

s. 3 definitions

category 1 offence means any of the following offences committed by a person who is 18 years of age or more at the time of the commission of the offence—

- (a) murder;
- (b) an offence against section 15A(1) of the [Crimes Act 1958](#) (causing serious injury intentionally in circumstances of gross violence);
- (c) an offence against section 15B(1) of the [Crimes Act 1958](#) (causing serious injury recklessly in circumstances of gross violence);
- (ca) an offence against section 16 of the **Crimes Act 1958** (causing serious injury intentionally) if—
 - (i) the [victim](#) was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 10AA(8), (9), (10) and (11); and
 - (ii) the [offender](#) knew or was reckless as to whether the [victim](#) was a person referred to in subparagraph (i);
- (cb) an offence against section 17 of the **Crimes Act 1958** (causing serious injury recklessly) if—
 - (i) the [victim](#) was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 10AA(8), (9), (10) and (11); and
 - (ii) the [offender](#) knew or was reckless as to whether the [victim](#) was a person referred to in subparagraph (i);
- (cc) an offence against section 18 of the **Crimes Act 1958** (causing injury intentionally or recklessly) if—
 - (i) the [victim](#) was an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 10AA(8), (9), (10) and (11); and
 - (ii) the [offender](#) knew or was reckless as to whether the [victim](#) was a person referred to in subparagraph (i);

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category 1 offence means any of the following offences committed by a person who is 18 years of age or more at the time of the commission of the offence—

- (d) an offence against section 38(1) of the **Crimes Act 1958** (rape);
- (e) an offence against section 39(1) of the **Crimes Act 1958** (rape by compelling sexual penetration);
- (f) an offence against section 49A(1) of the [Crimes Act 1958](#) (sexual penetration of a child under the age of 12);
- (g) an offence against section 49J(1) of the [Crimes Act 1958](#) (persistent sexual abuse of a child under the age of 16);
- (h) an offence against section 50C(1) of the [Crimes Act 1958](#) (sexual penetration of a child or lineal descendant) if the [victim](#) was, at the time of the offence, under the age of 18;
- (i) an offence against section 50D(1) of the [Crimes Act 1958](#) (sexual penetration of a step-child) if the [victim](#) was, at the time of the offence, under the age of 18;
- (ia) an offence against section 77B(2) of the [Crimes Act 1958](#) (aggravated home invasion);
- (ib) an offence against section 79A(2) of the [Crimes Act 1958](#) (aggravated carjacking);
- (ic) an offence against section 317AC of the [Crimes Act 1958](#) (intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving) if, in the commission of the offence, an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 317AB is injured;
- (id) an offence against section 317AD of the [Crimes Act 1958](#) (aggravated offence of intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving) if, in the commission of the offence, an emergency worker on duty, a custodial officer on duty or a youth justice custodial worker on duty within the meaning of section 317AB is injured;

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category 1 offence means any of the following offences committed by a person who is 18 years of age or more at the time of the commission of the offence—

- (j) an offence against section 71(1) of the **Drugs, Poisons and Controlled Substances Act 1981** (trafficking in a drug or drugs of dependence—large commercial quantity);
- (ja) an offence against section 71AA(2) of the [Drugs, Poisons and Controlled Substances Act 1981](#) (trafficking in a drug or drugs of dependence for the benefit of or at the direction of a criminal organisation—commercial quantity);
- (k) an offence against section 72 of the **Drugs, Poisons and Controlled Substances Act 1981** (cultivation of narcotic plants—large commercial quantity);
- (l) an offence against any of the following provisions of the [Crimes Act 1958 as in force before their repeal by section 16 of the Crimes Amendment \(Sexual Offences\) Act 2016](#) —
 - (i) section 44(1) (incest with the person's child, other lineal descendant or step-child) if the victim was, at the time of the offence, under the age of 18;
 - (ii) section 44(2) (incest with a child, other lineal descendant or step-child under the age of 18 of the person's de facto spouse);
 - (iii) section 45(1) (sexual penetration of child under the age of 16) committed in the circumstance of aggravation described in section 45(2)(a) of the [Crimes Act 1958](#) as then in force;
 - (iv) section 47A(1) (persistent sexual abuse of child under the age of 16);

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category 2 offence means any of the following offences committed by a person who is 18 years of age or more at the time of the commission of the offence—

- (a) manslaughter;
- (b) an offence against section 5A of the **Crimes Act 1958** (child homicide);
- (ba) an offence against section 5B of the **Crimes Act 1958** (homicide by firearm);
- (c) an offence against section 16 of the **Crimes Act 1958** (causing serious injury intentionally) other than a category 1 offence;
- (d) an offence against section 63A of the [Crimes Act 1958](#) (kidnapping);
- (da) an offence against section 75A(2) of the [Crimes Act 1958](#) (armed robbery) if—
 - (i) the [offender](#) has with him or her a firearm at the time of the offence; or
 - (ii) a [victim](#) of the offence has suffered injury as a direct result of the offence; or
 - (iii) the offence was committed by the offender in company with one or more other persons;
- (db) an offence against section 77A(3) of the [Crimes Act 1958](#) (home invasion);
- (dc) an offence against section 79(2) of the [Crimes Act 1958](#) (carjacking);
- (e) an offence against section 197A of the [Crimes Act 1958](#) (arson causing death);
- (ea) an offence against section 318(1) of the [Crimes Act 1958](#) (culpable driving causing death);
- (eb) an offence against section 319(1) of the [Crimes Act 1958](#) (dangerous driving causing death);

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category 2 offence means any of the following offences committed by a person who is 18 years of age or more at the time of the commission of the offence—

- (f) the offence of kidnapping at common law;
- (g) an offence against section 71AA(1) of the [Drugs, Poisons and Controlled Substances Act 1981](#) (trafficking in a drug or drugs of dependence—commercial quantity);
- (h) an offence against section 72A of the [Drugs, Poisons and Controlled Substances Act 1981](#) (cultivation of narcotic plants—commercial quantity);
- (i) an offence against section 4B(1) of the [Terrorism \(Community Protection\) Act 2003](#) (providing documents or information facilitating terrorist acts);
- (j) an offence against section 317AD of the [Crimes Act 1958](#) (aggravated offence of intentionally exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving) other than a category 1 offence;
- (k) an offence against section 317AF of the [Crimes Act 1958](#) (aggravated offence of recklessly exposing an emergency worker, a custodial officer or a youth justice custodial worker to risk by driving);
- (l) an offence against section 31C of the [Crimes Act 1958](#) (discharging a firearm reckless to safety of a [police officer](#) or a protective services officer) in circumstances where the [offender's](#) conduct created a risk to the physical safety of the [victim](#) or to any member of the public;
- (m) the offence of common assault committed in the circumstances referred to in section 320A(1) or (2) of the [Crimes Act 1958](#) if the assault consisted of or included the direct [application](#) of force within the meaning of the definition of **assault** in section 31(2) of that Act;

Division 2 of Part 3 of the Sentencing Act (1991) Offences that attract presumptive minimum terms

1. Manslaughter in circumstances gross violence (s.9B)
2. Manslaughter by single punch or strike (s.9C)
3. Causing serious injury in circumstances of gross violence s.10 certain offences against emergency workers, custodial officers and youth justice custodial workers on duty (s. 10AA)
4. Contravening supervision order or interim supervision order under Serious Offenders Act 2018 (s.10AB)
5. Aggravated home invasion (s.10AC)
6. Aggravated carjacking (s.10AD)
7. Offences against 317AC and 317AD in certain circumstances (s.10AE)

10A Special reasons relevant to imposing minimum non- parole periods

1) In this section—

impaired mental functioning means—

- (a) a mental illness within the meaning of the **Mental Health Act 2014**; or
- (b) an intellectual disability within the meaning of the **Disability Act 2006**; or
- (c) an acquired brain injury; or
- (d) an autism spectrum disorder; or
- (e) a neurological impairment, including but not limited to dementia;

self-induced intoxication has the same meaning as in section 322T(5) and (6) of the **Crimes Act 1958**.

(2) For the purposes of section 9B, 9C, 10, 10AA, 10AB, 10AC, 10AD or 10AE, a court may make a finding that a special reason exists if—

- (a) the offender has assisted or has given an undertaking to assist, after sentencing, law enforcement authorities in the investigation or prosecution of an offence; or

Notes

1 Section 5(2AB) also applies.

2 If an offender fails to fulfil an undertaking, the Director of Public Prosecutions has a right under section 291 of the **Criminal Procedure Act 2009** to appeal against the less severe sentence imposed.

10A Special reasons relevant to imposing minimum non- parole periods

- (c) the offender proves on the balance of probabilities that—
 - (i) subject to subsection (2A), at the time of the commission of the offence, he or she had impaired mental functioning that is causally linked to the commission of the offence and substantially and materially reduces the offender's culpability; or
 - (ii) he or she has impaired mental functioning that would result in the offender being subject to substantially and materially greater than the ordinary burden or risks of imprisonment; or

(d) the court proposes to make a Court Secure Treatment Order or a residential treatment order in respect of the offender; or

(e) there are substantial and compelling circumstances that are exceptional and rare and that justify doing so

(2A) Subsection (2)(c)(i) does not apply to impaired mental functioning caused substantially by self- induced intoxication.

(2B) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court—

(a) must regard general deterrence and denunciation of the offender's conduct as having greater importance than the other purposes set out in section 5(1); and

(b) must give less weight to the personal circumstances of the offender than to other matters such as the nature and gravity of the offence; and

(c) must not have regard to—

- (i) the offender's previous good character (other than an absence of previous convictions or findings of guilt); or
- (ii) an early guilty plea; or
- (iii) prospects of rehabilitation; or
- (iv) parity with other sentences.

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(3) In determining whether there are substantial and compelling circumstances under subsection (2)(e), the court must have regard to—

(aa) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 10 years should ordinarily be fixed for an offence of manslaughter in circumstances in which section 9B(2) or 9C(2) applies; and

(a) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed for an offence covered by section 10(1) or, subject to section 10AA(2), for an offence covered by section 10AA(1) and that a non-parole period of not less than the length specified in section 10(1) or 10AA(1) (as the case requires) should ordinarily be fixed in respect of that sentence; and

(ab) the Parliament's intention that a sentence of imprisonment of not less than 6 months should ordinarily be imposed for an offence covered by section 10AA(4); and

(ac) the Parliament's intention that a sentence of imprisonment of not less than 12 months should ordinarily be imposed for an offence covered by section 10AB; and

(ad) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 3 years should ordinarily be fixed for an offence covered by section 10AC; and

(ae) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 3 years should ordinarily be fixed for an offence covered by section 10AD; and

(af) the Parliament's intention that a sentence of imprisonment should ordinarily be imposed and that a non-parole period of not less than 2 years should ordinarily be fixed for an offence covered by section 10AE; and

(b) whether the cumulative impact of the circumstances of the case would justify a departure from that sentence and, where relevant, minimum non-parole period.

10A Special reasons relevant to imposing minimum non- parole periods

(4) If a court makes a finding under subsection (2), it must—

(a) state in writing the special reason; and

(b) cause that reason to be entered in the records of the court.

(5) The failure of a court to comply with subsection (4) does not invalidate any order made by it.

Mandatory and presumptive sentencing Part 2: Standard sentence scheme

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Topics

- ▶ The background to the enactment of the scheme.
- ▶ What is a ‘standard sentence’?
- ▶ The application of the scheme.
- ▶ Features of the scheme.
- ▶ Relevant Court of Appeal judgments.
- ▶ Key points with respect to the standard sentence scheme.

Background to the introduction of the standard sentence scheme

- ▶ Implementing the government's response to the SAC report on Sentencing Guidance in Victoria.
- ▶ Modelled on the NSW standard non-parole period scheme.
- ▶ *Muldrock v The Queen* (2011) 244 CLR 120.
- ▶ Stated aims of the standard sentence scheme.

What is a standard sentence?

- ▶ Definition in section 3(1) of the *Sentencing Act* 1991.
- ▶ Section 5A of the *Sentencing Act* 1991.
- ▶ *Muldrock v The Queen* (2011) 244 CLR 120.
- ▶ Limitation on the assessment of objective seriousness.
- ▶ Conspiracy, incitement and attempts.
- ▶ Length of standard sentences for the 13 standard sentence offences.

Standard sentence offence	Standard sentence
Murder	<ul style="list-style-type: none"> • 30 years if the sentencing court is satisfied that the prosecution has proved BRD that the person murdered was a custodial officer on duty or an emergency worker on duty and at the time of carrying out the conduct the accused knew or was reckless as to whether that person was a custodial officer or an emergency worker. • 25 years in any other case
Homicide by firearm	13 years
Rape	10 years
Sexual penetration of a child under the age of 12	10 years
Sexual penetration of a child under the age of 16	6 years
Sexual assault of a child under the age of 16	4 years
Sexual activity in the presence of a child under the age of 16	4 years
Causing a child under the age of 16 to be present during sexual activity	4 years
Persistent sexual abuse of a child under the age of 16	10 years
Sexual penetration of a child or lineal descendant under the age of 18 years	10 years
Sexual penetration of a stepchild under the age of 18 years	10 years
Culpable driving causing death	8 years
Trafficking in a large commercial quantity of a drug or drugs of dependence	16 years

Application of the scheme

- ▶ The provisions only apply to relevant offences that were committed on or after **1 February 2018** .
- ▶ Transitional provision concerning between dates charges.
- ▶ Exceptions to the application of the provisions.
- ▶ Aggregate sentences of imprisonment.

Features of the standard sentence scheme

- ▶ Consideration of the standard sentence.
- ▶ No effect on the instinctive synthesis approach to sentencing.
- ▶ Current sentencing practices.
- ▶ ‘Mandatory’ non-parole periods.
- ▶ Requirement for reasons.

Authorities

- ▶ *Brown v The Queen* (2019) 59 VR 462
- ▶ *Director of Public Prosecutions v Drake* [2019] VSCA 293
- ▶ *Lugo (a pseudonym) v The Queen* [2020] VSCA 75
- ▶ *Victorsen v The Queen* [2020] VSCA 248

Key points

- ▶ The standard sentence:
 - is a legislative guidepost, which has the same function as the maximum penalty;
 - does not affect the established ‘instinctive synthesis’ approach to sentencing; and
 - does not affect what a court may, or must, take into account when sentencing an offender.
- ▶ A sentencing judge is neither required nor permitted to assess the seriousness of the subject offending ‘taking into account only the objective factors’ in section 5A.
- ▶ A sentencing judge is neither required nor permitted to classify the subject offending on a scale of seriousness in comparison to the hypothesised mid-range offence.
- ▶ This does not mean that there is no element of comparison that takes place in considering the standard sentence - see the function of the maximum penalty.
- ▶ The obligation on the court to explain how the sentence relates to the standard sentence does not require the judge to ‘classify the objective seriousness of the offending’.
- ▶ An inadequate explanation by a court of this relationship will not, of itself, vitiate the sentence imposed.