside of the *AWF* decision, there is less explicit guidance provided to courts on the relationship between trauma and deterrence. In several cases, there is an acknowledgement that the 'broader context' of the offender and the offending (which could include the experience of trauma) may be relevant to the assessment of just punishment, and to deterrence.¹¹²

It is important to note that Indigeneity, in itself, is not indicative of trauma, and courts should avoid assumptions that equate cultural identity with psychological harm. Rather, where trauma is raised as a relevant consideration in sentencing, it must be substantiated on the facts of the individual case, consistent with the High Court's reasoning in *Bugmy v The Queen* (*Bugmy*).¹¹³ While many Aboriginal and Torres Strait Islander individuals have been disproportionately affected by the intergenerational consequences of colonisation, systemic discrimination, and institutionalisation, these factors must be judicially assessed in light of individualised evidence rather than assumed based on identity alone.

Nevertheless, there has been ongoing inconsistency in judicial approaches to the question of whether, and to what extent, Indigeneity may serve as an indication of trauma, and how such considerations should inform mitigation. In some cases, the impact of historical and intergenerational disadvantage has been treated as reducing moral culpability.¹¹⁴ In others, it has been seen as relevant to the reduced efficacy or fairness of specific deterrence.¹¹⁵ This inconsistency underscores the need for a principled and evidence-based sentencing framework, one that neither essentialises

¹¹⁰ Jamie Walvisch et al, 'Whydunnit? Causal Explanations in Sentencing Offenders with Mental Health Problems' in Kay Wilson et al (eds), *The Future of Mental Health, Disability and Criminal Law* (Routledge, 2024) 161, 164; *Verdins* (n 97) 271 [5].

¹¹¹ *AWF* (n 21) 4 [6] (Ormiston JA).

¹¹² See, e.g., *Neal v The Queen* (1982) 149 CLR 305, 324–6 (Brennan J). See also *R v Fernando* (1992) 76 A Crim R 58; *Herrmann* (n 98).

¹¹³ *Bugmy* (n 17).

¹¹⁴ See, e.g., *DPP (Vic) v Todd* [2019] VSC 585, 25 [82]–[83] (*Todd*) (Kaye JA).

¹¹⁵ See, e.g., *Bugmy* (n 17) 595 [44]–[45].

cultural identity nor disregards the well-documented structural conditions that may shape offending behaviour among Indigenous peoples.

The inconsistency in how courts address the relationship between trauma and deterrence underscores the need for clear judicial guidance. This article suggests that background trauma — especially when it results from systemic policy failures such as institutional abuse or colonial impacts — should significantly diminish the application of general deterrence. An offender who has had a traumatic background is not a good vehicle for general deterrence. Further, not all trauma manifests as a diagnosable mental condition, raising questions about how trauma should be evaluated when it does not fit neatly into existing legal categories. The current lack of clarity and consistency in addressing trauma as a mitigating factor points to a broader need for reform in the criminal justice system. To facilitate this process, the next Part considers the justifications for trauma mitigating an offender's sentence by focusing on the relationship between trauma and moral culpability and the application of the residual sentencing principle of mercy.

IV JUSTIFICATION FOR MITIGATION

A *What is Mitigation?*

Sentencing is not merely an exercise in proportioning punishment to crime, but a nuanced and context-sensitive process wherein judicial discretion must be guided by both principle and the particularities of individual cases. Mitigating and aggravating factors function as judicial tools that permit a calibrated response to the moral and social dimensions of offending, anchored within a principled framework of sentencing jurisprudence.

Mitigating factors serve to attenuate the perceived culpability of the offender or otherwise justify a reduction in the severity of the sentence. A range of factors can be considered as mitigating, including: (1) an early plea of guilty; (2) demonstrable remorse or cooperation with authorities; (3) the presence of mental illness or intellectual impairment; (4) absence of prior convictions; and (5) circumstances of provocation or duress, which may constrain the offender's autonomous decision-making.¹¹⁶ Importantly, mitigation is not about excusing criminal conduct, but about embedding it within a broader framework of human and legal context that can appropriately inform sentencing outcomes.¹¹⁷ Mitigation is a right owed to the offender, provided that there is a basis for grounds of mitigation.¹¹⁸

¹¹⁶ See, e.g.: Freiberg (n 4) ch 5; Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146, 149–55.

¹¹⁷ Andrew Ashworth, 'Re-Evaluating the Justifications for Aggravation and Mitigation in Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 22, 27.

¹¹⁸ *R v Storey* (1996) 89 A Crim R 519, 531–2 (Winneke P, Brooking, Hayne JJA and Southwell AJA); Richard Fox, 'The Burden of Proof at Sentencing: Storey's Case' (1998) 24(1) *Monash University Law Review* 194, 200.

Conversely, aggravating factors function to elevate the perceived gravity of the offence or amplify the offender's moral culpability.¹¹⁹ These factors may include evidence of premeditation, the use of weapons or violence, the victim's vulnerability, a pattern of repeat offending, or offences motivated by prejudice, such as hate crimes.¹²⁰ Proportionality is central in this evaluative process, as it cautions against 'double-counting', that is, giving undue weight to elements already encapsulated within the statutory definition of the offence.¹²¹

There are procedural and normative foundations that underpin the application of these principles. Sentencing must be grounded in fairness and transparency, ensuring that judicial reasoning is principled, intelligible, and subject to public scrutiny.¹²² The tension between judicial discretion and sentencing consistency is a recurrent theme. While individualised justice remains a key aim, unfettered discretion risks undermining uniformity and equality before the law. Enhancing public confidence in sentencing practices is therefore closely linked to the transparent and principled application of both mitigating and aggravating considerations. Ultimately, the concepts of mitigation and aggravation are not rigid formulas, but rather, dynamic principles that must be interpreted through the lenses of just deserts theory and consequentialist reasoning. These principles enable courts to reflect compassion, address social and systemic disadvantage, promote rehabilitation, and advance deterrent objectives, each within the bounds of a culturally and institutionally contingent legal environment.

The relationship between trauma and sentencing raises fundamental questions about the justification for mitigation based on an offender's prior experiences. Some sources of mitigation, such as an offender's mental illness, are generally mitigating because they indicate that the offender's moral culpability for the commission of the crime is reduced by enlivening the *Verdins* principle.¹²³ However, this simplistic link between trauma and moral culpability overlooks the complexities of assigning blame and responsibility in criminal law. It raises the issue of whether trauma should always diminish culpability or whether, in some cases, it could exacerbate the need for punishment. This Part explores the problematic nature of relying on trauma as a mitigating factor and the challenges for judges who must navigate these moral and legal complexities.

B *Reduction of Moral Culpability*

The term 'moral culpability' is frequently invoked in sentencing discourse, yet often without a thorough or consistent explanation in judicial reasoning. It is a

¹¹⁹ Julian Roberts, 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1, 1–5.

¹²⁰ *Ibid.* See also Freiberg (n 4) ch 5.

¹²¹ Roberts (n 119) 6.

¹²² *Ibid.* 13–15.

¹²³ *Verdins* (n 97) 276 [32].

concept that bridges legal and ethical domains, and understanding its meaning is essential for evaluating how mitigation is applied in sentencing. Moral culpability can be understood as referring to the degree of blameworthiness attributable to an offender, not merely in legal terms, but in light of broader moral, psychological, and social considerations. As Niki Kiepek argues in her analysis of Canadian judicial decisions, moral culpability reflects an awareness that individuals do not always exercise free will in an unencumbered fashion; rather, their choices may be constrained by systemic barriers, social deprivation, and lived trauma.¹²⁴

In sentencing, moral culpability occupies a central position in just deserts theory, where punishment is proportionate to the personal blameworthiness of the offender.¹²⁵ Here, ‘moral’ entails a normative judgement about the offender’s state of mind, intentions, and capacity to act otherwise. It implies a qualitative evaluation of character, decision-making autonomy, and the extent to which external influences have compromised the individual’s volitional control.

However, courts often fail to delineate how moral culpability differs from or overlaps with *legal culpability*, which is more narrowly concerned with objective elements of an offence, such as *actus reus* and *mens rea*.¹²⁶ This conceptual ambiguity can lead to inconsistent applications of mitigation where moral blameworthiness is either under-emphasised or inadequately supported by evidence. This difficulty in defining and applying the concept of moral culpability becomes particularly salient in cases where courts are asked to consider the impact of an offender’s traumatic background on their degree of blameworthiness.

In a number of sentencing decisions, the courts acknowledge that an offender’s experience of trauma can lessen their moral culpability.¹²⁷ In *Bugmy*, for example, the High Court described the manner in which the evidence of a traumatic background presented in that case was relevant to the assessment of the offender’s moral culpability:

The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.¹²⁸

¹²⁴ Niki Kiepek, ‘Discursively Embedded Institutionalized Stigma in Canadian Judicial Decisions’ (2025) 52(1) *Contemporary Drug Problems* 82, 93, 96.

¹²⁵ Erin I Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, 2018) chs 2, 3.

¹²⁶ Andrew Ashworth, ‘Legal and Moral Responsibility’ (2009) 4(6) *Philosophy Compass* 978, 978–80.

¹²⁷ *Bugmy* (n 17) 595 [44]; *Veen* (n 104) 493–4.

¹²⁸ *Bugmy* (n 17) 594 [40]. This was described by the Victorian Court of Appeal in *Herrmann* (n 98) as the more ‘general’ expression of sentencing principle: at 118 [36].

This is because, the Court reasoned:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.¹²⁹

The High Court found that the effects of profound childhood deprivation do not diminish with time, and that an offender does not exhaust their right to refer to this traumatic background; 'full weight' must be given to this background each time an offender comes before the court for sentencing.¹³⁰ Nevertheless, the Court noted that this does not mean that an offender's deprived background has 'the same (mitigatory) relevance for all of the purposes of punishment':

Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.¹³¹

However, this reasoning presents significant challenges. It risks overgeneralising trauma's impact, thereby potentially normalising a reduction in culpability without adequately considering the nuances of each case. Moreover, while the Court in *Bugmy* suggested that trauma should be given 'full weight' at each sentencing instance, it simultaneously cautioned that not all forms of trauma hold equal relevance for every sentencing purpose.¹³² This contradictory stance highlights a fundamental tension: how can trauma simultaneously mitigate culpability, yet not universally diminish the need for punishment? This leaves sentencing judges with a broad discretion that may result in inconsistent sentencing outcomes.¹³³ Focusing on whether the connection between trauma and offending is sufficient to reduce culpability, rather than establishing a direct causal link, also presents risks. It invites subjective interpretation, potentially leading to arbitrary decisions also undermining the principle of consistency in sentencing.¹³⁴

¹²⁹ *Bugmy* (n 17) 594–5 [43].

¹³⁰ *Ibid* 595 [44].

¹³¹ *Ibid*. This was described by the Victorian Court of Appeal in *Herrmann* (n 98) as the more 'specific' expression of sentencing principle: at 118–9 [36]–[37].

¹³² *Bugmy* (n 17) 595 [44].

¹³³ Walvisch et al (n 110) 169.

¹³⁴ *Ibid* 172.

1 *Circumstances ‘Not of His Making’*

The clearest articulation of why trauma mitigates sentencing is found in the Victorian Court of Appeal case of *DPP v Herrmann* (*Herrmann*).¹³⁵ This case concerned the sentencing of an offender for the rape and murder of a woman in Melbourne in 2019. The matter came before the Court of Appeal due to the Victorian Director of Public Prosecution’s appeal on the basis of manifest inadequacy. A full bench of the Court of Appeal considered the relationship between the offender’s profound childhood deprivation and trauma, and the assessment of their moral culpability. In their decision, the Court of Appeal clarified the task of assessment of moral culpability, stating that [i]n assessing an offender’s “moral culpability”, the sentencing court is making a moral judgment on behalf of the community about the degree of blameworthiness to be attached to the offender for the offending conduct.¹³⁶

In the Court’s view, determining the degree of Mr Herrmann’s ‘blameworthiness’ required a consideration of those factors that affected him, and which were connected to the commission of the two offences.¹³⁷ The Court of Appeal was assisted by detailed and considered expert evidence on the nature and causes of Mr Herrmann’s mental condition. This expert evidence was heavily informed by case notes from the Victorian Aboriginal Child Care Agency.

Underpinning the Court’s justification for mitigation was the notion that Herrmann was not the author of the circumstances that led to his development into someone capable of committing the unfathomable crime to which he pleaded. Crucially, the Court stated:

Determining how harshly a particular offender is to be judged — and punished — often requires a close examination of the personal circumstances and background of the offender and an exploration of factors which may explain the offending conduct. *To the extent that offending conduct can be seen to reflect the operation of factors which are beyond the offender’s control, the harshness of the moral judgment is likely to be moderated.*¹³⁸

In concluding, the Court held:

It must never be forgotten that the factors which explained this offending — [the offender’s] profoundly damaged personality and the associated personality disorder — were not of his making. That is precisely why the judge was right to regard his moral culpability as reduced.¹³⁹

¹³⁵ *Herrmann* (n 98).

¹³⁶ *Ibid* 114 [14].

¹³⁷ *Ibid* 114 [11].

¹³⁸ *Ibid* 114 [14] (emphasis added).

¹³⁹ *Ibid* 135 [113].

This statement discloses the underlying reasoning for mitigating a sentence on the basis of an offender's experience of trauma or deprivation. Mitigation is justified, as the trauma experienced by an offender was beyond their control, and therefore the effect it has had on them has also, to some degree, been beyond their control. This was not clearly stated in *Bugmy*, and it seems that courts either treat this matter as being too obvious to require articulation, or otherwise somewhat controversial and therefore better not to identify explicitly. The potential controversy behind this use of mitigation is that it runs counter to fundamental assumptions of the criminal law regarding the moral and legal responsibility of rational agents for their actions. Further, the Court's reliance on expert evidence in the decision of *Herrmann* underscores a critical limitation, which is that legal standards can vary widely depending on the availability and presentation of expert testimony.

2 *Lack of Instruction*

The theme of a 'lack of instruction' also emerges as an implicit basis for mitigation in a number of cases. Fundamental to this basis for mitigation are some commonly held beliefs about childhood development, including the fact that one's experience during childhood is relevant to the development of adult faculties, such as empathy.¹⁴⁰ Research has established that children who are emotionally secure and well-regulated rarely become antisocial individuals in the future.¹⁴¹ Conversely, research has also shown that a child's social environment has a huge effect on the development of the prefrontal cortex, and therefore empathy and impulse control.¹⁴²

Within this broad basis for mitigation, there are two strands of reasoning. The first rests on the notion that early developmental trauma or adverse experiences compromise an individual's ability to develop healthy coping mechanisms.¹⁴³ While there is rarely explicit reference to neurological development in the cases, there is acknowledgement of the fact that exposure to trauma can 'compromise the person's capacity to mature'.¹⁴⁴ This statement suggests that a person's ability to learn and grow is compromised by their exposure to trauma, such that even if they do have positive experiences or positive instruction after a traumatic event or experience, their capacity to integrate learnings and mature is reduced by their traumatic background. This could be described as the 'compromised functioning' basis of mitigation due to trauma.

This is a subtly different point from the second strand of reasoning, under the theme of a 'lack of instruction'. This second strand is justified by the fact that a lack of instruction renders someone less equipped to deal with adult life, and therefore

¹⁴⁰ See, e.g.: *Bugmy* (n 17) 585 [44] (Bell and Gageler JJ); *Herrmann* (n 98).

¹⁴¹ See, e.g., Christiane Otto et al, 'Risk and Resource Factors of Antisocial Behaviour in Children and Adolescents: Results of the Longitudinal BELLA Study' (2021) 15(1) *Child and Adolescent Psychiatry and Mental Health* 1.

¹⁴² Adrian Raine, *The Anatomy of Violence* (Allen Lane, 2013) 260.

¹⁴³ *Bugmy* (n 17) 594–5 [43].

¹⁴⁴ *Ibid.*

their sentence should be mitigated because of the poor care that they received in the past.¹⁴⁵ Under this reasoning, there is less emphasis on the notion of compromised mental functioning, and instead a simple statement of the fact that adverse childhood experiences, and a lack of basic care and parental stability, place an individual at a disadvantage in comparison to others who have had a stable early life. The decision of *DPP (Vic) v Todd* ('*Todd*') illustrates this notion.¹⁴⁶ The Court noted that Todd, who was 19 at the time of his offending,¹⁴⁷ had grown up in a home described as an 'environment of rotting refuse, vermin and complete squalor'.¹⁴⁸ Similarly, his relationships were described as mirroring the decay of the physical environment.¹⁴⁹ This was relevant to the assessment of Todd's moral culpability on the basis that Todd was not to be sentenced as a person who has had a 'normal, stable and regular home environment'.¹⁵⁰

While *Todd* is an example where the Court recognised the relevance of an offender's traumatic background, it is important to acknowledge that Todd received a life sentence with a non-parole period of 35 years.¹⁵¹ The reduction in the non-parole period was primarily attributed to his guilty plea rather than any explicit judicial finding that his moral culpability was substantially reduced.¹⁵² This outcome illustrates a critical point: recognition of trauma or adverse background does not necessarily lead to a significantly reduced sentence, particularly where the offence is of exceptional gravity. Rather, the seriousness of the offence remains a dominant factor in sentencing. This reinforces the broader argument that while trauma may inform the assessment of moral culpability, its practical influence on sentence length can be constrained by the weight given to other considerations, such as public protection, deterrence, and the objective seriousness of the offence.

Further, while the idea that childhood deprivation impairs psychosocial development has intuitive appeal, it lacks a clear legal standard for application. Rather it rests on the views of the individual sentencing judge.¹⁵³ If a sentencing judge believes that lack of instruction is a relevant basis for mitigation, this will receive greater attention. This also raises broader social policy questions about the role of the criminal justice system in addressing systemic inequities, which are not always aligned with the goals of punishment and deterrence. There ought to be more explicit acknowledgment that lack of care, neglect, and inadequate instruction has a negative effect on an individual's ability to develop prosocial skills, placing them at a significant disadvantage, even when no neurological impairment is present.

¹⁴⁵ See *Todd* (n 114).

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid* 2 [6], 9–10 [35].

¹⁴⁸ *Ibid* 25 [82].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* 25 [83].

¹⁵¹ *Ibid* 38 [125].

¹⁵² *Ibid* 34 [113], 38 [125].

¹⁵³ *Bugmy* (n 17) 591–2 [34].

C *Sentencing Judges as Moral Arbiters*

The consideration of trauma, and its relationship with the offender's moral culpability, *prima facie* requires the sentencing judge to perform the role of a moral arbiter.¹⁵⁴ Here, the central question for the sentencing judge is 'the extent of "moral blameworthiness" which should properly attach to the offending conduct'.¹⁵⁵ That sentencing judges have the capacity, or at least may develop the capacity, to be moral reasoners has been discussed by both judges and philosophers alike. For example, Lord Goff suggested extracurricularly that inherent to a sentencing judge's function is 'searching for principles (often only of limited application) which accord with a professionally developed sense of justice and an (to that extent) intuitive sense of a just result'.¹⁵⁶ John Tasioulas also suggests that 'the relative political insularity of judges and the piecemeal and discursive nature of their decisions mark them out as well suited to perform certain vital social tasks through ethical reasoning'.¹⁵⁷ Finally, Irit Samet suggests that there are attributes of the judiciary that are borne out of their professional experience which increases their ability to

get the answers to moral questions right. First, the procedure and etiquette of adjudication create a working environment in which risk factors, such as bias, are constantly controlled for ... Second, on the bench, judges become habituated to listening to both sides before making up their mind, gain proficiency at sifting truth from falsehood, and get accustomed to exercising a detached judgement. These executive virtues and skills are necessary in a good judge, but they also make it easier for them to excel as moral reasoners. The court room is thus a highly nurturing environment for straight thinking over problems in morality.¹⁵⁸

However, relying on judges to act as moral arbiters in assessing trauma's impact on sentencing presents a number of challenges. First, the subjective nature of moral reasoning risks undermining consistency, a cornerstone of equitable sentencing.¹⁵⁹

¹⁵⁴ Chris Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Speech, Victoria Law Foundation Oration, 14 August 2019) 8.

¹⁵⁵ *Ibid.*

¹⁵⁶ Lord Goff, 'The Future of the Law of Restitution' (1989) 12(1) *Sydney Law Review* 1, 2–3.

¹⁵⁷ John Tasioulas, 'Legal Relevance of Ethical Objectivity' (2002) 47(1) *American Journal of Jurisprudence* 211, 233; Maxwell (n 154) 9.

¹⁵⁸ Irit Samet, *Equity: Conscience Goes to Market* (Oxford, 2018) 206–7.

¹⁵⁹ Lyndon Harris, *Achieving Consistency in Sentencing* (Oxford University Press, 2022) ch 2. Although the High Court in *DPP (Vic) v Dalgliesh (pseudonym)* (2017) 262 CLR 428 ('*Dalglish*') appeared to recalibrate the weight given to consistency in sentencing by emphasising that courts must be consistently right rather than rightly consistent, this should not be understood as diminishing the broader normative role of consistency as a cornerstone of equitable sentencing. Rather, the judgment affirms that consistency should not be pursued at the expense of accuracy or justice in individual cases. In this context, subjective factors such as moral culpability may justifiably lead

Despite some judges being capable of ethical reasoning, this approach transfers substantial interpretive power to individual judges, which can result in divergent outcomes for similar cases. Like cases may attract different sentencing outcomes based simply on the personal views of the sentencing judge. Further, the expectation that judges will apply their personal moral values when considering trauma detracts from the principle of interpreting and applying the law in a consistent manner. This variability challenges the fairness and predictability of the sentencing system and raises questions about the appropriateness of such broad judicial discretion.

While trauma should not be seen as an automatic or universally determinative basis for sentence reduction, there is a strong normative argument for its formal recognition within a structured and principled sentencing framework.¹⁶⁰ The introduction of a legislative provision that identifies trauma as a mitigating factor would serve an important symbolic and doctrinal function, signalling the relevance of psychosocial adversity in shaping culpability, and encouraging courts to engage more systematically with such evidence. However, it must also be acknowledged that the mere codification of trauma as a mitigating consideration may not, in itself, yield substantive change in sentencing outcomes. In jurisdictions where intuitive synthesis remains the dominant methodology and guideline judgments have been rejected in favour of flexible, individualised discretion,¹⁶¹ the weight afforded to listed mitigating factors remains largely at the discretion of the sentencing judge.

In light of these institutional constraints, a more pragmatic and potentially effective approach lies in the development and promotion of structured judicial resources, such as bench books. Notably, the *Bugmy Bar Book*, developed in New South Wales, provides detailed, evidence-based material on the relevance of trauma to criminal behaviour and its implications for sentencing.¹⁶² Such tools do not seek to constrain judicial discretion but rather inform it, offering a principled foundation upon which courts can better understand and assess the impact of trauma on moral culpability. By embedding trauma-informed reasoning into judicial practice without imposing rigid constraints, these aids strike a balance between individualised justice and systemic coherence, thereby enhancing both the legitimacy and transparency of sentencing decisions.

to differentiated outcomes, but they must be assessed through a principled methodology to ensure that disparity does not devolve into arbitrariness. Thus, while moral reasoning introduces an element of subjectivity, it need not undermine consistency, so long as judicial discretion is exercised within an articulated framework of relevant sentencing principles. Cf *Wong v The Queen* (2001) 207 CLR 584.

¹⁶⁰ See, e.g., Mirko Bagaric, Gabrielle Wolf and Peter Isham, 'Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse' (2019) 30(1) *Stanford Law and Policy Review* 1, 38.

¹⁶¹ *Dalgliesh* (n 159) 450 [69]–[70] (Kiefel CJ, Bell and Keane JJ).

¹⁶² *Bugmy Bar Book* (n 7).

D *Mercy*

An often underdiscussed avenue for the consideration of an offender's traumatic background in sentencing is the residual principle of mercy. Mercy is a useful concept, as it can be enlivened when other avenues for use of the trauma in the sentencing process are closed. For example, in the absence of a clear nexus between the offending and the background of trauma, there may still be scope for courts to consider the evidence of an offender's experience of trauma in the sentencing process.¹⁶³ Mercy plays a greater role in the sentencing of persons who have experienced trauma than has been acknowledged in the cases or literature to date. Before considering the application of the principle of mercy to experiences of trauma, it is necessary first to articulate the meaning of 'mercy' within the Victorian sentencing framework.

1 *What is Mercy?*

If the law of sentencing allows for all mitigating factors to be taken into account, why should a sentencer, having accommodated all such matters, deliberately order less than what is called for by the criminal law? Mercy, a kind of sublime sentencing factor, generally arises in cases with unique, compelling and tragic circumstances.¹⁶⁴ The role of mercy, its definition, and how it differs from other concepts such as mitigation, is difficult to articulate. As has been stated by the Victorian Court of Appeal in *R v Miceli*, 'an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion'.¹⁶⁵

The preferred approach to mercy, according to Charles JA, was that stated in *R v Kane*:

[J]ustice and humanity walk together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.¹⁶⁶

¹⁶³ See, e.g., *Guode v The Queen* [2020] VSCA 257, [42] (Ferguson CJ, Priest and Beach JJA) ('*Guode*').

¹⁶⁴ *Markovic v The Queen* (2010) 30 VR 589, 592 [7] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA).

¹⁶⁵ [1998] 4 VR 588, 592 (Tadgell JA).

¹⁶⁶ *R v Kane* [1974] VR 759, 766.

2 *Mercy and an Offender's Background Trauma: The Guode Cases*

There has been limited consideration of the interrelationship between hardship, mitigation, and mercy.¹⁶⁷ The case of *Guode v The Queen*¹⁶⁸ provides an impactful illustration of the way in which evidence of trauma can be relevant for the purpose of sentencing.

Ms Guode was sentenced for the murder, attempted murder and infanticide of four of her children. In 2015, Ms Guode deliberately drove her car into Lake Gladman in Wyndham Vale, Victoria with four of her seven children in the car.¹⁶⁹ The children in the car were between 16 months and five years of age. Prior to this event, Ms Guode had been observed to be ‘huddled over the steering wheel with her face in her hands’, while one of her children was hanging off the front seat and another was ‘hysterical’ in the car.¹⁷⁰ While the legal significance of this case primarily relates to the question of the relevance of a charge of infanticide to charges of murder when sentenced concurrently, this case is also notable for the levels of trauma that the offender had experienced. Justices Gordon and Edelman summarised the experiences of Ms Guode in their dissent:

Ms Guode had arrived in Australia in 2005 as a refugee on a Global Special Humanitarian visa after having been raised in South Sudan during the civil war. She had witnessed her husband's murder [during a Janjaweed militia raid on her village]. She had been raped to the point of unconsciousness and had been wounded with a knife. She had escaped by walking for 18 days to Uganda with her three young children. After arriving in Australia, she had four further children as a result of a relationship which saw her ostracised from her community.¹⁷¹

In addition, Ms Guode had suffered a post-partum haemorrhage requiring a blood transfusion in giving birth to her youngest son, Bol, which occurred just over a year before the offending.¹⁷² The gravity of the horror of Ms Guode's experiences cannot be conveyed within the clinical language of sentencing remarks.

In this case, there was no link established between the trauma and Ms Guode's mental impairment, aside from a diagnosis of mild PTSD. The medical expert opined that Ms Guode's PTSD ‘overlap[ped] with other features of mood disorder’, including her diagnosed ‘major depressive disorder, [which was] mild-moderate in

¹⁶⁷ See, e.g., Natalia Antolak-Saper, ‘The Role of Mercy and Sentencing for Infanticide: The Tragic Case of *R v Guode*’ (2023) 35(1) *Current Issues in Criminal Justice* 65, 67–70.

¹⁶⁸ *Guode* (n 163); *R v Guode* (2020) 267 CLR 141 (‘*Guode* (HCA)’).

¹⁶⁹ *Guode* (n 163) 2–3 [7].

¹⁷⁰ *Guode* (HCA) (n 168) 158 [33] (Gordon and Edelman JJ).

¹⁷¹ *Ibid* 158–9 [35].

¹⁷² *Ibid* 163 [49].

severity, with somatic syndrome'.¹⁷³ Trauma in this instance could not invoke the application of the *Verdins* principles, as it did not satisfy the necessary threshold.

On 30 May 2017, Lasry J sentenced Ms Guode to 26 years and six months in jail, with a non-parole period of 20 years.¹⁷⁴ On 30 September 2020, the Court of Appeal reduced her sentence to 18 years with a non-parole period of 14 years, after finding that the original sentence was manifestly excessive.¹⁷⁵ At first instance and in the Victorian Court of Appeal, the Courts did not explicitly state that the compounding relationship of Ms Guode's traumas were relevant to the Courts' assessment of her moral culpability.¹⁷⁶

Once the matter returned before the Court of Appeal for resentencing following an appeal to the High Court, it was clear that mercy emerged as a key factor in sentencing Ms Guode.¹⁷⁷ The Court of Appeal noted that whilst the sentencing judge had observed that the principles of mercy were significant in sentencing the appellant,¹⁷⁸ the sentences imposed at first instance did not adequately reflect this. The Court of Appeal, composed of Ferguson CJ, Priest and Beach JJA, highlighted Ms Guode's experience of extreme disadvantage and hardship as the crucial factors that raised the need for mercy, and repeated statements made in the 2018 Court of Appeal decision:

It should not be thought that, in reaching [the conclusions we have reached], we have lost sight of the fact that three vulnerable children lost their lives (and that a fourth nearly did). Adjectives such as 'tragic' are inadequate to convey the depth of emotional response provoked by the destruction of such innocent lives. Each of the applicant's children had a right to expect that she would protect them and keep them safe from harm. The applicant fatefully and irredeemably, however, breached their trust. But it must also be remembered that, when she did so, her capacity to make calm and rational decisions was severely compromised by a mental condition which was not of her own making. Her situation is pitiable. And although the Court must avoid being weakly merciful, principle nonetheless demands that the punishment inflicted upon the applicant must be mitigated by, and justly reflect, her diminished moral culpability.¹⁷⁹

We see here that the Court used mercy as a residual category to justify tempering the sentence beyond the bounds of ordinary mitigation. Here, the Court also linked the concepts of trauma, mercy and diminished moral culpability, noting the effect of trauma on Ms Guode and her ability to make decisions. The Court also acknowledged

¹⁷³ *Guode* (n 163) [10]–[11].

¹⁷⁴ *R v Guode* [2017] VSC 285 ('*Guode* (VSC)').

¹⁷⁵ *Guode* (n 163) [51].

¹⁷⁶ *Guode* (VSC) (n 174); *Guode v The Queen* [2018] VSCA 205 ('*Guode* (VSCA 2018)').

¹⁷⁷ *Guode* (n 163) [45]–[50].

¹⁷⁸ *Guode* (VSCA 2018) (n 176) [52], [72].

¹⁷⁹ *Guode* (n 163) [47], quoting *ibid* [74].

that the trauma Ms Guode had experienced was linked to her diagnosed mental conditions, and that her circumstances were not of her own making.

In this way, the role of mercy overlaps with the other justifications for mitigation discussed above. First, the fact that many aspects of Ms Guode's previous traumas had not been of her own making, and, secondly, that the level of stress Ms Guode had experienced would be too much for many people to bear.¹⁸⁰ This overlap between mercy and other categories of mitigation makes it difficult to take a principled approach to treatment of an offender's experiences of trauma.

This case also provides a stark example of the way in which traumatised offenders are required to relate events and experiences that may be beyond articulation, in the sense that acute trauma can lead to a collapsing of narrative coherence and sense-making.¹⁸¹ This may drive the consequential amorphousness of the legal principles relevant to treatment of these offences.

An interesting question remains as to the link between evidence of a prior experience of trauma, the commission of the offence,¹⁸² and the prerogative of mercy. Where there is no expert evidence of a link or nexus between the offender's trauma and the offending, is it possible that the evidence of trauma can nevertheless be relevant — perhaps even to the same extent as it would have been had there been evidence of a link — through the enlivening of the court's prerogative of mercy? There is scant discussion of this particular question.¹⁸³ It does seem, however, that mercy can be used as an alternative route to acknowledging trauma in sentencing, particularly in the absence of evidence of a strong nexus, or where the evidence of trauma requires greater recognition than that allowed for by the key cases, such as *AWF* and *Terrick*.¹⁸⁴

V CONCLUSION

The relationship between trauma and sentencing is complex and multifaceted. Within the context of the criminal justice system, the recognition of trauma's pervasive impact is an imperative step towards achieving a more just and compassionate approach to sentencing. As this article has explored, the acknowledgment of an offender's past experiences of trauma is not merely an abstract consideration. This article has illuminated the profound implications on both mental and physical health as well as its impact on an offender's moral culpability.

¹⁸⁰ Antolak-Saper (n 167) 70–3.

¹⁸¹ *The Body Keeps the Score* (n 1) 15–17.

¹⁸² *AWF* (n 21) 4 [6].

¹⁸³ See, e.g., *Hill v The Queen* [2020] VSCA 220, [46] (Maxwell P and Niall JA).

¹⁸⁴ The principles outlined in *AWF* (n 21) do not seem particularly useful when considering Guode's case. It is for this reason that mercy was employed as a residual category of mitigation to provide proper acknowledgement of Ms Guode's prior trauma and unique circumstances: *Guode* (n 163) [46].

As research develops on intergenerational trauma and the effects of systemic racism and other forms of discrimination, the policies and legal principles applied within criminal sentencing courts need to develop to acknowledge the ways that these forces act upon individuals' lives. Developments in neuroscientific research and a growing understanding of the physical and biological effects of trauma also require careful attention from criminal practitioners, judicial officers and policy makers. It is clear, however, that an offender's prior traumatic experiences ought to be expressly provided for in the sentencing framework as a mitigating factor. Using case studies of the Stolen Generations and survivors of intergenerational trauma, we have seen how the judicial system in Victoria grapples with the intricate intersections of history, culture, and trauma in sentencing decisions.

Considering trauma as a mitigating factor while navigating the pitfalls of subjectivity and personal bias underscores the complexity of this endeavour. For this reason, it is suggested that trauma should be formally recognised within sentencing frameworks as a mitigating factor. Judicial guidelines should provide clear criteria for how trauma — particularly intergenerational trauma, systemic racism, and experiences of discrimination — may reduce an offender's culpability. This could be achieved through legislative reform or detailed judicial bench books that outline trauma's influence on offending behaviour. Courts should adopt trauma-informed sentencing principles that balance the goals of rehabilitation, deterrence, and community protection with a compassionate understanding of the offender's circumstances. These principles should encourage alternatives to incarceration where appropriate, focusing on rehabilitation and restorative justice practices.

Sentencing courts should have access to expert trauma assessments.¹⁸⁵ These assessments should include detailed examinations of how trauma has influenced the offender's behaviour and mental health. Training for legal professional and judicial officers on understanding and interpreting these assessments should be mandated. Ongoing judicial education programs must be developed to equip judges with the tools to assess trauma's relevance in sentencing. This should include training on the neurobiological effects of trauma, intergenerational trauma, and its specific impacts on Indigenous populations and marginalised groups. Education on avoiding unconscious bias when evaluating trauma in sentencing is essential to prevent subjective discrepancies.

In acknowledging the significance of trauma in sentencing, embracing education, and fostering dialogue, the criminal justice system can take strides toward a more equitable and humane approach that respects the depth of each individual's lived experience.

¹⁸⁵ See, e.g.: Anthony and Behrendt (n 12); Day and McLachlan (n 12).