Judicial Commission
of New South Wales

Sentencing

Bench Book

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Judicial Commission of New South Wales

Published in Sydney by —

Judicial Commission of New South Wales
Level 5, 60 Carrington Street
Sydney NSW 2000

GPO Box 3634
Sydney NSW 2001
www.judcom.nsw.gov.au

Printed September 2006

ISBN 0 7313 5613 6

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Currency

Update 59, August 2024

Update 59 amends the Bench Book to update and revise various chapters, and incorporate recent case law and legislative developments. The following chapters have been revised:

Subjective matters

- **[10-570] Deportation** to add reference to the CDPP's recently updated *Sentencing of federal offenders in Australia: a guide for practitioners* (edition 7.2), July 2024.

Section 21A factors "in addition to" any Act or rule of law

- The chapter at **[11-000]**ff has been extensively revised in relation to the discussion of mitigating factors under s 21A(3) of the *Crimes (Sentencing Procedure) Act 1999* at **[11-200]**ff.

Sentencing Commonwealth offenders

- **[16-000] Summary of relevant considerations** to add reference to the CDPP's recently updated *Sentencing of federal offenders in Australia: a guide for practitioners* (edition 7.2), July 2024.
- **[16-050] Conditional release on parole or licence** to add reference to *The King v Hatahet* [2024] HCA 23 regarding the distinction between the judicial function of sentencing and the executive function of determining parole.

Break and enter offences

- The chapter at **[17-000]**ff has been substantially revised and reference added to following cases:
  - *R v Ball* [2021] NSWCCA 314 regarding the assessment of objective seriousness where the offence of aggravated break and enter was committed following provocation by the victim
  - *MM v R* [2016] NSWCCA 235 and *Taufa v R* [2020] NSWCCA 264 regarding taking into account "circumstances of aggravation" in a s 112(2), (3) *Crimes Act 1900* offence.

Sexual offences against children (NSW)

- **[17-400]**ff to add amendments consequential on the publication of the new **[17-700] Commonwealth child sex offences** (see below) and to update cross-references. Note: this chapter is currently under review.

Commonwealth child sex offences

- A new chapter, **Commonwealth child sex offences**, has been added at **[17-700]**ff. This chapter provides detailed commentary in respect of sentencing for Commonwealth child sex offences, and includes a table of such offences at **[17-800]** detailing maximum penalties and, where relevant, mandatory minimum penalties, with cross-references to relevant commentary in the chapter.

Fraud offences

- **[20-065] Types of Commonwealth fraud** to add reference to the CDPP's recently updated *Sentencing of federal offenders in Australia: a guide for practitioners* (edition 7.2), July 2024.

Foreword

The sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

Individual judicial officers call upon a vast body of collective experience of other judicial officers, both contemporary and past, to assist them in this task. This publication constitutes a distillation of the principles derived from that cumulative knowledge.

A former Chief Justice of New South Wales, Sir Frederick Jordan, once said with respect to sentencing that "the only golden rule is that there is no golden rule."

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. It is, of course, impossible for courts to satisfy all sections of the community with respect to a matter like sentencing, because there are such significant divisions of opinion within the community. However, the permissible range for the exercise of the sentencing discretion by the judiciary is necessarily narrower than the broad range of opinion held within the community. This is because the core value of fairness in the administration of criminal justice requires the range to be narrow, so that criminal justice is seen to operate reasonably equally.

The reason why debate about sentencing will know no rest is because the sentencing task has always been, and will continue to be, a process of balancing overlapping, contradictory and incommensurable objectives. The preservation of a broad sentencing discretion is critical to the ability of the criminal justice system to ensure justice is served in all of the extraordinary variety of circumstances of individual offences and individual offenders. The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives, including deterrence, retribution and rehabilitation. These objectives do not always point in the same direction. The requirements of justice and the requirements of mercy are often in conflict, but we live in a society which values both justice and mercy.

Centuries of practical experience lead to the conclusion that the balancing of such a multiplicity of factors requires the exercise of a broad discretion. Nevertheless, that discretion is a judicial one and must be exercised in accordance with principle. This volume summarises the principles applicable to the exercise of that discretion in the criminal justice system of New South Wales.

This publication incorporates many years of research about sentencing acquired by officers of the Judicial Commission of New South Wales. It serves one of the principal functions of the Commission — the promotion of consistency in sentencing. Although the work is primarily designed to assist judicial officers on a day-to-day basis, its general publication will enable it to serve as a resource for all legal practitioners and others who seek a better understanding of the principles and practice of sentencing in New South Wales.

The Honourable JJ Spigelman AC
Chief Justice of New South Wales

Introduction

Sentencing a person convicted of a criminal offence has always been difficult but it has become an increasingly technical task. The *Sentencing Bench Book* provides ready access to sentencing law. It is published as a looseleaf service in order to easily accommodate changes in the law.

Chief Justice Gleeson remarked in 1993 that:

> There is no aspect of the administration of justice in which public acceptance of judicial decision-making is more important, or more difficult to sustain, than the sentencing of offenders. Most judges and magistrates will say that they find sentencing one of the most difficult tasks confronting them. (*The Sydney Morning Herald*, 2 December 1993, extracted from "Sentencing: The Law's Communication Problem," a speech delivered to the Criminal Bar Association, 19 November 1993).

The High Court has described sentencing as "a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money": *Weininger v The Queen* (2003) 212 CLR 629 at [24]. Later in *Markarian v The Queen* (2005) 228 CLR 357 at [27], the High Court explained that, ordinarily, there is no single route that a sentencer must take in arriving at an appropriate sentence:

> The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence [*Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]]. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies [*Johnson v The Queen* (2004) 78 ALJR 616 at 618 [5] per Gleeson CJ, 624 [26] per Gummow, Callinan and Heydon JJ; 205 ALR 346 at 348, 356].

The primary object of the *Sentencing Bench Book* is to assist sentencers in individual cases to "[take] into account all relevant considerations … in forming the conclusion reached". Individualised justice is an important aspect of sentencing. In *R v Whyte* (2002) 55 NSWLR 252 at [147], Spigelman CJ said:

> The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individualised.

Consistency in sentencing is achieved by the proper application of the relevant legal principles: *Hili v The Queen* (2010) 85 ALJR 195 at [18], [49]; *The Queen v Pham* (2015) 256 CLR 550 at [28]. Intermediate appellate court cases are the most useful guidance for sentencing judges: *The Queen v Pham* at [28], [50]. Therefore, by articulating sentencing principles, the *Sentencing Bench Book* assists the courts to achieve consistency in imposing sentences. Consistency of approach in applying sentencing principles is essential if reasonable consistency (as referred to by Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584 at [6], *Hili v The Queen* at [18] and *The Queen v Pham* at [28]) is to be achieved. It is sometimes forgotten in debates about sentencing that judicial officers are bound by sentencing principles: M Gleeson, "A core value" (2007) 8(3) *TJR* 329.

Since the early 1990s there has been an increasing tendency of Parliament to legislate in the area of sentencing law. The High Court has emphasised the importance of following strictly the terms of exhaustive sentencing provisions. In *Adams v The Queen* (2008) 234 CLR 143 at [10], the court frowned upon "judicially constructed harm-based gradation of penalties" for particular kinds of drugs when "Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs" through a quantity based statutory scheme. And in *Hili v The Queen* at [13], [37]–[38], the court disapproved of Court of Criminal decisions which accepted a "judicially determined norm" for non-parole period and recognizance release orders for Commonwealth offenders. Part IB *Crimes Act 1914* (Cth) has made exhaustive provision for these subjects. On the other hand, in *Muldrock v The Queen* (2011) 244 CLR 120, the court held that the NSW Court of Criminal Appeal should not have attributed determinative significance to standard non-parole periods for selected NSW offences. The legislation required an approach to sentencing whereby 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.

The *Crimes (Sentencing Procedure) Act 1999* (NSW) consolidated and rationalised various sentencing statutes. The Act has been amended many times since it was first enacted. A key amendment was: the creation, in s 21A, of a list of aggravating and mitigating matters that a sentencer may take into account in setting an appropriate sentence. Section 21A proved to be the source of a significant amount of litigation in the Court of Criminal Appeal. In *Mapp v R* [2010] NSWCCA 269, Simpson J, in the context of these provisions, referred to "the increasing complexity that attends sentencing" (at [6]) and cautioned that this "complexity casts an undue burden on sentencing judges" (at [8]).

In the past it may have been more appropriate to provide a commentary on the common law in which statutes touching on sentencing appeared. However, the reverse is now more appropriate — a commentary on the statutes touching on sentencing in which the common law appears.

The *Sentencing Bench Book* contains commentary on five key sentencing statutes:

- *Crimes (Sentencing Procedure) Act 1999* (NSW)
- *Children (Criminal Proceedings) Act 1987* (NSW)
- *Crimes Act 1914* (Cth)
- *Criminal Appeal Act 1912* (NSW)
- *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW).

It also contains commentary on sentencing law for the following offence categories:

- assault, wounding and related offences
- break and enter offences
- car-jacking and car rebirthing offences
- Commonwealth drug offences
- damage by fire and related offences
- dangerous driving

- detain for advantage/kidnapping
- domestic violence offences
- *Drug Misuse and Trafficking Act 1985* (NSW) offences
- firearms and prohibited weapons offences
- fraud offences
- manslaughter and infanticide
- murder
- public justice offences
- robbery
- sexual assault
- sexual offences against children.

The *Sentencing Bench Book*, like any looseleaf service, is a work in progress. More offence categories will be added where required.

I trust that judicial officers, practitioners and anyone interested in sentencing will find the *Sentencing Bench Book* to be both informative and useful.

Hugh Donnelly
Director, Research and Sentencing
July 2016

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[The next page is vii]

Contents

[The next page is 1001]

Procedural and evidential matters

[The next page is 1051]

Procedural fairness

A person sentenced before a court is entitled to procedural fairness: *Pantorno v The Queen* (1989) 166 CLR 466 at 472–474, 482–483; *Weir v R* [2011] NSWCCA 123 at [64]–[67]; *Ng v R* (2011) 214 A Crim R 191 at [43]; *R v Wang* [2013] NSWCCA 2 at [19]. Specific procedural rules have been applied to sentencing proceedings which are designed to ensure fairness and transparency.

[1-000] Proceedings must take place in open court

Sentencing proceedings must take place in open court and discussions must not take place in the chambers of the sentencer: *R v Rahme* (1991) 53 A Crim R 8; *R v Foster* (1992) 25 NSWLR 732 at 741; *Bruce v The Queen* (unrep, 19/12/75, HCA). In *Pearce v The Queen* (1998) 194 CLR 610 at [39], McHugh, Hayne and Callinan JJ quoted with approval Sir John Barry's comment that the criminal law:

> must be administered publicly in such a fashion that its activities can be understood by ordinary citizens and regarded by them as conforming with the community's generally accepted standards of what is fair and just.

If either party wish to adduce evidence of sensitive material, for example about an offender's assistance to authorities, such information should ordinarily be done by way of a sealed envelope: *R v Cartwright* (1989) 17 NSWLR 243 at 257. Where such evidence is tendered, courts have jurisdiction to modify and adapt the general rules of open justice and procedural fairness by tailoring non-publication orders to ensure the offender has the opportunity to consider and test the accuracy of the evidence and to make submissions: *HT v The Queen* (2019) 93 ALJR 1307 at [43]–[46]; [60]; [87].

[1-010] Reasons for decision

In *Markarian v The Queen* (2005) 228 CLR 357 at [39], Gleeson CJ, Gummow, Hayne and Callinan JJ remarked: "The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public".

Sentencers must give reasons for their decision. The statement of reasons forms a significant function in the administration of the criminal law: *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [42]–[43]; *R v Duffy* [1999] NSWCCA 321 at [11]; *R v JCE* (2000) 120 A Crim R 18 at [19]. In *Thomson and Houlton* at [42], Spigelman CJ put the obligation in these terms:

> Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of the common law that justice must not only be done but must manifestly be seen to be done. The obligation of a Court is to publish reasons for its decision, not merely to provide reasons to the parties.

Remarks on sentence provide an oral explanation to the offender, the victim(s) and persons in court at the time when sentence is being passed: *R v Hamieh* [2010] NSWCCA 189 at [29]. The use of language which is "totally incomprehensible to the offender" is to be avoided where possible: *R v Taylor* [2005] NSWCCA 242 per

Grove J at [10]. Sentence remarks must be intelligible to the lay listener or reader; they are one means by which the community is informed of the work of the courts: *Taylor v R* [2018] NSWCCA 255 at [53].

The requirement to give reasons for decisions has to be understood in the context of the environment in which each court operates. Generally speaking, more detailed reasons are required for matters dealt with on indictment. The Court of Criminal Appeal decisions are primarily directed to the District Court judges. However, a sentence judgment should not be constructed as a checklist where statutory or common law principles of sentencing are enumerated and then 'ticked off' to avoid the prospect of an appeal: *Taylor v R* at [51].

The reasons in *Gallant v R* [2006] NSWCCA 339 were two double-spaced pages of transcript. This was not in itself an indication of error but the brevity of the remarks risked the judge failing to adequately refer to matters of significance in the determination of sentence. The reasons were inadequate in relation to the standard non-parole period provisions.

A judge should do more than state the general sentencing principles that apply; more important is an explanation of how those principles have been applied: *R v Van Ryn* [2016] NSWCCA 1 at [123], [141]; *Taylor v R* at [52], [56]; *Porter v R* [2019] NSWCCA 117 at [67]. The offender and the community at large are entitled to know *why* and *how* a particular period of imprisonment has been assessed: *Porter v R* at [67]. Further, mere recitation of the facts for each offence will not satisfy the requirement to assess the objective seriousness of an offence: *R v Van Ryn* at [133], [141].

Matters dealt with on indictment

The obligation to give reasons requires a sentencing judge to identify which matters have been taken into account, especially aggravating factors: *DBW v R* [2007] NSWCCA 236 at [33]. Remarks on sentence should "adequately reveal [the judge's] reasoning process": *R v Lesi* [2010] NSWCCA 240 per Hoeben J at [36]. It is desirable that sentencing judges summarise precisely the facts giving rise to the offence(s), including findings in relation to all matters taken into account in mitigation or aggravation of sentence and the reasoning which leads to the sentence imposed: *Thomas v R* [2006] NSWCCA 313 at [16]. The reasons should, however briefly, state the findings of fact upon which the judge is persuaded and expose a process of reasoning for an appeal court. An appellate court will not assume the judge has taken into account an aggravating factor which is not contested where it is not clear and where there is no express rejection of submissions supporting the course: *DBW v R* at [37].

The judge erred in *Gal v R* [2015] NSWCCA 242 by making no reference to the facts of the offence and by failing to assess the objective seriousness of the offence despite references to seriousness in argument. There was an insufficient statement of the basis upon which the applicant was sentenced: *Gal v R* at [37]. A sentencing judgment should state or refer to the essential facts upon which an offender is sentenced and provide at least some assessment of, or reflection upon, the seriousness of the offences: *Gal v R* at [37], [39].

In *R v Alcazar* [2017] NSWCCA 51, the judge erred by failing to explain how he resolved the question of consent which was at issue on sentence. It was encumbent on the judge to explain how he had resolved that issue and why: *R v Alcazar* at [44]–[46].

There is a limit to which remarks on sentence can be scrutinised on appeal. Remarks on sentence are often delivered ex tempore. In *R v McNaughton* [2006] NSWCCA 242 at [48], Spigelman CJ remarked: "The conditions under which District Court judges give such reasons are not such as to permit their remarks to be parsed and analysed".

Local Court

It is accepted that any scrutiny of the reasons given in remarks on sentence in the Local Court must take into account that the court is ordinarily dealing with a huge volume of work and has less time to deal with cases as exhaustively as those dealt with on indictment. In *Acuthan v Coates* (1986) 6 NSWLR 472 at 478–479, Kirby P said:

> It is also to fall into the error of examining this unedited and unpunctuated record of ex tempore remarks in a busy magistrate's court, as if the transcript were a document to be construed strictly. It is the substance of what the magistrate said and did that the court is concerned with. Any other approach would impose an intolerable burden on magistrates. When that substance is examined, it is sufficiently clear that the magistrate held the correct tests in mind and properly approached the exercise of the discretion reposed in him …

This principle in *Acuthan v Coates* was applied in the context of a statutory requirement to give reasons in *Tez v Longley* (2004) 142 A Crim R 122 at [33] and *JIW v DPP (NSW)* [2005] NSWSC 760 at [67]. The pressure under which courts of summary jurisdiction work has been acknowledged: *Roylance v DPP* [2019] NSWSC 933 at [13], [16]; *Yassin v Williams* [2007] WASC 8 at [31]–[34]; *Talukder v Dunbar* [2009] ACTSC 42; (2009) 194 A Crim R 545 at [16], [60]. However, this does not obviate the need for reasons to be given, even if the proceedings are ex-parte: *Roylance v DPP* at [12]–[16].

[1-020] Contemporaneity between passing of sentence and expression of reasons

There must be contemporaneity between the handing down of the sentence and the expression of the judge's reasons: *R v CJP* [2003] NSWCCA 187. The court said in *CJP* at [66]:

> The separation of the imposition of the sentence from the expression of the appropriate reasons not only creates a sense of injustice in the mind of all concerned with the sentencing process but also creates significant practical difficulties.

The court accepted a submission at [68] that:

> such separation tended to bring the sentencing process into disrepute, as it may suggest that the reasons are being moulded to fit in with a predetermined sentence, rather than the other way around.

[1-030] Published in oral form

The reasons for a decision should be published in oral form. In *R v Bottin* [2005] NSWCCA 254 at [12], Studdert J explained the logic of this requirement:

> all in court can be made fully acquainted not only with the sentence or sentences being passed but with the reasons for such sentence or sentences as well. Obviously, this is of particular concern to the offender, any victim or victims, and any relatives of the

> victim or victims who may be present in court. Publication of reasons by oral means also affords the opportunity for correction if there is some obvious error revealed in the expression of the sentencing remarks.

In *Curtis v R* [2007] NSWCCA 11 at [30]–[31], the court held that the sentencing judge's failure to publish the 70-page remarks orally breached the requirement stated in *Bottin*. The excuse given to the parties, that the judge's voice would not sustain the exercise, was not a sufficient reason. The court acknowledged at [31] that "the sheer length of the remarks was itself a deterrent to oral delivery", but this was "a reason for economy in the preparation of the remarks".

[1-040] Opportunity of addressing the court on issues

Generally speaking, judges should afford both parties the opportunity of addressing and placing arguments before the court in proceedings for offences dealt with on indictment. This includes an opportunity to address the sentencer on penalty: *R v Tocknell* (unrep, 28/5/98, NSWCCA), citing *R v Tait* (1979) 24 ALR 473 at 476–477. In *Tocknell*, Hulme J said:

> To deny a party that opportunity is also a fundamental breach of the requirements of procedural fairness. Of course, some latitude exists in the application of the principle … Sometimes a judge, conscious that he is about to make a decision in accordance with that sought by a party will, particularly in a busy list, not invite address by that party. Not infrequently a party which has received an indication from a tribunal of an intention to make a decision in that party's favour will see no need to address. For many years it was almost an invariable practice for the Crown not to address on penalty and, in those days, a judge could be pardoned for relying on any prosecutor who wished to depart from this practice to so indicate. However, for some years now it has been common for persons appearing for the Crown in the District and Supreme Court to address on penalty and, indeed, it has been made clear that there is an obligation on the Crown to assist the judge in the sentencing exercise — *Tait v Bartley* 24 ALR 473 at 476–7. If there is the remotest possibility that a decision will be adverse to a party's interest, a judge must allow, and in my view should invite, that party or its legal representative to address the court.

While it is permissible for a judge to form a preliminary view of the appropriate sentence, and while a judge is not obliged to listen to meritless argument, the principles of impartiality and procedural fairness require that an offender's submissions be listened to without pre-judgment: *Anae v R* [2018] NSWCCA 73 at [51]–[54]. The obligation to accord procedural fairness to the parties was emphasised by the High Court in *DL v The Queen* (2018) 92 ALJR 764 at [39]. In that case, the failure of the appellate court to put the offender's counsel on notice that the court intended to depart from concessions made by the prosecutor in the sentence proceedings resulted in a miscarriage of justice. So too in *HT v The Queen* (2019) 93 ALJR 1307, where the appellant was not given access to evidence of his assistance to authorities for the purposes of a Crown appeal against his sentence, and could neither test the evidence or make submissions: *HT v The Queen* at [21], [23], [27], [57]; [66]–[67].

However, a sentencing judge is not obliged to raise with the parties factual findings that should have been obvious, including where the offender's evidence is inherently implausible. The parties bear the onus of presenting the evidence each thinks necessary for the court to properly determine the issues. It is not the sentencing court's

responsibility to specifically enumerate matters in dispute and raise possible findings of fact before making them. This would place an impossible burden on sentencing courts: *Gwilliam v R* [2019] NSWCCA 5 at [124]–[128].

Agreed facts

The opportunity to address on relevant matters has been applied in several contexts. In *Yaghi v R* [2010] NSWCCA 2 at [50], RA Hulme J said that a sentencer will err:

> if he or she fails to give notice that he or she is minded to sentence upon a basis which differs from that contained in a statement of agreed facts and fails to provide an opportunity for the parties to address on that issue.

See also *R v Falls* [2004] NSWCCA 335 per Howie J at [37] and *Purdie v R* [2019] NSWCCA 22 per Price J at [54]. It was open to the sentencing judge in *Zammit v R* [2010] NSWCCA 29 at [27] to reject the offender's sworn evidence contradicting agreed facts since the judge properly raised the issue with the parties. Similarly, there is no error where the judge indicates a view on a topic, considers it further, contemplates a different approach, and then informs the parties for the purpose of permitting an opportunity for further submissions: *Yaghi v R* at [53], quoting *R v Howard* [2004] NSWCCA 348 at [47] with approval.

Later increasing a proposed sentence

Procedural fairness is denied where the judge indicates the sentence he or she will impose at the hearing but later increases it without notice when judgment is delivered: *Baroudi v R* [2007] NSWCCA 48 at [33]; *Button v R* [2010] NSWCCA 264 at [18]; *Weir v R* [2011] NSWCCA 123 at [78]-[80]; *Ng v R* [2011] NSWCCA 227 at [48]-[51]. Latham J said in *Button v R* at [18] that whatever the reason for the judge's departure, the applicant was "entitled to receive the sentence that was accepted by the Judge and the parties as an appropriate sentence in all the circumstances". Justice Price said in *Baroudi v R*, at [33], Sully and Howie JJ agreeing, that it was preferable for the judge to have indicated that his views were only tentative. However, in *Weir v R*, it was held there was a breach of procedural fairness notwithstanding the judge expressed a "tentative" view as to the proposed sentence (see [69], [75]) because the judge had also made other comments that it is "highly likely that that would be the sentence": at [69]–[71], [75]–[77]. For the judge to later impose a lengthier sentence than the proposed sentence occasioned "a practical injustice and substantial unfairness": *Weir v R* at [78].

The cases of *Button v R* and *Weir v R*, which involved indications about the proposed sentence, are to be distinguished from those where the procedural breach is a failure by the judge to foreshadow the rejection of uncontested evidence: *R v Wang* [2013] NSWCCA 2 at [81]. Where that occurs, the question on appeal is whether, assuming the evidence was accepted, a less severe sentence is warranted in law under s 6(3) *Criminal Appeal Act 1912*. Only when that question is answered in the affirmative is it proper for the court to ask for submissions on the issue or to remit the matter for re-sentence on that premise: *R v Wang* at [81].

During submissions in *Fairbairn v R* (2006) 165 A Crim R 434 at [37], the judge indicated that it was not appropriate to impose cumulative sentences but did so after the matter was reserved for judgment. The court held that the applicant was denied the opportunity of having his legal representative put arguments in favour of concurrency.

Fairbairn v R is to be contrasted with *Toole v R* [2014] NSWCCA 318 at [47], where the judge was held to be entitled to impose partially cumulative sentences despite the Crown's written submission conceding that concurrent sentences could (rather than should) be imposed. It was not a case where the judge changed his or her view like in *Fairbairn v R*.

Information in other cases, prevalence and receiving evidence from the co-offender

A judge who intends to rely on information he or she has obtained in other cases, should disclose his or her intention to the parties to afford the parties an opportunity of objecting or of taking other steps: *R v JRB* [2006] NSWCCA 371 at [42].

However, a judge is entitled to sentence at a range above that suggested by the Crown at the hearing and is not obliged to give specific reasons in the remarks for doing so: *R v Weininger* (2000) 119 A Crim R 151 at [45], and see *Weininger v Queen* (2003) 212 CLR 629 at [84].

An appellate court can deny procedural fairness by departing from a previous non-binding authority without giving notice that it was considering it, and without the appellant having a proper opportunity to make submissions: *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494 (although it did not occur in that case).

In *R v House* [2005] NSWCCA 88 at [23] it was held that if a judge decides that the increasing prevalence of a particular crime calls for an increase in the pattern of sentencing, counsel should be warned to enable the parties to address on the issue.

In *Le v R* [2007] NSWCCA 330, evidence which was adverse to the applicant's assertion that he had acted under duress was given by his co-offender. It was received by the court when the applicant and his legal representative were absent. The court held at [29]:

> Procedural fairness required that [the co-offender's] evidence be given when the applicant and his counsel were present and could challenge it. Procedural fairness also called for the opportunity to be provided to the applicant in further evidence to deal with what [the co-offender's] had said.

Adjournment of sentence proceedings

A refusal to stand down or adjourn sentence proceedings to allow a party the opportunity to obtain further supporting documents can in some circumstances amount to a denial of procedural fairness: *Talukder v Dunbar* [2009] ACTSC 42; (2009) 194 A Crim R 545 at [51].

There is a line of West Australian and South Australian authority quoted in *Yassin v Williams* [2007] WASC 8 at [14]–[18] which holds that a court considering a sentence of immediate imprisonment for a self-represented defendant should first inform the defendant of that prospect and offer the opportunity of an adjournment for the purpose of obtaining legal advice where it is possible to obtain it. See further *Scanlon v Bove* [2008] WASC 213 at [66] and *Powell v WA* [2010] WASC 54 at [23].

[1-045] Excessive intervention by the court

On some occasions an unsatisfactory statement of facts is presented to the court in the sentencing proceedings. It is not the function of the court to perform an inquisitorial

role in cases where this occurs. The court should adjudicate upon the issues raised by the parties: *Ellis v R* [2015] NSWCCA 262 at [70]; *Chow v DPP* (1992) 28 NSWLR 593. The court is entitled to seek clarification of matters raised in evidence but in drug supply cases it cannot insist on an offender to identify his or her co-offenders: *Ellis v R* at [68] citing *Pham v R* [2010] NSWCCA 208 at [27] and *R v Baleisuva* [2004] NSWCCA 344 at [29].

Excessive intrusion by the court in adversarial proceedings to fill gaps puts at risk a fair trial and impairs the judicial officer's ability to properly assess the demeanour of a witness: *Ellis v R* at [57]. A reasonable apprehension of bias may arise where the judge intervenes in proceedings to the extent of taking over the leading of evidence from a witness as this suggests they have stepped beyond the role of impartial arbiter of the facts as presented by the parties: *Tarrant v R* [2018] NSWCCA 21 at [67]–[72]. However, it is not necessary to show a reasonable apprehension of bias where excessive intrusion by the judicial officer is alleged by an offender on appeal: *Ellis v R* at [65]. The ultimate question must always be whether intervention was unjustifiable and resulted in a miscarriage of justice: *Ellis v R* at [57]. A miscarriage of justice will occur where the intervention prevents a party from properly presenting his or her case: *Ellis v R* at [65].

A judge's intervention in proceedings, by requesting earlier versions of expert reports or questioning a witness, may disclose bias against a party if it suggests the judge would not assess the evidence and arguments solely on their merits: *Mansweto v R* [2019] NSWCCA 232 at [59]–[61]. Such intervention in the particular circumstances of that case was warranted because the conduct of the defence case delayed finalising the sentence proceedings.

[1-050] Opportunity of meeting the whole case

The offender must have a fair opportunity of meeting the case against him or her: *Thompson v The Queen* (1999) 73 ALJR 1319 at [13]–[14]. In both *R v Mohamad* [2005] NSWCCA 406 at [14] and *R v Ryan* (2003) 141 A Crim R 403 at [29], the offender was not "put on notice by the Crown or by the presiding judge that his assertion was not to be accepted". In *The Queen v Olbrich* (1999) 199 CLR 270 at [52], Kirby J said that the accused should be made aware of all of the material relied upon by the court:

> In the event that asserted facts are disputed, those facts must be proved or disregarded. It is the duty of the judge to ensure (if there be any doubt) that the accused is aware of all of the material provided to the court upon which the judge will rely in determining the sentence.

[1-060] Appeals

If the judge is contemplating an increased sentence in a severity appeal from the Local Court to the District Court he or she must indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal: *Parker v DPP* (1992) 28 NSWLR 282 at 295. The principle extends to a change in the character of the sentence from an alternative form of imprisonment to one served by way of full-time detention: *Jones v DPP* (1994) 76 A Crim R 422. Justice Kirby collects the authorities

in a discussion in *R H McL v The Queen* (2000) 203 CLR 452 at [126]–[127]. Notice of an increased sentence is not required in a Crown appeal against sentence (from the Local Court) because the Crown is seeking an increase and the respondent has no statutory right to withdraw the appeal: *Barendse v Comptroller-General of Customs* (1996) 93 A Crim R 210.

See also **Fact finding at sentence** at [1-455].

[1-070] Warnings for high risk and terrorism-related offenders

A court sentencing a person for a:

- **serious offence** is to cause the person to be advised of the existence of the *Crimes (High Risk Offenders) Act 2006* and of its application to the offence under s 25C. A serious offence is defined in s 4(1) as including a serious sex offence or a serious violence offence. Those terms are defined in ss 5(1) and 5A respectively.
- **NSW indictable offence** is to cause the person to be advised of the existence of the *Terrorism (High Risk Offenders) Act 2017* and of its application to the offence: s 70. A "NSW indictable offence" is defined in s 4(1). However, in determining whether the particular person needs to be advised of the operation of the Act, regard should also be had to the definition of an "eligible offender" in s 7 and the definitions of a "convicted NSW terrorist offender" in s 8, a "convicted NSW underlying terrorism offender" in s 9(1) and a "convicted NSW terrorism activity offender" in s 10(1).

The following suggested form of words for use in respect of the *Crimes (High Risk Offenders) Act* includes a brief explanation of the operation of the Act and an encouragement to the offender to undertake rehabilitation (see s 3, which sets out the objects to the Act):

> *I am obliged to tell you of the existence of the* Crimes (High Risk Offenders) Act *2006, which applies to "serious offences" including the offence for which you have been sentenced.*
>
> *In summary, this means that the State can apply to the Supreme Court for an order that you continue to receive supervision or be held in detention at the end of your sentence if the court considers you would be a "high risk offender" who poses an unacceptable risk of committing a serious offence.*
>
> *It is, therefore, in your interests to engage in rehabilitation opportunities that may be offered to you in the course of your sentence.*
>
> *[Add, for the purposes of the* Terrorism (High Risk Offenders) Act *2017*:
>
> *Conduct that you engage in while you are in custody may also affect whether or not you could be subject to ongoing supervision or detention after your sentence for this offence is completed.]*

The form of words suggested above could also be adapted for use for the purpose of informing the person of the existence of the *Terrorism (High Risk Offenders) Act* as the objects of this Act are, relevantly, in identical terms to the *Crimes (High Risk Offenders) Act*.

However, the terms of s 70 *Terrorism (High Risk Offenders) Act* are broader because it appears to suggest an offender sentenced to a term of imprisonment for any NSW

indictable offence should be informed of the potential operation of the Act. The court should seek the assistance of the parties before informing the person of the operation of this Act. Note also s 16 which provides that the *Terrorism (High Risk Offenders) Act* does not limit the circumstances in which an order can be made in respect of an eligible offender under the *Crimes (High Risk Offenders) Act*.

For an example of orders made under the *Crimes (High Risk Offenders) Act*, see *R v ZZ* [2013] NSWCCA 83 at [149].

[The next page is 1101]

Obligations of the parties

[1-200] The prosecutor

The duty of the prosecution at sentence is outlined by the High Court in *Barbaro v The Queen* (2014) 253 CLR 58 at [39]. It is "… to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases". The court will have all the information which is necessary to decide what sentence should be passed without any need for the prosecution to proffer its view about available range: *Barbaro v The Queen* at [38]. A guilty plea does not relieve the Crown of its obligation to prove its case on sentence without assistance from the offender: *Strbak v The Queen* [2020] HCA 10 at [32].

The prosecutor has a "… duty to assist the court to avoid appealable error where a sentencing judge indicates the form (as opposed to the duration) of a proposed sentencing order and the prosecutor considers it to be manifestly inadequate": *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2015) 90 ALJR 113 per French CJ, Kiefel, Bell, Nettle and Gordon JJ at [40] explaining the decision of *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at [63]-[64].

In *CMB v Attorney-General (NSW)*, (2015) 89 ALJR 407 French CJ and Gaegler J had said at [38]:

> The Crown (by whomever it is represented) has a duty to assist a sentencing court to avoid appealable error. That duty would be hollow were it not to remain rare that an 'appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error' fn *R v Tait* (1979) 24 ALR 473 at 477.

[1-203] Submissions as to the bounds of the range prohibited

The prosecution may make a submission that a custodial or non-custodial sentence is appropriate in a particular case: Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 29.12.4; Legal Profession Uniform Conduct (Barristers) Rules 2015, r 95(d).

However, a prosecutor is not required, and should not be permitted, to make a submission as to the bounds of the available sentencing range or to proffer some statement of the specific result: *Barbaro v The Queen* at [7], [39]. Such a statement is one of opinion and is neither a proposition of law or fact which a sentencing judge may properly take into account: *Barbaro v The Queen* at [7], [39], [43], [49]. It is not the role of the prosecution to act as a surrogate judge: *Barbaro v The Queen* at [29]. Allowing prosecutors to proffer a view of the sentencing range assumes they will determine the range dispassionately. But in cases where the offender has, or will, assist authorities or where a plea of guilty avoids a very long and costly trial, the prosecutor's view cannot be dispassionate: *Barbaro v The Queen* at [32].

The court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work*

Building Industry Inspectorate (2015) 90 ALJR 113 had cause to clarify the ambit of *Barbaro v The Queen* specifically on the question whether a court could receive and accept submissions regarding agreed penalties in civil penalty proceedings. The court held that the basic differences between criminal prosecution and civil proceedings provide a principled basis for excluding the application of *Barbaro v The Queen* from civil proceedings and so the parties were therefore entitled to make submissions as to agreed penalty: *Commonwealth of Australia* at [1], [56]; [68]; [79]. French CJ, Kiefel, Bell, Nettle and Gordon JJ at [40] reiterated that the Crown's opinion as to an appropriate length of sentence in criminal proceedings is irrelevant (footnotes excluded) at [56]:

> … in criminal proceedings the imposition of punishment is a uniquely judicial exercise of intuitive or instinctive synthesis of the sentencing facts as found by the sentencing judge (consistently with the jury's verdict) and the judge's relative weighting and application of relevant sentencing considerations in accordance with established sentencing principle. There is no room in an exercise of that nature for the judge to take account of the Crown's opinion as to an appropriate length of sentence. For the purposes of imposing a criminal sentence, the question is what the judge considers to be the appropriate sentence. Nor can there be any question of a sentencing judge being persuaded by the Crown's opinion as to the range of sentences open to be imposed. As was observed in *Barbaro*, apart from the conceptually indeterminate boundaries of the available range of sentences and systemic problems which would likely result from a criminal sentencing judge being seen to be influenced by the Crown's opinion as to the available range of sentences, the Crown's opinion would in all probability be informed by an assessment of the facts and relative weighting of pertinent sentencing considerations different from the judge's assessment. That is why it was held in *Barbaro* that it is inconsistent with the nature of criminal sentencing proceedings for a sentencing judge to receive a submission from the Crown as to the appropriate sentence or even as to the available range of sentences.

In "The prosecutor's role in sentencing" (2014) 26(6) *JOB* 47 at 48, Basten JA and Johnson J, writing extra-judicially, said:

> The lesson [to be derived from *Barbaro v The Queen*] is that the prosecution should provide more, rather than less, assistance. As the High Court noted, the statement of a range is at least unhelpful and probably misleading if the underlying elements are not articulated. The underlying elements will include: (a) the facts of the particular case; (b) the maximum penalty and standard non-parole period (if any); (c) mitigating and aggravating factors identified by the relevant statute; (d) if parity is an issue, the sentences imposed on co-offenders; (e) sentencing statistics (if useful) and (f) details of comparable cases.

Barbaro v The Queen did not alter the pre-existing duty of the prosecutor to assist the court by the making of submissions as to comparable and relevant cases: *DPP (Cth) v Thomas* [2016] VSCA 237 at [178] citing *Matthews, Vu and Hashmi v The Queen* (2014) 44 VR 280, 292; [27]–[28] and *R v Ogden* [2014] QCA 89 at [7].

[1-205] Professional Rules and DPP Guidelines

The duty to avoid appealable error is reflected in the Legal Profession Uniform Conduct (Barristers) Rules 2015: r 95(c) and the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015: r 29.12.3 and, potentially, r 19.2.

The Director of Public Prosecutions issues Prosecution Guidelines under s 13 *Director of Public Prosecutions Act 1986*. Chapter 2.4 addresses the obligations of the Crown at sentence and consolidates the case law on the subject, such as *R v Tait & Bartley* (1979) 24 ALR 473:

> **Guideline 2.4 The role of the prosecutor in sentencing** [Issued March 2021]
>
> The prosecutor has an active role to play in the sentencing process.
>
> It is the duty of the prosecutor to present the facts of the case at sentence. Whenever possible a statement of agreed facts should be submitted (see Guideline 4.4).
>
> If the offender is being sentenced after trial or hearing, the prosecutor should prepare a summary of the facts capable of being found by the judge or magistrate that is consistent with the verdict.
>
> Where facts are asserted on behalf of the offender that are contrary to the prosecutor's position on a matter of some significance to sentence, the prosecutor should identify areas in agreement and those to be determined following a hearing (often referred to as a 'disputed facts hearing').
>
> The prosecutor must:
>
> 1. make submissions addressing the objective seriousness of the offence and the subjective circumstances of the offender where known
> 2. inform the court of any relevant authority or legislation bearing on the appropriate sentence
> 3. inform the court about the outcome of proceedings against any co-offender and provide copies of relevant material before the court that dealt with a co-offender
> 4. fairly test the evidence or assertions advanced for the offender where necessary
> 5. correct any error made on behalf of the offender during a sentence hearing
> 6. assist the court to avoid appellable error on the issue of sentence.
>
> The prosecutor must provide reasonable notice to the defence of any witness required for cross-examination. If the prosecutor has been given insufficient notice of defence material to properly consider the prosecution's position or verify defence assertions, an adjournment should be sought. Whether notice is insufficient will depend on the seriousness of the offence, the complexity and volume of the new material, the significance of the new allegations, the degree of divergence between the prosecution and defence positions and the availability of the means to check the material's reliability.
>
> A prosecutor may:
>
> 1. submit that a sentence of full-time detention is appropriate or that a sentence other than full-time detention is within range, but must not suggest or recommend a numerical sentence or a sentencing range in a particular case, unless by reference to a guideline judgment
> 2. provide statistical material and details of comparable cases where it would assist the court, indicating how the court would be assisted
>
> A prosecutor must not in any way limit the discretion of the Director to appeal against the inadequacy of the sentence.

For prosecutorial obligations in respect of Form 1 offences, see **Charge negotiations: prosecutor to consult with victim and police** at [13-275] and **Obligation on the Crown to strike a balance** at [13-250].

Duty of disclosure

The prosecution's duty of disclosure extends to disclosing material relevant to sentence proceedings: *R v Lipton* (2011) 82 NSWLR 123 at [82]. See also, Office of the Director of Public Prosecutions Prosecution Guidelines, Ch 13; Legal Profession Uniform Conduct (Barristers) Rules 2015, rr 87, 91; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, r 29.5, 29.8. In *R v Lipton*, the police were obliged to provide material to the DPP who had to form a view as to whether the material was relevant and, where relevant, advise the offender of any claim for public interest immunity which would be determined by a court. Sections 15A(6) and (7) *Director of Public Prosecutions Act 1986* provide that police are not required to disclose material subject to privilege, public interest immunity or statutory immunity unless requested by the DPP: ss 15A(6)–(9). If such a request is made it "must" be provided: ss 15A(7).

[1-210] The defence

There are papers by Public Defenders (past and present) which articulate the role and obligations of the defence lawyer at sentence notably:

- *Sentencing in the District Court: Practical Considerations* by John Stratton SC, Deputy Senior Public Defender, www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20 Defenders/public_defenders_sentencing_district_court.aspx, accessed 2 November 2016
- *Tactical Plea Making in the Superior Courts* by Chris Craigie SC (original paper 1998); revised by Chrissa Loukas, Public Defender (September 2009), www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_tactical_plea_making_sup_courts.aspx, accessed 2 November 2016
- *Common Ethical Problems for the Criminal Advocate* by Justice Hidden (for the May 2003 Public Defence Conference), www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20-%20A%20to%20K/hidden_2003.05.00.pdf, accessed 2 November 2016.

The proscription of quantified sentencing range submissions under *Barbaro v The Queen* does not apply to defence counsel; a plea in mitigation would be significantly compromised if the defence was prevented from making such submissions: *Matthews, Vu and Hashmi v The Queen* [2014] VSCA 291 at [22], [24].

It is the duty of defence representatives to raise matters in their clients' favour: *Toole v R* [2014] NSWCCA 318 at [44]. Defence counsel should consider, and bring to the court's attention, any alternative sentencing options which might reasonably be available in the circumstances of an individual case: *EF v R* [2015] NSWCCA 36 at [13], [58]. A failure to do so "may be the cause of injustice": *EF v R* per Simpson J at [13].

Defence practitioners have an obligation, unless circumstances warrant otherwise in the practitioner's considered opinion, to advise a client of matters that reduce penalty. Rules r 39–41 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 address criminal pleas. It is the duty of the barrister to advise the client generally about any plea to the charge: r 39(a). The barrister may, in an appropriate case, advise the client that a guilty plea is generally regarded by a court as a mitigating factor: r 40.

[1-220] Duty of legal practitioners to assist sentencing judge

There is a fundamental obligation on legal practitioners appearing in sentence proceedings to assist the sentencing judge. All practitioners must ensure the judge is not led into error by the provision of incorrect information: *Haines v R* [2021] NSWCCA 149 at [66]–[67]; *McGovern aka Lanesbury v R* [2021] NSWCCA 176 at [76]–[78]. They must be astute to correct misstatements by judges when they occur. If a judge misstates the maximum penalty whilst giving reasons in open court, it is the duty of the practitioners appearing to correct the error immediately even if it involves interrupting the judge to draw his or her attention to the matter. If not done immediately, it should be done before the proceedings conclude and preferably before sentence is passed: *Campbell v R* [2018] NSWCCA 17 at [34]; *Kandemir v R* [2018] NSWCCA 154 at [71].

[The next page is 1151]

Fact finding at sentence

[1-400] The judicial task of finding facts

In *R v MacDonell* (unrep, 8/12/95, NSWCCA) at 1, Hunt CJ at CL stated:

> The sentencing procedures in the criminal justice system depend upon sentencers making findings as to what the relevant facts are, accepting the principles of law laid down by the Legislature and by the courts, and exercising a discretion as to what sentence should be imposed by applying those principles to the facts found.

It is for the sentencer, alone, to decide the sentence to be imposed and for that purpose, the sentencer must find the relevant facts: *GAS v The Queen* (2004) 217 CLR 198 at [30]. The majority of the High Court acknowledged the significance of fact finding at sentence in *The Queen v Olbrich* (1999) 199 CLR 270 at [1]:

> Unless the legislature has limited the sentencing discretion, a judge passing sentence on an offender must decide not only what type of penalty will be exacted but also how large that penalty should be. Those decisions will be very much affected by the factual basis from which the judge proceeds. In particular, the judge's conclusions about what the offender did and about the history and other personal circumstances of the offender will be very important.

Findings of fact about matters such as motive or the degree of an offender's involvement have a significant effect on the assessment of an offender's moral culpability. There are many cases involving either a plea of guilty, or a conviction following a plea of not guilty, where the task of assessing an offender's culpability is more difficult than that of determining his or her guilt: *Cheung v The Queen* (2001) 209 CLR 1 per Gleeson CJ, Gummow and Hayne JJ at [8].

[1-405] Onus of proof

In *The Queen v Olbrich* (1999) 199 CLR 270 at [24], the High Court collected the authorities in Australia for the previous 30 years in relation to the onus and standard of proof at sentence. The majority judges said at [25]:

> References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution and offender in sentencing proceedings; there is no such joinder of issue. Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. (We say "if necessary" because the calling of evidence would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.).

The guilty plea is the offender's formal admission of the legal ingredients of the offence and the High Court in *Strbak v The Queen* (2020) 267 CLR 494 said, at [32]–[33], that because of this:

> … as the joint reasons in *R v Olbrich* explain, references to the onus of proof in the context of sentencing may be misleading if they are taken to suggest that some general issue is joined between the prosecution and defence.

A guilty plea does not relieve the prosecution of its obligation to prove the facts of the primary case on which it seeks to have the offender sentenced *without* the offender's assistance.

[1-410] Standard of proof

A court may not take facts into account in a way that is adverse to the interests of the offender unless those facts have been established beyond reasonable doubt: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]–[28]; *Leach v The Queen* (2007) 230 CLR 1 at [41]; *Filippou v The Queen* (2015) 89 ALJR 776; [2015] HCA 29 at [64], [66]; *Strbak v The Queen* (2020) 267 CLR 494 at [32]. The offender bears the burden of proving on the balance of probabilities matters which are submitted in his or her favour: *Filippou v The Queen* at [64], [66]; *The Queen v Olbrich* at [27]–[28].

[1-420] Disputed factual issues

The court must do its best to find facts concerning the offending and the offender's moral culpability. In some cases it is not possible to ascertain everything that is relevant especially where an offender chooses not to offer any evidence on the plea: *Filippou v The Queen* [2015] HCA 29 at [70]. Framing the fact finding process by using terms such as the onus and standard of proof may give a misleading impression that all disputed issues of fact related to sentencing must be resolved for or against the offender: *Weininger v The Queen* (2003) 212 CLR 629 at [19]. Some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed: *Weininger v The Queen* at [19]. It is sometimes not possible for the court to ascertain everything that is relevant. Where that occurs the court must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard: *Filippou v The Queen* at [70]. The court is not bound to adopt the view of the facts most favourable to the offender: *Filippou v The Queen* at [5], [70], [72]; *Weininger v The Queen* at [20]. In this respect, the fact finding process in Australia differs from the common law jurisdictions of England, Canada and New Zealand: *Filippou v The Queen* at [71]. Therefore, in *Filippou v The Queen*, there was no error for the court to sentence the offender on the basis that the origin of the gun was unknown after the court had rejected the offender's submissions to the contrary.

Disputed facts should be resolved by the accusatorial process, upon the evidence before the court applying the respective onus and standards of proof: *O'Neill-Shaw v R* [2010] NSWCCA 42 at [26]. Counsel for the parties did not discharge their duty to the court and imposed "a significant procedural irregularity" on the sentencer where there was no agreed statement of facts and the sentencer was expected to resolve disputed issues in the absence of cross-examination: *O'Neill-Shaw v R* at [48].

However, if evidence is unchallenged by the prosecution, and it is not inherently implausible, the sentencer is not entitled to reject it or fail to act on it without giving proper notice to the offender of that intended course: *O'Neill-Shaw v R* at [26], citing *R v Palu* [2002] NSWCCA 381 at [21]. *O'Neill-Shaw v R* involved a disputed history of violence by the victim towards the offender which was relied upon to lessen the applicant's culpability: at [54]. The judge, in the absence of evidence to the contrary, should have accepted and taken into account the unchallenged material: at [28]. "Where

there has been no cross-examination, 'judges should in general abstain from making adverse findings about parties and witnesses': *MWJ v The Queen* (2005) 80 ALJR 329": *O'Neill-Shaw v R* per Basten JA at [27].

[1-430] Factual issues need not be either aggravating or mitigating factors

Each factual matter found at sentence need not fit into the extremes of aggravating and mitigating factors. In *Weininger v The Queen* (2003) 212 CLR 629 at [22], the High Court said:

> Many matters that must be taken into account in fixing a sentence are matters whose proper characterisation may lie somewhere along a line between two extremes. That is inevitably so. The matters that must be taken into account in sentencing an offender include many matters of, and concerning, human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

[1-440] Fact finding following a guilty verdict

In *Savvas v The Queen* (1995) 183 CLR 1 at 8, Deane, Dawson, Toohey, Gaudron and McHugh JJ referred to the "principle that a sentencing judge may form his or her own view of the facts, so long as it does not conflict with the jury's verdict". Fact finding following a jury verdict is affected by the inscrutability of a jury verdict. In *Cheung v The Queen* (2001) 209 CLR 1 the High Court (the joint judgment at [14]; Callinan J at [169]) cited the decision of *R v Isaacs* (1997) 41 NSWLR 374 with approval on the question of fact finding following a jury verdict. The joint judgment summarised the law at [14]:

> In *Isaacs* the Court of Criminal Appeal summarised certain well-established principles concerning the law and practice of sentencing in New South Wales as follows [(1997) 41 NSWLR 374 at 377–378 per Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ] (omitting references to authority):
>
> "1. Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury …
>
> 2. Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings …
>
> 3. The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury …
>
> 4. A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt …
>
> 5. There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender. … However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, then the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender …".

The joint judgment in *Cheung v The Queen* stresses that a jury's verdict decides the issues joined by the plea to the indictment. It does not decide, either expressly or by implication, all facts of possible relevance to sentencing. It may be possible to infer that certain parts of the evidence must have been accepted by the jury. However, it is impossible to know whether some or all of the jurors accepted all of the evidence relied upon by the prosecution. Relying on evidence on sentence that is fundamentally inconsistent with the evidence given at the trial (or making findings based on it which are inconsistent with those which, in all probability, formed the basis of the jury's verdict), in a manner favourable to the prosecution, is not permitted: *Tarrant v R* [2018] NSWCCA 21 at [92].

[1-445] Exceptions to approach in Cheung and Isaacs

In *Chiro v The Queen* (2017) 260 CLR 425, the court held that the approaches taken in *Cheung v The Queen* (2001) 209 CLR 1 and *R v Isaacs* (1997) 41 NSWLR 374 were not intended to govern sentencing for a persistent sexual offence charge. See further **Maintain unlawful sexual relationahip with child: s 66EA** at **[17-500]**.

[1-450] Fact finding following a guilty plea

A plea of guilty admits those matters which are the essence of the charge: *Strbak v The Queen* (2020) 267 CLR 494 at [32]. It does not admit the non-essential ingredients an offence: *R v O'Neill* [1979] 2 NSWLR 582 at 588; *Duffy v R* [2009] NSWCCA 304 at [21]. In *GAS v The Queen* (2004) 217 CLR 198 at [30], five members of the High Court said of fact finding following a plea of guilty:

> In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case.

For example, in *Duffy v R* at [20], an agreed statement facts was silent on the question of whether an assault was committed at the instigation of an offender by pre-arrangement with his co-offenders. The applicant testified he came upon the victim by chance. It was not open on the evidence for the judge to find that the applicant "deliberately set out with some friends in case he needed assistance to deal with the victim": at [21].

[1-455] Plea agreements

Often where an offender pleads guilty, sentencing procedures are marked by a degree of informality. Usually, an agreed statement of facts, sometimes negotiated between the accused and the prosecution, will be placed before the sentencing judge: *The Queen v Olbrich* (1999) 199 CLR 270 per Kirby J at [52]. In *GAS v The Queen* (2004) 217 CLR 198 at [27]–[32], the High Court said that plea agreements are affected by five fundamental principles:

1. It is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person.
2. It is the accused person, alone, who must decide whether to plead guilty to the charge preferred.
3. It is for the sentencing judge, alone, to decide the sentence to be imposed.

4. There may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found, the relevant law and sentencing principles.
5. An erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law.

In *GAS v The Queen*, the purported part of the plea agreement "that each offender should receive a lesser sentence than a principal" breached the fourth principle. The court said at [39]:

> It was an inappropriate subject for any kind of agreement between counsel. It related, in substance, to the significance for a sentencing judge's discretion of a circumstance that varies in importance from case to case.

See also *Barbaro v The Queen* (2014) 253 CLR 58 at [44]–[48].

Plea agreements should ordinarily be recorded in writing

The High Court in *GAS v The Queen* added the following general observations about plea agreements at [42]:

> It is as well to add some general observations about the way in which the dealings between counsel for the prosecution and counsel for an accused person, on subjects which may later be said to have been relevant to the decision of the accused to plead guilty, should be recorded. In most cases it will be desirable to reduce to writing any agreement that is reached in such discussions. Sometimes, if there is a transcript of argument, it will be sufficient if an agreed statement is made in court and recorded in the transcript as an agreed statement of the position reached. In most cases, however, it will be better to record the agreement in writing and ensure that both prosecution and defence have a copy of that writing before it is acted upon. There may be cases where neither of these courses will be desirable, or, perhaps, possible, but it is to be expected that they would be rare.

[1-460] Agreed statements of facts

In *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

> Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory.

In *Loury v R* [2010] NSWCCA 158, there were no written instructions to plead guilty from the applicant. There was no suggestion the Agreed Statement of Facts had ever been read over, signed or explained to him: at [107]–[108]. The court found a serious miscarriage of justice in *Loury v R*. The agreed statement of facts were "entirely inconsistent with the instructions the appellant had given to [his solicitor]": at [108]. Nor was the appellant aware of his solicitor's plea negotiations with the Crown: at [81].

However, in *CL v R* [2014] NSWCCA 196, the applicant unsuccessfully sought to challenge the agreed statement of facts to which his legal representatives did not object. The court held that the applicant was bound by the conduct of his counsel at the sentence hearing: *CL v R* at [44]. On the other hand, the statement of facts tendered by the applicant had no such standing: *CL v R* at [45].

Must be comprehensible

The assistance a sentencing judge is entitled to expect from the Crown and an offender's counsel, particularly in complex cases, commences with the agreed facts: *Kareem v R* [2022] NSWCCA 188 at [1] (Price J).

It is the statutory obligation of the Crown to ensure the agreed statement of facts presents, in a comprehensible fashion, the facts and circumstances of the offences upon which it seeks the court to sentence the offender: *Della-Vedova v R* [2009] NSWCCA 107 at [14]. The statement of facts must be framed so the court can discern what is agreed to be fact and what is merely assertion: *Della-Vedova v R* at [11]. In *Kareem v R* the court was unanimous in its criticism of the unnecessary complexity caused by the tender of different agreed facts for two co-offenders which made it difficult for the sentencing judge to properly assess the roles of each: at [1] (Price J); [2]–[3] (N Adams J); [87] (Ierace J). As to the approach that should be taken, Ierace J, at [87], said:

> A court that is tasked with sentencing co-offenders on the basis of agreed facts should be provided with facts, either separate or combined, that clearly delineate the roles of each offender. The agreed facts in both cases fell short of that standard.

While N Adams J acknowledged that the negotiation of agreed facts was a matter for the parties, her Honour said, at [3], that:

> This case highlights yet again the problems that can arise when care is not taken in the negotiation process to arrive at facts which do not make the sentencing process unnecessarily complex.

It is unsatisfactory to leave the preparation of the statement of agreed facts to those whose function and expertise is in investigation (in this case, the AFP, NSW Police and NSW Crime Commission), and not those who are trained, skilled and experienced in the preparation of evidence: *Della-Vedova v R* at [14].

Tender of additional documents

The wisdom of tendering the entire Crown brief in addition to the agreed statement of facts where a plea agreement has been reached was doubted by the court in *R v H* [2005] NSWCCA 282 at [58] and *R v Bakewell* (unrep, 27/6/96, NSWCCA). This is because it runs a risk that the sentencer will take into account facts that will aggravate the offence contrary to the principle in *The Queen v De Simoni* (1981) 147 CLR 383: *R v FV* [2006] NSWCCA 237 at [41]. In *R v FV* the complainant's statement was used as an elaboration of the agreed statement of facts. The court held it provided an insight into her ordeal and supplemented, rather than contradicted, the agreed statement. In *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

> Where agreed facts are presented and the other materials tendered by either side depart from the agreed facts, counsel should draw this to the judge's attention and advise which is to prevail and on what facts the offender should be sentenced. If this does not happen and the judge subsequently discovers that there is a difference he should raise it with the parties and not proceed to sentence until the matter is resolved by agreement or otherwise.

Assigning a higher degree of culpability

If a sentencer decides to assign a higher degree of culpability to the offender than disclosed in the agreed facts, he or she should give the offender an opportunity to address the judge's view: *R v Uzabeaga* [2000] NSWCCA 381 at [38], referred to in *Yaghi v R* [2010] NSWCCA 2 at [50].

It is open for a judge to sentence in accordance with the agreed statement of facts despite contradictory sworn evidence from the offender, but where a judge decides to sentence an offender other than in accordance with those facts, this should be referred to during the remarks on sentence: *Zammit v R* [2010] NSWCCA 29 at [26]. The judge should not act on material inconsistent with, or in amplification of, some aspect of the agreed facts, without first bringing this to the parties' attention: *Zammit v R* at [26]; *R v Falls* [2004] NSWCCA 335 per Howie J at [37]; *R v Crowley* at [46].

See also **Procedural fairness** at **[1-040]** and **[1-050]**.

Form 1 documents and agreed facts

A court must not take into account offences specified in a list of additional charges on a Form 1 (see s 32) or any statement of agreed facts that was the subject of charge negotiations, unless the prosecutor has filed a certificate with the court. The certificate must verify that the consultation between the victim and the police officer in charge of investigating the offence has taken place or, if consultation has not taken place, the reasons why it has not occurred. The certificate must also verify that any statement of agreed facts, tendered to the court, which arises from the negotiations constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts, or has otherwise been settled in accordance with the applicable prosecution guidelines: s 35A *Crimes (Sentencing Procedure) Act 1999*.

See **Charge negotiations: prosecutor to consult with victim and police** at **[13-275]**.

Parity and agreed facts

For a discussion on parity and agreed facts, see *Baquiran v R* [2014] NSWCCA 221 in **Parity** at **[10-801]**.

[1-470] Factual disputes following a committal for sentence

Last reviewed: November 2023

Chapter 3 Pt 2 Div 8 *Criminal Procedure Act 1986*, and particularly s 97, enables an accused to plead guilty to an indictable offence in committal proceedings before a magistrate and, if the plea is accepted, the accused is committed to the District or Supreme Court for sentence. Where a dispute concerning essential facts arises during sentence proceedings (see generally *R v Radic* [2001] NSWCCA 174, although this considered s 51A(1)(d) of the *Justices Act 1902* (rep)), the courses available to a sentencing judge are set out in s 101 which provides that the judge may order the committal proceedings continue before a magistrate if—

(a) it appears from the information or evidence given that the facts in respect of which a court attendance notice was issued do not support the offence to which the accused person pleaded guilty, or

(b) the prosecutor requests the order be made, or

(c) the judge thinks fit to do so.

Section 102(1) states that the court "may, on the basis of a court attendance notice, indictment or charge certificate, proceed to sentence or otherwise deal with an accused person brought before the Court under section 97 as if [they] had on arraignment …

pleaded guilty to the offence on an indictment filed or presented". Of the equivalent provision, s 51A(1)(d)(ii) *Justices Act 1902* (rep), Carruthers AJ said, in *R v Radic* [2001] NSWCCA 174 at [38], that the judge can direct that a plea of not guilty be entered and the matter proceed to trial.

In *R v Radic*, where the accused had been committed for sentence for break, enter and commit serious indictable offence (steal), the court held that the judge erred by resolving a factual dispute at sentence (whether the goods allegedly stolen were jewellery or a drill) in favour of the accused. It was for the Crown, not the accused, to nominate the goods and the charge should have identified the specific property allegedly stolen: at [32], [38]. Carruthers AJ (Hidden J and Badgery-Parker AJ agreeing) said at [30] that the plea of guilty "admits those matters which are of the essence of the charge. [It]…does not, however, admit non-essential ingredients of the offence". See also *Dean v R* [2019] NSWCCA 27 at [19]–[24] and *Hamilton v DPP* [2020] NSWSC 1745 at [84]–[114] where, in each, a similar issue was considered although in different contexts.

[1-480] Application of the Evidence Act 1995 to sentencing

Often the prosecution brief (or parts of it) tendered by the Crown at sentence may not conform to the ordinary rules of evidence. The rules of evidence can be invoked at sentence in appropriate cases.

Section 4(2) *Evidence Act* provides that the Act applies to sentencing proceedings only if: (a) the court directs that the law of evidence applies in the proceeding, and (b) if the court specifies in the direction that the law of evidence applies only in relation to specified matters — the direction has effect accordingly.

Section 4(3) provides:

> The court must make a direction if:
>
> (a) a party to the proceeding applies for such a direction in relation to the proof of a fact, and
>
> (b) in the court's opinion, the proceeding involves proof of that fact, and that fact is or will be significant in determining a sentence to be imposed in the proceeding.

Section 4(4) provides:

> The court must make a direction if the court considers it appropriate to make such a direction in the interests of justice.

The court in *Youkhana v R* [2013] NSWCCA 85 made a direction that the *Evidence Act* applied and then admitted (in the Crown case) a statement of an unavailable witness under s 65(2)(b) and (d). Note that the test for admission of such a statement is different where a defendant seeks to have such a statement admitted under s 65(8): *Baker v The Queen* (2012) 245 CLR 632 at [55]. In *Lam v R* [2015] NSWCCA 143, the court applied the provisions of the *Evidence Act* (on appeal) to determine whether it was open for the judge to reject a psychologist's opinion favourable to the offender. The judge did not accept the history upon which the opinion evidence was based. This was a legitimate basis for rejecting the conclusions in an expert's report: *Lam v R* at [58]; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

A court has no power to make a costs order under s 177(7) *Evidence Act* unless or until it gives a direction (in accordance with s 4(2)(a)) that the *Evidence Act* applies to sentencing proceedings: *Badans v R* [2012] NSWCCA 97 at [81].

Section 191 *Evidence Act* deals with agreements as to facts. The section provides that, where "formalities are met", no evidence can be adduced to contradict or qualify an agreed fact unless the court gives leave under s 191(2)(b). Formalities in the context of sentencing will include that the parties have signed the agreed statement of facts as encouraged in *GAS v The Queen* (2004) 217 CLR 198 at [42]. The section was discussed in *R v FV* [2006] NSWCCA 237 at [35], [39], [44].

In *Duffy v R* [2009] NSWCCA 304 at [20], the court suggested that the prosecutor could have utilised s 44(3) *Evidence Act* where there was a factual dispute about the offender's involvement in a joint criminal enterprise. The prosecutor could have invited the offender to read particular answers given by his co-offenders to police (recorded in a statement to police or a record of interview) and then asked the offender to either confirm that the information was true, or identify where it was false, in accordance with s 44(3). In the event the prosecutor was faced with denials by the offender, it would then have been open to attempt to prove the matters by other admissible evidence.

[1-490] Untested self-serving statements

The fact that the rules of evidence are rarely invoked and that hearsay evidence is routinely admitted does not mean the court is not required to critically assess the weight of the evidence before it. The Court of Criminal Appeal has said repeatedly that while hearsay evidence of statements made by offenders to doctors, psychologists, psychiatrists and parole officers in reports is admissible on sentence, very considerable caution should be exercised in relying on such statements when the prisoner does not give any evidence and the matters are in dispute: *R v Harrison* [2001] NSWCCA 79 at [32]; *R v Hooper* [2004] NSWCCA 10 at [49]; *Munro v R* [2006] NSWCCA 350 at [17]–[19]; *Woodgate v R* [2009] NSWCCA 137 at [19]; *Butters v R* [2010] NSWCCA 1 at [18].

The Court of Criminal Appeal has criticised the practice of placing such material before sentencing judges in an attempt to minimise the objective seriousness of a crime otherwise apparent on the face of a record: *R v Qutami* [2001] NSWCCA 353, per Smart AJ at [58]–[59], and per Spigelman CJ at [79]. Great caution should also be exercised when accepting exculpatory or mitigatory histories from offenders recorded in documents tendered on sentence but not supported by sworn evidence: *Lewin v R* [2017] NSWCCA 65 at [26]; *PH v R* [2017] NSWCCA 79 at [53], [56].

In *Imbornone v R* [2017] NSWCCA 144, Wilson J set out at [57] a number of principles to be applied when a sentencing judge is faced with an untested statement made to a third party:

1. Although statements made to third parties are generally admissible in sentence proceedings (subject to objection and the application of the rules of evidence) courts should exercise very considerable caution in relying upon them where there is no evidence given by the offender. In many cases such statements can be given little or no weight: *R v Qutami* [[2001] NSWCCA 353] at [58]–[59].
2. Statements to doctors, psychologists, psychiatrists, the authors of pre-sentence reports and others, or assertions contained in letters written by an offender and

tendered to the court, should all be treated with considerable circumspection. Such evidence is untested, and may be deserving of little or no weight: *R v Palu* [[2002] NSWCCA 381 at [40]–[41]]; *R v Elfar* [2003] NSWCCA 358 at [25]; *R v McGourty* [2002] NSWCCA 335 at [24]–[25].

3. It is open to a court in assessing the weight to be given to such statements to have regard to the fact that an offender did not give evidence and was not subject to cross-examination: *Butters v R* [2010] NSWCCA 1 at [18]. It is one matter for an offender to express remorse to a psychologist or other third party and quite another to give sworn evidence and be cross-examined on the issue: *Pfitzner v R* [2010] NSWCCA 314 at [33].

4. If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his or her criminality, or otherwise mitigate penalty, then it should be done directly and in a form which can be tested: *Munro v R* [2006] NSWCCA 350 at [17]–[19].

5. Whilst evidence in an affidavit from an offender which is admitted into evidence without objection may be accepted by a sentencing judge (see *Van Zwam v R* [2017] NSWCCA 127), generally the circumstances in which regard should be had to such untested evidence is limited. Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience": *R v Harrison* [[2001] NSWCCA 79] at [44].

However, notwithstanding the caution that should be taken to untested self-serving statements by an offender to an expert witness, such as a psychiatrist, when there is evidence from the expert about the offender's mental state, it may be wrong to take an unduly restrictive approach to such evidence, particularly when it may be supported by other evidence in the case: *Luque v R* [2017] NSWCCA 226 at [71]–[84]; see also the observations by McCallum JA in *Lloyd v R* [2022] NSWCCA 18 at [46]–[47].

[1-500] De Simoni principle

In *The Queen v De Simoni* (1981) 147 CLR 383 at 389, Gibbs CJ said:

> the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

The court reiterated in *Nguyen v The Queen* (2016) 90 ALJR 595 at [29] that "the *De Simoni* principle is an aspect of the fundamental principle that no one should be punished for an offence of which the person has not been convicted".

If another offence carries a higher maximum penalty than does the offence for which the offender is being sentenced, that other offence will be a more serious offence for

the purposes of the principles stated in *The Queen v De Simoni*. See for example *R v Booth* (unrep, 12/11/93, NSWCCA); *R v Channells* (unrep, 30/9/97, NSWCCA); *R v JB* [1999] NSWCCA 93; *R v Hector* [2003] NSWCCA 196.

The effect of s 21A(4) *Crimes (Sentencing Procedure) Act 1999* is to require the court to disregard a matter of aggravation cited in s 21A because to take it into account would be to punish the offender for an offence which was more serious than that for which the offender was to be sentenced: *R v Wickham* [2004] NSWCCA 193 at [26]. This consideration is most likely to arise when the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act 1900*, such as that the offence was committed in company, that the offender used a weapon, or that the offender was in a position of trust.

See also **Section 21A(2) and the De Simoni principle** at **[11-050]** in **Section 21A Factors "in addition to" any Act or rule of law** .

The principle operates for the benefit of an offender and does not apply to preclude a court taking into account the absence of a circumstance which, if present, would render the offender guilty of a more serious offence: *Nguyen v The Queen* at [29], [60] overturning *R v Nguyen* [2013] NSWCCA 195 at [52]. However, such an enquiry, although not a breach of *De Simoni*, is irrelevant: *Nguyen v The Queen* at [29].

Taking into account aggravating facts for offences with the same maximum

In *R v Overall* (1993) 71 A Crim R 170 at 175, Mahoney JA, Allen J agreeing, said that "the precise ambit of the principle is yet to be determined". The uncertainty about the ambit of the principle was explained by Hunt CJ at CL in *R v Crump* (unrep, 30/5/94, NSWCCA):

> It has sometimes been argued in this court that [the *De Simoni*] principle applies also to exclude as an aggravating feature any fact established in the evidence if that fact would by itself have rendered the offender guilty of *any* other offence, whether or not that other offence would have rendered the offender liable to a more serious penalty than that to which he is liable for the offence for which he is being sentenced. That is *not* so. At first blush, the early eighteenth century principle to which Gibbs CJ referred in of his judgment (at 389) would support such an argument, but the modern authorities which the Chief Justice went on to discuss (at 389–391) make it clear that such a fact should be excluded only where it would have made the offender liable to a *more serious* penalty. [emphasis in original]

The proposition that the principle cannot be transgressed *unless* the offender is exposed to a higher maximum penalty has been called into question in some cases. As the discussion in the chapters referred to below shows, the mere fact that "the other offence" carries the same maximum penalty does not necessarily preclude the operation of the *De Simoni* principle. For example, in *Cassidy v R* [2012] NSWCCA 68 at [6], [26] offences under ss 27 to 30 *Crimes Act* which require an intent to kill and which have standard non-parole periods, were regarded as "more serious" for the purposes of the *De Simoni* principle than an offence under s 198 *Crimes Act* (destroying or damaging property with intention of endangering life) notwithstanding that the latter offence has the same maximum penalty. Ultimately, what *De Simoni* requires is an assessment of whether "the other offence" is more serious. The course that the charge negotiations have taken in the particular case may also have a bearing on whether it is unfair to take into account a particular aggravating feature.

For a discussion of the application of the *De Simoni* principle to particular offences see **Break and enter offences** at **[17-060]**; **Sexual offences against children** at **[17-450]**; **Dangerous driving** at **[18-370]**; **Public justice offences** at **[20-150]**; **Robbery** at **[20-210]**, **[20-220]**, **[20-250]**, **[20-260]**, **[20-280]**; **Sexual assault** at **[20-650]**; **Assault, wounding and related offences** at **[50-030]**, **[50-050]**–**[50-090]**, **[50-120]**; **Damage by fire and related offences** at **[63-015]**.

[The next page is 2001]

Crimes (Sentencing Procedure) Act 1999

Sentencing procedures generally

[The next page is 2051]

Application of the Act

[2-000] Short statutory history

The *Crimes (Sentencing Procedure) Act 1999* (the Act) implemented a number of significant changes that were recommended by the NSW Law Reform Commission in its report on sentencing: *Sentencing,* Report 79, Sydney, 1996.

When it was introduced, the principal objective of the Act was to rationalise and consolidate sentencing law. The *Sentencing Act 1989*, the *Community Service Orders Act 1979*, the *Periodic Detention of Prisoners Act 1981* and the *Home Detention Act 1996* were repealed, and their contents amalgamated with sentencing provisions previously contained in the *Crimes Act 1900*, the *Criminal Procedure Act 1986* and the (since repealed) *Justices Act 1902*. But as Spigelman CJ remarked in *R v Carrion* (2000) 49 NSWLR 149 at [15], the Act "… is in large measure a consolidating Act, but it is not only a consolidating Act".

While the *Crimes (Sentencing Procedure) Act* preserved several features of the common law, it also introduced several reforms. Some of the key reforms introduced were to:

- Require the court firstly to set the term of the sentence to be imposed and then to set a non-parole period, pursuant to s 44. (This was later amended in 2002, to require the court firstly to set the non-parole period and then the balance of the term).
- Re-introduce suspended sentences as a sentencing option under s 12. (These were later abolished in 24 September 2018. Existing s 12 bonds cease to have effect 3 years from the date of abolition.)
- Require a court which imposes a sentence of less than six months imprisonment to give reasons why the court is of the view that no penalty other than imprisonment is appropriate: s 5(2).
- Modify some sentencing terminology, such as replacing "recognisance" with "good behaviour bond", and replacing "cumulative sentences" with "consecutive sentences". (Good behaviour bonds were later replaced in 2018 with conditional release orders.)
- Create a statutory version of the common law "Griffiths remand", which involves deferring sentence and granting bail while rehabilitation or assessment is undertaken: s 11.
- Expand the guideline sentencing provisions, so as to allow the Attorney General to apply for a guideline judgment for summary offences, and to formally authorise the Director of Public Prosecutions to intervene in proceedings following a guideline application.

Since its introduction the Act has been repeatedly amended. The notable amendments to date include the insertion of s 21A (aggravating, mitigating and other factors in sentencing) and Pt 4 Div 1A (standard non-parole periods).

[2-010] Primacy of the Act

The primacy of the *Crimes (Sentencing Procedure) Act 1999* in sentencing law has been recognised by the Court of Criminal Appeal as:

> … provid[ing] the framework upon which a court determines the sentence to be imposed upon a particular offender for any offence. The Act provides the sentencing practice, principles and penalty options that operate in all courts exercising State jurisdiction. There are also the sentencing principles and practices derived from the common law and that have been preserved by the provisions of the Act.: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* (2004) 61 NSWLR 305 per Howie J at [45].

[The next page is 2101]

Purposes of sentencing

[2-200] The common law

Section 3A *Crimes (Sentencing Procedure) Act 1999* sets out the purposes for which a court can impose a sentence. Given that s 3A does not depart from the common law (see further below), the starting point for any discussion of the purposes of punishment must be *Veen v The Queen (No 2)* (1988) 164 CLR 465 where Mason CJ, Brennan, Dawson and Toohey JJ said at 476:

> … sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection 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.

In *R v Engert* (unrep, 20/11/95, NSWCCA) Gleeson CJ said at 68 after discussing *Veen v The Queen (No 2)*:

> A moment's consideration will show that the interplay of the considerations relevant to sentencing may be complex and on occasion even intricate. …
>
> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

The common law concept of retribution is discussed at **[2-297]**.

[2-210] Section 3A

Section 3A sets out the following seven purposes "for which a court may impose a sentence on an offender":

(a) to ensure that the offender is adequately punished for the offence,

(b) to prevent crime by deterring the offender and other persons from committing similar offences,

(c) to protect the community from the offender,

(d) to promote the rehabilitation of the offender,

(e) to make the offender accountable for his or her actions,

(f) to denounce the conduct of the offender,

(g) to recognise the harm done to the victim of the crime and to the community.

The High Court said of s 3A in *Muldrock v The Queen* (2011) 244 CLR 120 at [20]:

> The purposes there stated [in s 3A] are the familiar, overlapping and, at times, conflicting, purposes of criminal punishment under the common law [*Veen v The Queen (No 2)* at 476–477]. There is no attempt to rank them in order of priority and nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* [at 476] in applying them. [Relevant footnote references included in square brackets.]

In *Re Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (unrep, 20/12/2002, NSWCCA) Spigelman CJ at [57]–[60] raised the question of whether the terms of s 3A(e) and (f) constituted a change from the common law approach. The above statement in *Muldrock* suggests that s 3A does not depart from the common law. See also other comments to the same effect in *R v MA* [2004] NSWCCA 92 at [23]; *R v King* [2004] NSWCCA 444 at [130]; *R v MMK* [2006] NSWCCA 272 at [10].

It is an appellable error to fail to address the purposes of sentencing at all: *R v Stunden* [2011] NSWCCA 8 at [112]. A failure to expressly refer to each does not mean that they were not considered: *R v Stunden* at [113].

The following discussion will elaborate upon each of the subsections in s 3A.

[2-230] To ensure that the offender is adequately punished for the offence: s 3A(a)

Section 3A(a) incorporates the common law principle of proportionality, as acknowledged in *R v Scott* [2005] NSWCCA 152. Howie J, Grove and Barr JJ agreeing, said at [15]:

> There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed and the circumstances of the crime committed. This principle arose under the common law: *R v Geddes* (1936) SR (NSW) 554 and *R v Dodd* (1991) 57 A Crim R 349. It now finds statutory expression in the acknowledgment in s 3A of the *Crimes (Sentencing Procedure) Act* that one of the purposes of punishment is "to ensure that an offender is adequately punished". The section also recognises that a further purpose of punishment is "to denounce the conduct of the offender".

The principle of proportionality operates to guard against the imposition of unduly lenient or unduly harsh sentences. The principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *R v McNaughton* (2006) 66 NSWLR 566 at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Dodd* (unrep, 4/3/91 NSWCCA) and *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158].

In *R v Dodd* (unrep, 4/3/91 NSWCCA) the court explained that the process of applying the principle of proportionality involves assessing the relative seriousness of the crime. The court said at 354:

> As Jordan CJ pointed out in *Geddes* at 556, making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and

> the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place. Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472; 33 A Crim R 230 at 234 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary: see, for example, the passage from the judgment of Street CJ in *Todd* [1982] 2 NSWLR 517 quoted in *Mill* (1988) 166 CLR 59 at 64; 36 A Crim R 468. Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case: *Rushby* [1977] 1 NSWLR 594.

[2-240] To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)

Last reviewed: August 2023

Deterrence is, and remains, omnipresent in sentencing law. An argument that use of the word 'may' in s 3A operated to remove the long established sentencing principles relating to specific and general deterrence was firmly rejected in *Weribone v R* [2018] NSWCCA 172: [14], [54].

Section 3A(b) gives statutory recognition to the common law principles of specific and general deterrence. Deterrence theory is predicated on the assumption that the harsher the punishment the greater the deterrent effect. However, the utility of general deterrence has been questioned (see discussion below).

It is axiomatic that the purpose of the criminal law is to deter not only the offender but also others who might consider breaking the law. The Court of Criminal Appeal has consistently cited with approval the New Zealand decision of *R v Radich* [1954] NZLR 86 (first in *R v Goodrich* (1955) 72 WN (NSW) 42 and more recently in *R v Hamieh* [2010] NSWCCA 189 at [63]). The New Zealand Criminal Court of Appeal said at 87:

> … one of the main purposes of punishment … is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.

The High Court in *Munda v Western Australia* (2013) 87 ALJR 1035 at [54] affirmed the place of general and specific deterrence in sentencing law (see below) and again in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186 at [65] on the question of setting deterrent civil penalties (see below).

In *R v Harrison* (unrep, 20/2/97, NSWCCA) at 320 Hunt CJ at CL said at 320:

> Except in well-defined circumstances such as youth or the mental incapacity of the offender … public deterrence is generally regarded as the main purpose of punishment, and the subjective considerations relating to the particular prisoner (however persuasive) are necessarily subsidiary to the duty of the courts to see that the sentence which is imposed will operate as a powerful factor in preventing the commission of similar crimes by those who may otherwise be tempted by the prospect that only light punishment will be imposed.

General deterrence might be regarded as important because of the notoriety or high profile of the offender (see for example, *R v Wilhelm* [2010] NSWSC 378 at [30] referred to in *R v Mauger* [2012] NSWCCA 51 at [38]). It has been held that weight should be given by a court to specific and general deterrence for a range of offences including:

- Armed robberies: *Tilyard v R* [2007] NSWCCA 7 at [22]; and when committed by young offenders in *R v Sharma* (2002) 54 NSWLR 300.
- Firearm offences: *R v Howard* [2004] NSWCCA 348 at [65]–[66]; and particularly when multiple shots were fired in *Haidar v R* [2007] NSWCCA 95 at [57].
- Drug offences: importing narcotics in *R v Bezan* [2004] NSWCCA 342 at [37]; and supplying prohibited drugs in *R v Ha* [2004] NSWCCA 386 at [20]; *Ma v R* [2007] NSWCCA 240 at [97].
- Fraud offences: defrauding the revenue in *R v Howe* [2000] NSWCCA 405 at [13]; social security fraud in *Johnsson v R* [2007] NSWCCA 192 at [40]; fraud by a public officer in *Studman v R* [2007] NSWCCA 263 at [11], [39]; insider trading in *R v Rivkin* (2004) 59 NSWLR 284 at [423]; *R v Hannes* (2002) 173 FLR 1; [2002] NSWSC 1182; and crimes involving the market or other forms of business dealings in *R v Pogson* (2012) 82 NSWLR 60 at [143]; calculated contravention of legislation where commercial profit is the driver of the contravening conduct: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* at [65].
- Offences committed against police officers acting in the course of their duty: *R v Adam* [1999] NSWSC 144 at [44]–[45]; *Curtis v R* [2007] NSWCCA 11 at [85].
- Offences against justice: *R v Nomchong* (unrep, 10/4/1997, NSWCCA) including contempt in *Field v NSW Crime Commission* [2009] NSWCA 144 at [20] quoting Kirby P's reference in *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314–315 to *DPP v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 741.
- Violent offences: committed in a domestic context: *Simpson v R* [2014] NSWCCA 23 at [35]; *Smith v R* [2013] NSWCCA 209 at [69]; *R v Hamid* [2006] NSWCCA 302 at [68]; and premeditated violence, particularly leading to grievous bodily harm, in *R v Najem* [2008] NSWCCA 32 at [33].
- Solicit to murder: *R v Potier* [2004] NSWCCA 136 at [56].
- Sexual offences involving children: *R v ABS* [2005] NSWCCA 255 at [26]; *R v CMB* [2014] NSWCCA 5 at [47]–[48]; and possession of child pornography in *R v Gent* [2005] NSWCCA 370 at [65]; *Minehan v R* [2010] NSWCCA 140 at [98].
- Sexual assaults: where the offender took advantage of the fact that the complainant was asleep in *Dean v R* [2006] NSWCCA 341 at [52].
- Offences committed in prisons: *R v Hoskins* [2004] NSWCCA 236 at [63].
- Drink driving offences: *Application by the Attorney-General Under Section 37 Crimes (Sentencing Procedure) Act For a Guideline Judgment Concerning the Offence of High-Range Prescribed Concentration of Alcohol Under Section 9(4) Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* (2004) 61 NSWLR 305 at [118]–[119].

- Offences dealt with on a Form 1 under s 33 *Crimes (Sentencing Procedure) Act*: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* (2002) 56 NSWLR 146 at [42].
- Offences involving a breach of trust: white collar offenders in *R v El Rashid* (unrep, 7/4/95, NSWCCA) and *R v Pont* [2000] NSWCCA 419 at [36]; legal practitioners in *R v Pangallo* (unrep, 13/8/91, NSWCCA); police officers in *R v Patison* [2003] NSWCCA 171 at [45]; and priests in *R v Ryan (No 2)* [2003] NSWCCA 35 at [26].

Specific or personal deterrence is applicable where an offender has a prior criminal record which manifests a continuing attitude of disobedience, such that more weight should be given to retribution, personal deterrence or protection of the community: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477; *R v Rice* [2004] NSWCCA 384 at [26]; *R v Abboud* [2005] NSWCCA 251 at [33]; *R v McNaughton* (2006) 66 NSWLR 566 at [54].

The operation of general or personal deterrence can be affected by the prominence of other principles in the circumstances of the case. Some examples are:

- Evidence of rehabilitation may mitigate the need for personal deterrence: *Stanford v R* [2007] NSWCCA 73 at [19].
- The motive for the commission of the offence may have a mitigating effect on the need for personal deterrence, but the more serious the offence the less weight can be given to motive as a mitigating factor: *R v Mitchell* [2007] NSWCCA 296 at [31]–[32].
- Where an offender acts under duress, considerations of deterrence, rehabilitation, retribution and community protection may be "appreciably different" than in usual cases: *Papadopoulos v R* [2007] NSWCCA 274 at [176]–[177].
- The offender is a person with a very low risk of re-offending: *R v Mauger* [2012] NSWCCA 51 at [39].
- If the offender's moral culpability is reduced because of profound childhood deprivation (see *Bugmy v The Queen* (2013) 249 CLR 571) so general deterrence is of less significance, but greater emphasis to community protection may be necessary: *Dungay v R* [2020] NSWCCA 209 at [141].

Mental condition and deterrence

General deterrence is attributed little weight in cases where the offender suffers from a mental condition or abnormality because such an offender is not an appropriate medium for making an example of: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]–[54]; *R v Anderson* [1981] VR 155; *R v Scognamiglio* (unrep, 23/8/91, NSWCCA). In *R v Wright* (unrep, 28/2/97, NSWCCA) at [51] Hunt CJ at CL said that, while this was an accepted principle, if the offender acts with knowledge of what he is doing and with knowledge of the gravity of his actions, the moderation need not be great. See also *R v Letteri* (unrep, 18/3/92, NSWCCA), *R v Israil* [2002] NSWCCA 255 per Spigelman CJ at [21]–[23] and *R v Matthews* [2004] NSWCCA 112 Wood CJ at CL at [22]–[27]. In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ, when considering a case involving an applicant with diagnoses of antisocial personality disorder and polysubstance abuse — recognised in the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington

DC — concluded that it was by no means clear that such mental conditions should always justify reducing the application of general deterrence. At [23] the Chief Justice said:

> Although *DSM(IV)* has come to be widely used … it should not be assumed that … [by] affixing a label to a mental condition … [the] condition is such as to attract the sentencing principle that less weight is to be given to general deterrence …

See further "The relevance of an offender's mental condition" in **Subjective matters at common law** at **[10-460]**.

Arguments about the limited utility of general deterrence

The effectiveness of general deterrence has always been the subject of debate. King CJ in *Yardley v Betts* (1979) 1 A Crim R 329 at 333 remarked:

> The courts must assume, although the evidence is wanting, that the sentences which they impose have the effect of deterring *at least some people* from committing crime. [Emphasis added.]

In *Munda v Western Australia* (2013) 87 ALJR 1035 at [54], the High Court acknowledged that general deterrence may have limited utility in some circumstances:

> It may be argued that general deterrence has little rational claim upon the sentencing discretion in relation to crimes which are not premeditated. That argument has special force where prolonged and widespread social disadvantage has produced communities so demoralised or alienated that it is unreasonable to expect the conduct of individuals within those communities to be controlled by rational calculation of the consequences of misconduct. In such cases it may be said that heavy sentences are likely to be of little utility in reducing the general incidence of crimes, especially crimes of passion. That having been said, there are three points to be made in response. First, the proper role of the criminal law is not limited to the utilitarian value of general deterrence. The criminal law is more than a mode of social engineering which operates by providing disincentives directed to reducing unacceptably deviant behaviour within the community. To view the criminal law exclusively, or even principally, as a mechanism for the regulation of the risks of deviant behaviour is to fail to recognise the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence …

The court's second point (at [43]) was to agree with an observation by McLure P in the WA Court of Appeal (*Western Australia v Munda* [2012] WASCA 164 at [65]) that "addictions ordinarily increase the weight to be given to personal deterrence (and/or community protection) because of the associated increase in the risk of reoffending". The fact that the offence was committed where the abuse of alcohol is common must be taken into account in assessing his personal moral culpability, but that consideration must be balanced with the seriousness of the appellant's offending.

The court's third point was to affirm (at [58]) Gleeson CJ's observation in *R v Engert* (unrep, 20/11/95, NSWCCA) at [68] that the:

> … interplay of the considerations relevant to sentencing may be complex … in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance ...

> It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances …

The High Court in *Munda* also affirmed (at [59]) a statement in *Wong v The Queen* (2001) 207 CLR 584 at [74]–[76] adopted by the joint judgment in *Markarian v The Queen* (2005) 79 ALJR 160 at [37] that the description of the balance struck by a sentence as an "instinctive synthesis" is not used:

> … to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

In the later case of *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186, the court held that general and specific deterrence must play a primary role in assessing the appropriate civil penalty in cases of calculated contravention of legislation for commercial profit: at [65].

Deterrence to be applied notwithstanding criticisms

Before the enactment of s 3A(b) (which affirms the continued relevance of deterrence), Spigelman CJ said in *R v Wong* (1999) 48 NSWLR 340 at [127]–[128] that legislation would be required to change the court's approach to deterrence:

> There are significant differences of opinion as to the deterrent effect of sentences, particularly, the deterrent effect of marginal changes in sentence. Nevertheless, the fact that penalties operate as a deterrent is a structural assumption of our criminal justice system. Legislation would be required to change the traditional approach of the courts to this matter.
>
> Deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice. Guideline judgments are a mechanism for increasing the efficiency of the transmission of such knowledge. Deterrence is an appropriate basis for promulgation of a guideline. (See *Henry* [(1999) 46 NSWLR 346] at [41] and [205]–[211]; *Police v Cadd* (1997) 94 A Crim R 466 at 511; and my address "Sentencing Guideline Judgments" 11 *CICJ* 5 at 10–11; 73 *ALJ* 876 at 880–881).

In *R v Miria* [2009] NSWCCA 68 at [8], the sentencing judge erred by omitting to incorporate any reflection of general deterrence in his sentencing assessment. The sentencing judge echoed the first part of Spigelman CJ's comments in *R v Wong* concerning the "significant differences of opinion as to the deterrent effect of sentences", but did not heed the Chief Justice's qualification which recognised the legal imperative to acknowledge general deterrence: *R v Miria* at [13]. There is no legal authority permitting a judge to dismiss general deterrence as a factor for assessment in sentencing: *R v Miria* at [11].

General deterrence may be controversial in relation to some offences, but this is not the case with respect to crimes involving the market or other forms of business dealings: *R v Pogson* (2012) 82 NSWLR 60 at [143].

In the context of civil penalties, the High Court has held that pecuniary penalties should be fixed according to what might reasonably be thought as appropriate to

serve as a real deterrent to the corporate offender and to its competitors: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 304 ALR 186 at [66].

[2-250] To protect the community from the offender: s 3A(c)

Parliament did not intend by the enactment of s 3A(c) to introduce a system of preventative detention contrary to the principles expressed by the High Court in *Veen v The Queen (No 2)* (1988) 164 CLR 465: *Aslett v R* [2006] NSWCCA 49 at [137].

At common law it was accepted that the various purposes of punishment were said to achieve the single or main purpose, that of protecting the community from crime: *R v Goodrich* (1952) 70 WN (NSW) 42; *R v Radich* [1954] NZLR 96; *R v Cuthbert* (1967) 86 WN (Pt 1) (NSW) 272 at 274; *Munda v Western Australia* [2013] HCA 31 at [54]. In *R v Zamagias* [2002] NSWCCA 17 Howie J said at [32]:

> It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

In *Veen v The Queen (No 2)* the court held that while protection of the community is a consideration in the sentencing of offenders, a sentence should not be increased beyond what is proportionate to the crime merely to protect the community from the risk of further offending by the offender: at [472], per Mason CJ, Brennan, Dawson and Toohey JJ. The court added at [473]:

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

Generally, giving substantial weight to general and specific deterrence also serves to further community protection, including from the offender: *R v Dong* [2021] NSWCCA 82 at [44], [48]. However, where there are circumstances making the offender a potential danger and also a poor candidate for general and specific deterrence, protecting the community from the offender may require separate and express consideration, albeit consistently with *Veen v The Queen (No 2)*: *R v Dong* at [48]. In *R v Dong* the respondent was mentally ill, committed premeditated murder for no apparent motive, had poor prospects of rehabilitation, limited insight into his condition and while in custody had been involved in violence and had, on occasion, not taken his medication. In those circumstances, the need to protect the community was a matter requiring express consideration and the judge's failure to do so was erroneous: at [53]–[54].

For statutory exceptions to the principle prohibiting preventative detention in NSW, see: *Habitual Criminals Act 1957*, *Crimes (High Risk Offenders) Act 2006* and *Terrorism (High Risk Offenders) Act 2017*. Proclamations under the *Habitual Criminals Act* are extremely rare: *Strong v The Queen* (2005) 224 CLR 1. The High

Court discussed preventative detention legislation in Australia in *Buckley v The Queen* (2006) 80 ALJR 605 at [2]; see also *Minister for Home Affairs v Benbrika* [2021] HCA 4 where the court considered the continuing detention order scheme in Div 105A of the *Criminal Code Act* 1995 (Cth) for Cth terrorism offenders.

The prior criminal record of an offender is a powerful factor to be considered when having regard to retribution, personal deterrence and the protection of the community: *R v Baxter* [2005] NSWCCA 234 at [39]. Although fresh punishment may not be imposed for past offences, it is legitimate to take into account the antecedent criminal history of the offender when it shows his or her dangerous propensity: *Veen v The Queen (No 2)*.

Predicting dangerous behaviour

In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [12]:

> No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles … permit or require such predictions at the time of sentencing, which will often be many years before possible release.

Kirby J on the other hand discussed the unreliability of predictions of criminal dangerousness in *Fardon v Attorney General for the State of Queensland* at [124]–[125].

Findings as to future dangerousness and likelihood of reoffending do not need to be established beyond reasonable doubt: *R v SLD* (2003) 58 NSWLR 589 at [40]. In *R v SLD*, a case where the 13 year old offender fatally stabbed a three year old girl, the sentencing judge took into account that the applicant poses "a significant risk of recidivism and of being a serious risk to the community in terms of potentially killing again or committing sexual offences". The court stated at [40]:

> A sentencing judge is not bound to disregard the risk that a prisoner would pose for society in the future if he was at liberty merely because he or she cannot find on the criminal onus that the prisoner would re-offend. The view that the risk of future criminality can only be determined on the criminal standard is contrary to all the High Court decisions since *Veen (No 1)*.

R v SLD was approved in *R v McNamara* [2004] NSWCCA 42 at [23]–[30] and *Knight v R* [2006] NSWCCA 292 at [30]. Earlier, in *R v Harrison* (unrep, 20/2/97, NSWCCA) at 319, the court held that a sentencing judge is not required to be satisfied beyond reasonable doubt that an offender will *in fact* re-offend in the future. It is sufficient, for the purpose of considering the protection of the community, if a *risk* of re-offending is established by the Crown.

[2-260] To promote the rehabilitation of the offender: s 3A(d)

Rehabilitation as a purpose of sentencing is aimed at the renunciation by the offender of his or her wrongdoing and the offender's establishment or re-establishment as an honourable law-abiding citizen: *Vartzokas v Zanker* (1989) 51 SASR 277 at 279. It has long been recognised as an important consideration in sentencing offenders, even in cases where the seriousness of the objective circumstances call for a custodial sanction. The concept of rehabilitation includes ensuring that an offender will not re-offend

by addressing underlying issues that bear upon the risk of recidivism: *R v Pogson* (2012) 82 NSWLR 60 at [103]. However, rehabilitation as a concept is broader than merely avoiding re-offending. In *R v Pogson*, McClellan CJ at CL and Johnson J at [124]–[125], Price, RA Hulme and Button JJ agreeing at [152], [155]–[156], stated:

> [R]ehabilitation has as its purpose the remodelling of a person's thinking and behaviour so that they will, notwithstanding their past offending, re-establish themselves in the community with a conscious determination to renounce their wrongdoing and establish or re-establish themselves as an honourable law abiding citizen: *Vartzokas v Zanker* at 279 (King CJ).
>
> In this sense, every offender is in need of rehabilitation. Some may need greater assistance than others.

Rehabilitation has been described as one of the cornerstones of sentencing discretion: *R v Cimone* [2001] NSWCCA 98 per Beazley JA at [19]; and "[t]he prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being almost axiomatic": *R v Ponfield* (1999) 48 NSWLR 327 per Grove J at [38].

Voluntary cessation of criminal activity provides strong evidence of rehabilitation: *R v Burns* [2007] NSWCCA 228 at [30].

In *R v Groombridge* (unrep, 30/9/90, NSWCCA) Wood J, with whom Hunt and McInerney JJ agreed, said at [8]–[9]:

> Judges need to be astute to detect cases where, after a poor record, a turning point or watershed in the life of a young offender has been reached, see *R v Caridi* CCA, unreported, 3 December 1987.
>
> There is a strong public interest in rehabilitation, both for the benefit of the community and the individual. That interest of rehabilitation may properly be taken into account in determining whether or not to impose a fixed term. Additionally, if a minimum and additional term are imposed, it may also be taken into account in relation to each leg of the sentencing process. The force of rehabilitation is not confined to the minimum term to the exclusion of the additional term or vice versa, for the reasons explained by this court in *R v Moffitt*, unreported, 21 June 1990 and *R v Chee Beng Lian*, unreported, 28 June 1990.

Sentencing judges must be vigilant to ensure that submissions to the effect that an offender is "at a turning point in his or her life", "has seen the error of his or her ways", or "has excellent prospects of rehabilitation", are not accepted uncritically, or at face value: *R v Govinden* [1999] NSWCCA 118 at [35].

Rehabilitation while at large

Although genuine rehabilitation occurring while the offender has been at large after absconding is not to be ignored entirely, it cannot be given the same significance as rehabilitation during delay not brought about by the applicant: *R v Warner* (unrep, 7/4/97, NSWCCA) per Simpson J; and *R v Nahle* [2007] NSWCCA 40 at [25], where the court confirmed that the respondent could not receive full consideration for his rehabilitation, due to his conduct in absconding.

Rehabilitation and delay between offence and sentencing

Where there has been a substantial delay in prosecution and the offender is successfully rehabilitated and has refrained from re-offending, those matters will be relevant to

determining a sentence that is proportionate to the offence and appropriate to punish the offender: *AJB v R* [2007] NSWCCA 51 at [29]–[30] (delay of 24 years); *Kutchera v R* [2007] NSWCCA 121 at [27]–[28]; *Wright v R* [2008] NSWCCA 91 at [14].

The non-parole period and rehabilitation

The parole system is an important influence for reform of those in gaol, a basis of hope for earlier release and an incentive for rehabilitation of the offender: *Bugmy v The Queen* (1990) 169 CLR 525 at 536. Non-parole periods are to be seen as a mitigation of punishment in favour of rehabilitation through conditional freedom by parole, once the sentencing judge has determined the minimum period of custody appropriate to the circumstances of the offence: *Bugmy v The Queen* at 536.

The non-parole period should not be seen as the shortest time required for the Parole Board to assess the prospects of rehabilitation. It must represent the minimum period the offender must spend in custody having regard to the purposes of punishment and objective and subjective features of the case: *Bugmy v The Queen*; *Power v The Queen* (1974) 131 CLR 623.

Rehabilitation cannot be used to justify longer sentences

Allowance cannot be made for rehabilitation by lengthening the overall sentence above that which is appropriate to reflect the objective seriousness of the offence: *R v Royal* [2003] NSWCCA 275. See further discussion of special circumstances in **Setting terms of imprisonment** at **[7-510]**.

Rehabilitation in prison

In *Muldrock v The Queen* (2011) 244 CLR 120 at [57], the High Court held that the Court of Criminal Appeal had erred in determining the structure of the sentence upon a view that the appellant would benefit from treatment while in full-time custody. This was because "full-time custody is punitive" and the availability of rehabilitative programs in prison is a matter for the executive: at [57].

[2-270] To make the offender accountable for his or her actions: s 3A(e)

This purpose is directed to making the offender liable to be called to account for his or her deeds. It has been recognised as a purpose of punishment that must be fulfilled: *R v Pogson* (2012) 82 NSWLR 60 at [98]. Making the offender accountable is an important purpose of sentencing: *R v Dawes* [2004] NSWCCA 363 at [40].

[2-280] To denounce the conduct of the offender: s 3A(f)

The purpose of denunciation is to condemn the offender for his or her conduct. Kirby J said in *Ryan v The Queen* (2001) 206 CLR 267 at [118]:

> *Denunciation and impartiality*: A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of an offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law". In the case of offences against children, which involve derogations from the fundamental human rights of immature, dependent and vulnerable persons, punishment also has an obvious purpose of reinforcing the standards which society expects of its members.

The notion of denunciation first appeared in *R v MacDonald* (unrep, 12/12/95, NSWCCA), where Gleeson CJ, Hunt CJ at CL and Kirby P said:

> In a case such as the present, it is important to bear in mind the denunciatory role of sentencing. Manslaughter involves the felonious taking of human life. This may involve a wide variety of circumstances, calling for a wide variety of penal consequences. Even so, unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime. (See *R v Hill* (1981) 3 A Crim R 397 at 402.) The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectations of that system.
>
> … Society was entitled to have the conduct of the respondent denounced at least in that fashion.

The court in *R v King* [2009] NSWCCA 117 at [1] made express reference to s 3A(f) and *R v MacDonald* and said:

> Society is entitled to have the sentence imposed denounce the criminal conduct of the offender and, if the sentence does not do so, there has been an error in the exercise of the sentencing discretion.

A suspended sentence for an offence of sexual intercourse with a child under 10 years of age fell "far short" of appropriately denouncing the crime: *R v King* at [1].

The purpose of denunciation should be given more weight than in ordinary cases where a person such as a police officer, who is involved directly in the administration of justice, acts in a way that perverts the course of justice: *R v Nguyen* [2004] NSWCCA 332 at [43].

[2-290] To recognise the harm done to the victim of the crime and the community: s 3A(g)

Last reviewed: August 2023

In *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) No 2 of 2002* (unrep, 20/12/02, NSWCCA) at [59], Spigelman CJ said that it is arguable s 3A(g) "introduces a new element into the sentencing task". This purpose permits the sentencer to set out the content of the victim impact statements of third parties providing the limitations upon the use of this evidence (as then referred to in *R v Previtera* (1997) 94 A Crim R 76) is acknowledged: *SBF v R* [2009] NSWCCA 231 at [89]–[90].

At common law, courts are always required to take into account the impact of criminal behaviour on victims for the purposes of determining the culpability of the offender: *Siganto v The Queen* (1998) 194 CLR 656.

Where a crime involves multiple victims, acknowledgment should be made of the harm done to each victim, and this may require at least partial accumulation of the sentences: *Baroudi v R* [2007] NSWCCA 48 at [52]–[53] referring to *R v Wilson* [2005] NSWCCA 219 at [38]. See also *Carlton v R* [2009] NSWCCA 231 at [122].

The law in relation to victims is further discussed at **Victims and Victim Impact Statements** at **[12-790]**ff.

[2-297] Retribution

Last reviewed: August 2023

In *R v Gordon* (unrep, 7/2/94, NSWCCA) Hunt CJ at CL said at 468:

> Retribution, or the taking of vengeance for the injury which was done by the offender, is also an important aspect of sentencing: *R v Goodrich* (1952) 70 WN 42 at 43; *R v Cuthbert* (1967) 86 WN (Pt 1) 272 at 274; *R v Rushby* [1977] 1 NSWLR 594 at 598.

Not only must the community be satisfied that the offender is given his just desserts, it is important that the victim, or those who are left behind, also feel that justice has been done: *Ryan v The Queen* (2001) 206 CLR 267 per McHugh J at [46].

In *R v Milat* (unrep, 27/7/96, NSWSC), Hunt CJ at CL seemed to treat "retribution" and "vengeance" as equivalent concepts:

> … above all, these truly horrible crimes of murder demand sentences which operate by way of retribution, or (as it is sometimes described) by the taking of vengeance for the injury which was done by the prisoner in committing them. Not only must the community be satisfied that the criminal is given his just desserts, it is important that those whom the victims have left behind also feel that justice has been done.

However, the Canadian Supreme Court in *The Queen v CAM* [1996] 1 SCR 500 queried the "unfortunate association" between retribution and vengeance. Chief Justice Lamer at [80] explained that vengeance represents:

> … an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person.

By contrast, retribution represents:

> … an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct.

Retribution and Form 1 offences

When taking additional offences into account on a Form 1, the penalty should be increased to recognise, inter alia, the community's entitlement to retribution for each of the other offences, although the focus remains on the primary offence: *Watts v R* [2007] NSWCCA 153 at [4]; *Yin v R* [2007] NSWCCA 350 at [19]; *R v Hamid* [2006] NSWCCA 302 at [130]. In *Watts v R* at [5], the court held:

> In the interests of all the victims of the other [Form 1] offences the community was entitled to retribution, but again the large number of other offences did not bring commensurate arithmetic increase in penalty.

[The next page is 2601]

Penalties that may be imposed

Non-association and place restriction orders

Breaches of non-custodial community-based orders

[The next page is 2651]

Penalties that may be imposed

Non-association and place restriction orders

Breaches of non-custodial community-based orders

[The next page is 2651]

Penalties generally

Section 4 *Crimes (Sentencing Procedure) Act 1999* provides:

(1) The penalty to be imposed for an offence is to be the penalty provided by or under this or any other Act or law.

(2) The penalty to be imposed for a statutory offence for which no penalty is so provided is imprisonment for 5 years.

(3) Part 3 applies to the imposition of all penalties imposed by a court, whether under this Act or otherwise.

[3-000] Interpretation of provisions imposing penalties

Section 18 *Crimes (Sentencing Procedure) Act 1999* provides:

(1) The penalty:

(a) specified at the end of a section of an Act (whether or not the section is divided into subsections), or

(b) specified at the end of a subsection of a section of an Act, but not at the end of the section, or

(c) specified at the end of a section of an Act or subsection of a section of an Act and expressed in such a way as to indicate that it applies to part only of the section or subsection,

indicates that a contravention of the section, subsection or part, respectively, is an offence against the Act, punishable on conviction by a penalty not exceeding the penalty so specified.

(2) For the purposes of subsection (1), a penalty specified at the end of the last subsection of a section is taken not to be specified at the end of the section if a penalty is specified at the end of any previous subsection.

(3) If:

(a) a section of an Act, or a subsection of a section of an Act, provides that a person is guilty of an offence under specified circumstances, and

(b) a penalty is specified at the end of the section or subsection and expressed in such a way as to indicate that it applies to the section or subsection,

a person who is guilty of such an offence is liable, on conviction, to a penalty not exceeding the penalty so specified.

(4) This section applies to a statutory rule in the same way as it applies to an Act, subject to any necessary modification.

(5) This section applies to a provision of an Act or statutory rule except in so far as the contrary intention appears in the Act or statutory rule concerned.

[3-010] Effect of alterations in penalties

Section 19 *Crimes (Sentencing Procedure) Act 1999* provides:

(1) If an Act or statutory rule increases the penalty for an offence, the increased penalty applies only to offences committed after the commencement of the provision of the Act or statutory rule increasing the penalty.

(2) If an Act or statutory rule reduces the penalty for an offence, the reduced penalty extends to offences committed before the commencement of the provision of the Act or statutory rule reducing the penalty, but the reduction does not affect any penalty imposed before that commencement.

(3) In this section, a reference to a penalty includes a reference to a penalty that is expressed to be a maximum or minimum penalty.

[3-020] No double jeopardy

Section 20 *Crimes (Sentencing Procedure) Act 1999* provides:

If an act or omission constitutes:

(a) an offence under a law of New South Wales, and

(b) an offence under a law of the Commonwealth or of some other State or Territory,

and a penalty has been imposed on the offender in respect of the offence referred to in paragraph (b), the offender is not liable to any penalty in respect of the offence referred to in paragraph (a).

[3-030] Power to reduce penalties

Section 21 *Crimes (Sentencing Procedure) Act 1999* provides:

(1) If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.

(2) If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term.

(3) If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.

(4) The power conferred on a court by this section is not limited by any other provision of this Part.

(5) This section does not limit any discretion that the court has, apart from this section, in relation to the imposition of penalties.

[The next page is 2701]

Penalties of imprisonment

[3-300] Imprisonment as a sanction of last resort

Section 5(1) *Crimes (Sentencing Procedure) Act 1999* provides that a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

This provision reflects the common law principle that imprisonment should be used as a sanction of last resort: *R v Way* (2004) 60 NSWLR 168 at [115]. A sentence of imprisonment should only be imposed if no other sentence is appropriate. When approaching the imposition of a sentence of imprisonment, there are three steps a sentencing court should follow: *R v Zamagias* [2002] NSWCCA 17 at [25]–[26]; *R v Douar* (2005) 159 A Crim R 154 at [69]ff; *R v Hamieh* [2010] NSWCCA 189 at [82]–[84].

1. The first question (described as "the preliminary question" by Howie J in *R v Zamagias* at [25]) to be asked and answered is whether there is an alternative to the imposition of a sentence of imprisonment.
2. Having determined no penalty other than a sentence of imprisonment is appropriate, the court must determine the term of the sentence. If a court sentences an offender to imprisonment for 6 months or less, s 5(2) requires that reasons be given for doing so, including for deciding:
   (a) that no penalty other than imprisonment is appropriate, and
   (b) not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).
3. Once the term of the sentence of imprisonment has been determined, the court must then consider whether an alternative to full-time imprisonment is available and should be utilised: *R v Zamagias* at [25]–[29]. This will depend on the length of the term of sentence and any preconditions set out in legislation. It is preferable that a sentencing judge articulate his or her conclusion as to the appropriate term before determining whether there is an alternative to full-time imprisonment: *R v Assaad* [2009] NSWCCA 182 at [33].

In *Brown v R* [2006] NSWCCA 144 at [51]–[53], the judge determined that no penalty other than imprisonment was appropriate and the length of the term of imprisonment. However, the judge failed to complete the final step and consider how the sentences of imprisonment should be served, in particular, whether execution of the sentences should be suspended (an option no longer available since the repeal of s 12, with effect from 24 September 2018). Similarly, in *Campbell v R* [2018] NSWCCA 87 at [46]–[48], [51]–[52], the court concluded the judge erred by failing to consider alternatives to full-time custody. Where a sentence of less than 2 years imprisonment is imposed and there are clear alternatives available, it is preferable to make it clear that such alternatives have been considered and explain why they are not appropriate: *Campbell v R* at [53].

In *Casella v R* [2019] NSWCCA 201, the Chief Justice, at [63]–[65], referred to this aspect of *Campbell v R*, observing that a failure to adopt this course is not, of itself, erroneous. However, mechanical compliance with the relevant requirements, without elaboration, might result in some uncertainty about the reasons why the s 5 threshold was met and, in certain cases, why alternatives to full time custody were rejected: *Casella v R* at [65].

Failing to comply with s 5 does not invalidate the sentence: s 5(4).

Intensive correction orders (ICOs)

A court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence be served by way of intensive correction in the community: s 7(1) *Crimes (Sentencing Procedure) Act*. An ICO is a "custodial sentence" referred to in Pt 2, Div 2 *Crimes (Sentencing Procedure) Act*. As it is a form of imprisonment, the steps above should be followed. See further **Power to make ICO subject to Pt 5** at [3-610].

[3-310] Good practice to refer to s 5

The absence of an express reference to s 5 does not always result in error but it is good practice to refer to the section to avoid any ambiguity concerning its application. In *R v Cousins* (2002) 132 A Crim R 444, Giles JA, Sperling and Greg James JJ agreeing, said at [33]:

> In the applicants' submissions it was noted that the sentencing judge had not referred to s 5 of the *Crimes (Sentencing Procedure) Act*, by which a judge must not sentence an offender to imprisonment unless satisfied having considered all possible alternatives that no penalty other than imprisonment is appropriate. Absence of express reference does not mean sentencing error, and from the transcript of the submissions made to his Honour it is plain that he turned his mind to whether sentences less than sentences of imprisonment were appropriate. The applicants' then counsel acknowledged that sentences of imprisonment were "open". In this application the applicants submitted that sentences of imprisonment had not been open, and that his Honour erred in taking up that alternative. I am unable to agree. In my opinion, in the circumstances I have outlined sentences of imprisonment were the only proper sentencing alternative.

[The next page is 2801]

Community-based orders generally

[3-500] Introduction

The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (the amending Act), which commenced on 24 September 2018, amended the *Crimes (Sentencing Procedure) Act 1999* to reform the community-based sentencing options available on sentence.

The amending Act abolished suspended sentences (previous s 12), home detention (previous s 6), community service orders (previous s 8) and good behaviour bonds (previous s 9), and restructured intensive correction orders (ICOs).

Two new sentencing orders, community correction orders (CCOs) and conditional release orders (CROs), were introduced to replace community service orders and good behaviour bonds, respectively.

The reforms are the NSW Government's response to the NSW Law Reform Commission's report *Sentencing* (Report No 139, 2013) and were aimed at preventing and reducing reoffending. In the Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 1, the Attorney General (NSW), the Hon M Speakman SC, said the amending Act:

> will introduce new, tough and smart community sentencing options that will promote community safety by holding offenders accountable and tackling the causes of offending.

In relation to "tackling the causes of offending", the Attorney General said, in the Second Reading Speech, the reforms would "help offenders receive the supervision and programs that address their offending behaviour" (at p 2) and that the assessment reports prepared by community corrections would "advise courts about offenders' risks, needs, suitability for work and other relevant details so that they can tailor the conditions of orders to offenders' individual circumstances" (at p 2).

The statutory scheme for these community-based sentencing options 2017 sentencing reforms is contained in the relevant provisions of the following:

- *Crimes (Sentencing Procedure) Act 1999*
- *Crimes (Administration of Sentences) Act 1999*
- *Crimes (Sentencing Procedure) Regulation 2017*
- *Crimes (Administration of Sentences) Regulation 2014*.

The provisions governing ICOs, CCOs and CROs are discussed in detail in **Intensive correction orders (ICOs) (an alternative to full-time imprisonment)** at **[3-600]**, **Community correction orders (CCOs)** at **[4-400]** and **Conditional release orders (CROs)** at **[4-700]** respectively.

The following Table summarises, for each community-based order, such key features as the maximum term, standard conditions, additional conditions and further conditions.

Order type	Intensive correction order (ICO) s 7	Community correction order (CCO) s 8	Conditional release order (CRO) s 9*
Maximum term	• 2 years: s 68(1) • 3 years (s 53A aggregate or two or more cumulated sentences): s 68(2)–(3)	• 3 years: s 85(2)	• 2 years: s 95(2)
Standard conditions	• The offender must not commit any offence: s 73(2)(a) • The offender must submit to supervision by a community corrections officer: s 73(2)(b).	• The offender must not commit any offence: s 88(2)(a) • The offender must appear before the court if called on to do so at any time during the term of the CCO: s 88(2)(b).	• The offender must not commit any offence: s 98(2)(a) • The offender must appear before the court if called on to do so at any time during the term of the CCO: s 98(2)(b).

Order type	Intensive correction order (ICO) s 7	Community correction order (CCO) s 8	Conditional release order (CRO) s 9*
Additional conditions	• The court *must* impose at sentence at least one additional condition, unless satisfied there are exceptional circumstances: s 73A(1)–(1A). • **Available conditions** (s 73A(2)): – Home detention** – Electronic monitoring – Curfew – Community service work** (max 750 hours, or max hours prescribed by cl 14(1) of the regulations for class of offence, whichever is less) – Participation in rehabilitation or treatment program – Abstention condition (alcohol and/or drugs) – Non-association condition – Place restriction condition.	• The court *may*, at sentence or subsequently on application, impose an additional condition: s 89(1). • **Available conditions** (s 89(2)): – Curfew (not exceeding 12 hours in any 24-hour period) – Community service work** (max 500 hours, or max hours prescribed by cl 14(1) of the regulations for class of offence, whichever is less) – Participation in rehabilitation or treatment program – Abstention condition (alcohol and/or drugs) – Non-association condition – Place restriction condition – Supervision condition. • **Conditions which are not available** (s 89(3)): – Home detention – Electronic monitoring – Curfew exceeding 12 hours in any 24-hour period.	• The court *may*, at sentence or subsequently on application, impose an additional condition: s 99(1). • **Available conditions** (s 99(2)): – Participation in rehabilitation or treatment program – Abstention condition (alcohol and/or drugs) – Non-association condition – Place restriction condition – Supervision condition. • **Conditions which are not available** (s 99(3)): – Home detention – Electronic monitoring – Curfew – Community service work.

Order type	Intensive correction order (ICO) s 7	Community correction order (CCO) s 8	Conditional release order (CRO) s 9*
Further conditions	• **May be** imposed by the court at sentence: s 73B(1). • **Must not be:** – Inconsistent with standard or additional conditions (whether or not the additional condition is imposed): s 73B(2).	• **May be** imposed by the court at sentence or subsequently on application: s 90(1). • **Must not be:** – Inconsistent with standard or additional conditions (whether or not the additional condition is imposed) – Impermissible under s 89(3): s 90(2).	• **May be** imposed by the court at sentence or subsequently on application: s 99A(1). • **Must not be:** – Inconsistent with standard or additional conditions (whether or not the additional condition is imposed) – Impermissible under s 99(3): s 99A(2).

* A CRO can also be imposed without proceeding to conviction: ss 9(1)(b), 10(1)(b).

** Must not be imposed unless an assessment report states the offender is suitable: ss 73A(3), 89(4).

The statutory provisions concerning assessment reports and the matters to be considered when an offender is subject to multiple orders are found in Pt 2, Divs 4B and 4C and are discussed at **[3-510]** and **[3-520]** respectively.

[3-510] Requirements for assessment reports

Before making an ICO, CCO or CRO, a court may request an assessment report on the offender: s 17C(1)(a) *Crimes (Sentencing Procedure) Act 1999*. An assessment report can inform the conditions that may be imposed on the community-based order.

The relevant statutory requirements for assessment reports are contained in Pt 2, Div 4B (ss 17B–17D). Section 17B(2) provides that the purpose of an assessment report is to "assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender". The report must be prepared by either a community corrections officer or a juvenile justice officer: s 17B(3).

An assessment report:

- is generally required before making an order for an ICO: s 17D(1)
- but is not required for an ICO if the court is satisfied there is sufficient information before it to justify making an ICO without a report: s 17D(1A)
- must always be obtained before imposing home detention as a condition of an ICO or community service work as a condition of either an ICO or CCO: s 17D(2), (4)
- must not be requested in relation to a home detention condition on an ICO unless the court has imposed a sentence of imprisonment on the offender for a specified term: s 17D(3).

A court is not otherwise obliged to request an assessment report for an offender: s 17C(1). However, although a court is not required to obtain an assessment report before imposing, for example, a CCO, it is important to obtain one because it informs

consideration of not only the appropriate sentence options but the availability of particular conditions such as community service work: *RC v R* [2020] NSWCCA 76 at [223]–[228].

Times when the report may be requested

Except as provided by s 17D, a court may request an assessment report only:

- after finding an offender guilty of an offence and before imposing a sentence: s 17C(1)(b)(i)
- during sentencing proceedings, after a sentence of imprisonment has been imposed: s 17C(1)(b)(ii)
- during proceedings to impose, vary, or revoke an additional or further condition on a CCO or a CRO: s 17C(1)(b)(iii)
- during proceedings to correct a sentencing error in accordance with s 43: s 17C(1)(b)(iv)
- during proceedings to re-sentence an offender following breach of a CCO or CRO: s 17C(1)(b)(v).

If a court refers an offender for assessment in relation to a sentence and a sentence of imprisonment has been imposed, the referral stays the execution of the sentence and the operation of s 48 (which deals with specifying dates associated with the sentence including its commencement) until the court decides whether or not to make an ICO: s 17C(2).

Subject to s 73A(3) (the requirement that a court must not impose home detention condition or community service work conditions on an ICO unless an assessment report states the offender is suitable) the court is not bound by the report: s 69(2).

The following table lists the different report types, a general indication of contents and minimum timeframes.

Report type	Contents	Minimum timeframe
Assessment report	Background, community service, supervision	6 weeks
Assessment report with home detention	Background, community service, supervision, home detention (only available after imprisonment is imposed)	6 weeks
Home detention assessment only	Home detention (when imprisonment is imposed and an ordinary assessment report has already been provided)	3 weeks
Specific purpose assessment	Specific issue identified by court (eg accommodation, rehabilitation availability)	3 weeks
Community service assessment only	Community service	3 weeks
Update sentencing assessment	Update to report previously provided	3 weeks
Court duty	Community service or a general indication of supervision suitability (only if a court duty officer is available)	Same day

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The assessment report will not obviate the need for appropriate medical reports which would usually be obtained by the defence.

Matters the report must address

Clause 12A(1) *Crimes (Sentencing Procedure) Regulation 2017* sets out the following matters which a report must address:

(a) the offender's risk of re-offending

(b) factors relating to the offender's offending behaviour

(c) factors impacting on the offender's ability to address his or her offending behaviour

(d) how the matters in (b) and (c) would be addressed by supervision and the availability of resources to do so

(e) any conditions that would facilitate the effective supervision of the offender in the community

(f) the offender's suitability for community service work

(g) a summary of the offender's response to any previous period of management in the community in respect of any relevant order, and

(h) any specific additional matters that the court wishes to be addressed.

Although cl 12A(1) is expressed in mandatory terms, cl 12A(3) provides that the report need not address a matter if it is not relevant to the offender's circumstances or the court does not require it to be addressed.

Clause 12B(1) provides that reports concerning home detention conditions must address:

- the offender's suitability for home detention
- any risks with imposing home detention (including risks to the offender or any other person, including children)
- any strategies that could manage the risks, and
- any other matters relevant to administering an ICO with a home detention condition.

Clause 12B(3) provides the matters that can be addressed in an assessment report related to home detention are not limited to those listed in cl 12B(1). However, if the offender does not have suitable accommodation, the assessment report addressing a home detention condition cannot be finalised until reasonable efforts have been made by Community Corrections, in consultation with the offender, to find suitable accommodation: cl 12B(2).

[3-520] Multiple orders

The statutory requirements where an offender is subject to multiple orders with apparently inconsistent conditions are found in Pt 2, Div 4C *Crimes (Sentencing Procedure) Act 1999*. Part 2, Division 4C establishes a hierarchy between ICOs, CCOs and CROs and their associated conditions and sets out the approach to be taken.

Hierarchy where multiple orders

Only one relevant order can be in force for an offender at the same time in respect of the same offence: s 17F(1). "Relevant orders" are defined in s 17E as ICOs, CCOs or CROs. Where an offender is subject to multiple orders at the same time, an ICO

prevails over a CCO, and the CCO prevails over a CRO: s 17F(3). Where there is an inconsistency as to how any of the conditions of orders operate together, an ICO condition prevails over a CCO condition and a CCO condition prevails over a CRO condition: s 17F(4)(a)–(b). Despite this, a standard condition prevails over a non-standard condition: s 17F(4)(c).

Community service work conditions

If a court is considering imposing a community service work condition on an offender already subject to a condition of that type, the new order may not be made if the sum of: (a) the hours of community service work to be performed under the new order, and (b) the number of hours of work to be performed under an existing order, exceeds 750 hours (if one of the orders is an ICO) or 500 hours (if all the orders are CCOs): s 17G(1). In determining the sum referred to in s 17G(1), the hours of community service work to be performed under the new order are to be disregarded where they run concurrently with those to be performed under any existing order: s 17G(2). The hours of community service work to be performed under the new order are taken to run concurrently with those to be performed under any existing order: s 17G(3).

Curfew conditions

Section 17H addresses the circumstance where two or more curfew conditions apply under multiple orders. Subsections 17H(3)–(4) set out the maximum number of curfew hours to be observed and how any excess is to be managed. If all the relevant orders are CCOs:

- the offender cannot be required to observe a curfew of more than 12 hours in a 24-hour period. Any excess is to be disregarded: s 17H(3)(a)
- the offender is required in the 24-hour period to observe only the curfew imposed by the one curfew condition that specifies the most hours: s 17H(3)(b).

If at least one of the relevant orders is an ICO and at least one is a CCO:

- the curfew conditions imposed on an ICO are not affected: s 17H(4)(a)
- the offender cannot be required to observe a curfew in respect of more than the greater of:
  1. the hours required by curfew conditions imposed on the ICO(s) in the period of 24-hours or
  2. 12 hours in the period of 24 hours.

  Any excess is to be disregarded: s 17H(4)(b).
- In determining the number of hours under two or more curfew conditions imposed on two or more CCOs, only the one curfew condition that specifies more hours than the others is to be considered: s 17H(4)(c).

If all the orders are ICOs, s 17H does not affect the curfew conditions as there is no specific limit on curfew hours: s 17H(2).

[The next page is 3001]

Intensive correction orders (ICOs) (alternative to full-time imprisonment)

[3-600] Introduction

Last reviewed: March 2024

Section 7(1) *Crimes (Sentencing Procedure) Act 1999* provides that a court that has sentenced an offender to imprisonment in respect of one or more offences may make an intensive correction order (ICO) directing that the sentence be served by way of intensive correction in the community.

Part 5 *Crimes (Sentencing Procedure) Act* sets out the sentencing procedures governing ICOs. The *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*, which commenced on 24 September 2018, restructured and amended the provisions relating to ICOs.

The changes made allow offenders to access intensive supervision as an alternative to a short prison sentence and "help courts ensure that offenders address their offending behaviour and are held accountable": Attorney General (NSW), the Hon M Speakman SC, Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2.

A feature of Pt 5 is that community safety is the paramount consideration when determining whether to make an ICO because, the Attorney General said, at p 2, "community safety is not just about incarceration" and "community supervision and programs are far more effective" at reducing re-offending.

The provisions in Pt 5 also:

- give the court more discretion to tailor the particular conditions to be imposed on the ICO to the individual offender
- require that an ICO be subject to two standard conditions and at least one additional condition (which may include home detention)
- further restrict the offences for which an ICO can be made.

An ICO cannot be backdated: see **Pronouncement of ICO by court, terms and commencement** at **[3-660]**.

Summary of significant ICO provisions

- The court must not make an ICO unless it has obtained an assessment report in relation to the offender, but the court is not bound by that report: ss 17D, 69(2). However, the court is not required to obtain a report if satisfied it has sufficient information available to justify making the ICO without one: s 17D(1A). See **[3-635]**.
- An ICO must not be made for a single offence if the term of imprisonment exceeds 2 years. If an ICO is made for multiple offences, or two or more ICOs are made, the term of the aggregate or effective sentence of imprisonment must not exceed 3 years: s 68. See **[3-610]**, **[3-620]**.
- ICOs are not available for certain offences, including manslaughter, murder, prescribed sexual offences, certain terrorism offences, breaches of serious crime prevention and public safety orders, and offences involving the discharge of a firearm: s 67. See **[3-620]**.
- An ICO must not be made for offenders under the age of 18 years: s 7(3). See **[3-620]**.
- An ICO can only be made for a domestic violence offence where the court is satisfied the victim of the offence and any person with whom the offender is likely to reside, will be adequately protected: s 4B. See **[3-620]**.
- In determining whether to make an ICO, community safety is the paramount consideration. When considering community safety, the court is to assess whether an ICO or full-time detention is more likely to address the offender's risk of reoffending: s 66. See **[3-632]** and the clear statement of the relevant principles from *Stanley v DPP* [2023] HCA 3 found in *Zheng v R* [2023] NSWCCA 64 below.
- An ICO must commence on the date it is made but may be reduced to take into account pre-sentence custody to enable the ICO to commence on the day it is imposed. See **[3-660]**. However, in determining the length of imprisonment, it is impermissible to deduct pre-sentence custody to circumvent the ceiling at which an ICO becomes unavailable. See **[3-630]**.
- When making an ICO, the court is required to impose the standard conditions and at least one additional condition (unless there are exceptional circumstances) and may impose further conditions where necessary: ss 73, 73A, 73B. Home detention is available as an additional condition of an ICO: s 73A(2). See **[3-640]**.
- The court must not make an ICO or impose a home detention or community service work condition unless it has obtained a relevant assessment report in relation to the offender: ss 73A(3), 17D(2), (4). See **[3-635]**, **[3-640]**.
- A court cannot request an assessment report for a home detention condition until it has imposed a sentence of imprisonment: s 17D(3). See **[3-635]**.
- The Parole Authority may, in certain circumstances, impose, vary or revoke any conditions of an ICO, including those imposed by the court: *Crimes (Administration of Sentences) Act 1999*, s 81A. See **[3-635]**, **[3-640]**.

[3-610] Power to make ICO subject to Pt 5

Last reviewed: May 2023

See also **[3-300] Penalties of imprisonment.**

A court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence be served by way of intensive correction in the community: s 7(1) *Crimes (Sentencing Procedure) Act 1999*. If such an order is made, the court must not set a non-parole period for the sentence: s 7(2).

Although s 7(1) is expressed in the past tense, "[a] court that has sentenced", s 7(4) makes it clear that the power under s 7(1) is "subject to the provisions of Part 5" of the Act. Part 5 is headed "Sentencing procedures for intensive correction orders" and applies when "a court is *considering*, or has made, an intensive correction order": s 64; *Stanley v DPP* [2023] HCA 3 at [68] [emphasis added].

For commentary regarding when a court needs to consider whether to make an ICO, see **[3-630] ICO is a form of imprisonment**.

[3-620] Restrictions on power to make ICO

Last reviewed: March 2024

Part 5, Division 2 *Crimes (Sentencing Procedure) Act 1999* sets out specific restrictions on the power to make an ICO.

ICO not available for certain offences

Section 67(1) provides that an ICO must not be made in respect of a sentence of imprisonment for:

(a) murder or manslaughter

(b) a prescribed sexual offence

(c) a terrorism offence within the meaning of the *Crimes Act 1914* (Cth) or under s 310J *Crimes Act 1900*

(d) an offence relating to a contravention of a serious crime prevention order under s 8 *Crimes (Serious Crime Prevention Orders) Act 2016*

(e) an offence relating to a contravention of a public safety order under s 87ZA *Law Enforcement (Powers and Responsibilities) Act 2002*

(f) an offence involving the discharge of a firearm

(g) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraphs (a)–(f)

(h) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraphs (a)–(g).

"Prescribed sexual offence" is defined in s 67(2) and encompasses a range of offences including offences under Pt 3, Divs 10–10A *Crimes Act* where the victim is under 16 years or the offence involves sexual intercourse and the victim is of any age; child prostitution; voyeurism offences where the victim is a child; State and Commonwealth

child abuse material and child pornography offences; offences of trafficking children and procuring children for sexual activity under the Criminal Code (Cth) and some repealed offences under the *Crimes Act 1914* (Cth).

Nor can an ICO be made with respect to an aggregate sentence of imprisonment in relation to two or more offences, where any one of the offences is an offence listed in s 67(1): s 67(3).

ICOs and domestic violence offences

An ICO must not be made in respect of a sentence of imprisonment for a domestic violence offence, or an aggregate sentence of imprisonment where any one or more of the offences is a domestic violence offence, unless the court is satisfied the victim of the domestic violence offence, and any person with whom the offender is likely to reside, will be adequately protected: s 4B(1). If the court finds a person guilty of a domestic violence offence, the court must not impose a home detention condition if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2).

ICOs not available for juvenile offenders

An ICO may not be made with respect to offenders under the age of 18 years: s 7(3).

ICOs not available where imprisonment exceeds limits

An ICO must not be made in respect of a single offence if the duration of the term of imprisonment for the offence exceeds 2 years: s 68(1). An ICO may be made in respect of an aggregate sentence of imprisonment, however the aggregate term must not exceed 3 years: s 68(2). Two or more ICOs may be made for two or more offences but the duration of any individual term of imprisonment must not exceed 2 years, and the duration of the term of imprisonment for all offences must not exceed 3 years: s 68(3); see *R v Fangaloka* [2019] NSWCCA 173 at [51].

A court cannot manipulate pre-sentence custody to bring a sentence within the jurisdictional ceiling for the imposition of an ICO: *R v West* [2014] NSWCCA 250 at [43]–[44]; *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25].

For commentary regarding taking into account pre-sentence custody, see **[3-660] Pronouncement of ICO by court, terms and commencement**.

ICOs not available for offenders residing in other jurisdictions

The court may not make an ICO in respect of an offender who resides, or intends to reside, in another State or Territory, unless the regulations declare that State or Territory to be an approved jurisdiction: s 69(3). No State or Territory is currently declared to be an approved jurisdiction.

[3-630] ICO is a form of imprisonment

Last reviewed: March 2024

An ICO is a "custodial sentence" referred to in Pt 2, Div 2 *Crimes (Sentencing Procedure) Act 1999*. Since it is a form of imprisonment, making an ICO requires a sentencing court to follow a three stage process before directing that the sentence can be served in that way: *Stanley v DPP* [2023] HCA 3 at [59]; *R v Fangaloka* [2019] NSWCCA 173 at [44]; *Mandranis v R* [2021] NSWCCA 97 at [22]–[28].

First, the court must be satisfied that, having considered all possible alternatives, no penalty other than imprisonment is appropriate: s 5(1) *Crimes (Sentencing Procedure) Act*; *Stanley v DPP* at [59]–[60]; *R v Douar* [2005] NSWCCA 455 at [70]; *R v Hamieh* [2010] NSWCCA 189 at [76].

Second, if a sentence of imprisonment is appropriate, the court determines the length of sentence without regard to how it is to be served: *Stanley v DPP* at [59]; *R v Douar* at [71]; *R v Zamagias* [2002] NSWCCA 17 at [26]; *Zreika v R* [2012] NSWCCA 44 at [56]. It is preferable for the court to articulate its conclusion as to the appropriate term: *R v Assaad* [2009] NSWCCA 182 at [33]. It is inappropriate to consider how the sentence will be served before determining its length: *R v Ryan* [2006] NSWCCA 394 at [1], [4]. It is also an impermissible exercise of the sentencing discretion to deduct pre-sentence custody at this stage to circumvent the 3-year ceiling at which an ICO becomes unavailable so as to facilitate imposing an ICO: *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25].

The court must then consider whether any alternative to full-time imprisonment should be imposed: *Stanley v DPP* at [59]; *R v Zamagias* at [28]; *R v Foster* [2001] NSWCCA 215 at [30]; *Campbell v R* [2018] NSWCCA 87 at [47], [52]. The appropriateness of an alternative option depends on various factors, including whether such an alternative results in a sentence that reflects the objective seriousness of the offence and fulfils the purposes of punishment. Sight should not be lost of the fact that the more lenient the alternative the less likely it will do so: *R v Zamagias* at [28]; *R v Hamieh* at [76]; *R v Douar* at [72]. It is preferable to make clear that such alternatives have been considered and, if necessary, explain why they are not appropriate, although a failure to do so is not erroneous: *Casella v R* [2019] NSWCCA 201 at [63]–[65]; see also *Campbell v R* [2018] NSWCCA 87 at [53].

In considering the third step and whether an alternative to full-time imprisonment should be imposed, the court will come under a duty to consider whether to make an ICO where that matter is properly raised in the circumstances of the case: *Stanley v DPP* at [65]. Such an obligation may be enlivened where a cogent argument is advanced for taking that course: *Wany v DPP* [2020] NSWCA 318 at [52]; *Blanch v R* [2019] NSWCCA 304 at [68]–[69].

Inherently lenient or a substantial punishment?

An ICO has the capacity to operate as substantial punishment, but can also reflect a significant degree of leniency because it does not involve immediate incarceration: *R v Pullen* [2018] NSWCCA 264 at [53]*; R v Pogson* [2012] NSWCCA 225 at [108]; *Whelan v R* [2012] NSWCCA 147 at [120]; see also *Zheng v R* [2023] NSWCCA 64 at [296]; *R v Fangaloka* at [67].

In *R v Pullen* the court concluded that ICO's under the new scheme still involved substantial punishment given the multiple mandatory obligations attached to the standard conditions (see *Crimes (Administration of Sentences) Regulation 2014*, cll 186, 187 and 189) and that the degree of punishment involved, and its appropriateness in a particular case, should be assessed having regard to the number and nature of conditions imposed. In some cases, an ICO could be more onerous because of the significant number of obligations prescribed by the regulations: *R v Pullen* at [66].

In *R v Fangaloka*, the court, when discussing the effect of the competing purposes of sentencing on the consideration of whether a sentence of imprisonment should be served in custody or by way of an ICO, observed at [67];

> there will remain cases in which the significant element of leniency contained in an ICO is inconsistent with the imposition of an adequate penalty, so that an ICO is an unacceptable form of imprisonment.

[3-632] Mandatory considerations when determining whether to impose ICO

Last reviewed: May 2024

Community safety

Community safety must be the court's paramount consideration when determining whether to make an ICO: s 66(1) *Crimes (Sentencing Procedure) Act 1999*; *Stanley v DPP* [2023] HCA 3 at [72]; *Zheng v R* [2023] NSWCCA 64 at [277], [282]. In *Zheng v R*, Gleeson JA (Hamill and Ierace JJ agreeing) at [281]–[286] provides a clear statement of the relevant principles from *Stanley v DPP* in the consideration of community safety pursuant to s 66:

1. [T]he power to make an ICO requires an evaluative exercise that treats community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2). The issue is not merely the offender's risk of reoffending, but the narrower risk of reoffending in a manner that may affect community safety: *Stanley v DPP* at [72], [75].
2. [Section] 66(2) is premised upon the view that an offender's risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety: *Stanley v DPP* at [74].
3. [T]he nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of reoffending: *Stanley v DPP* at [75].
4. [T]he consideration of community safety required by s 66(2) is to be undertaken in a forward-looking manner having regard to the offender's risk of reoffending: *Stanley v DPP* at [74].
5. [W]hile community safety is not the sole consideration in the decision to make, or refuse to make, an ICO, it will usually have a decisive effect unless the evidence is inconclusive: *Stanley v DPP* at [76].

Consideration of community safety is mandatory, regardless of the weight it is ultimately given: *Stanley v DPP* at [72]; *Wany v DPP* [2020] NSWCA 318 at [56], [60]; *R v Fangaloka* [2019] NSWCCA 173 at [65]. This does not require express reference to s 66, but it must be apparent, even if by implication, that consideration has been given to ss 66(1) and (2): *Blanch v R* [2019] NSWCCA 304 at [60]–[62]; *Mourtada v R* [2021] NSWCCA 211 at [37], [43]; *SR v R* [2024] NSWCCA 43 at [2], [45], [55]. The obligation to consider s 66 only arises when the court is considering whether the sentence can be served by way of an ICO. If the proposed sentence exceeds 2 years, in the case of a sentence for an individual offence, or 3 years where an aggregate sentence is being contemplated, there is no requirement to consider s 66: s 68; *Cross v R* [2019] NSWCCA 280 at [26], [35].

While community safety can operate in different ways in different circumstances, the purpose of s 66 is "merely to ensure that the court does not assume that full time detention is more likely to address a risk of reoffending than a community-based program of supervised activity": *R v Fangaloka* at [66]; *Mourtada v R* at [25].

When considering community safety, the court must assess whether making the order or serving the sentence by way of full-time detention is more likely to address the offender's risk of re-offending: s 66(2). The sentencing court is to assess the possible impacts of an ICO or full-time imprisonment on the offender's risk of reoffending; to look forward to the future possible impacts of an ICO or full-time imprisonment: *Stanley v DPP* at [72]; also see *Zheng v R* at [285].

This requirement recognises community safety is not achieved simply by incarcerating an offender, but that incarceration may have the opposite effect; the concept of community safety is linked with considerations of rehabilitation, which is more likely to occur with supervision and access to programs in the community: *R v Pullen* [2018] NSWCCA 264 at [84]. Section 66(2) implicitly rejects any assumption that full-time imprisonment will most effectively promote community safety, and gives effect to Parliament's recognition that, in some cases, community safety will be better promoted by a term of imprisonment served in the community: *Stanley v DPP* at [74], [82]–[85]; also see *Zheng v R* at [283]. However, consideration of specific deterrence also plays an important role in making the assessment required by s 66(2): *Mourtada v R* at [23]–[24], [34].

Having reached a conclusion favouring an ICO under s 66(2), a sentencing court retains a discretion to refuse to make such an order. Of this, McCallum JA said, in *Wany v DPP*, at [64]:

> So much is made plain by s 66(3); and see the remarks of Basten JA in *Fangaloka* at [65]. But the point of the section is to require the sentencing court to consider that question without any preconception in favour of incarceration as the only path to rehabilitation.

Evidence to assist in determining an offender's risk of re-offending may be contained in an assessment report as the regulations require that this be addressed: cl 12A(1)(a) *Crimes (Sentencing Procedure) Regulation 2017*. However, subject to certain qualifications, not presently relevant, the court is not bound by the assessment report: s 69(2). *Zheng v R* is a case where the court relied upon, inter alia, the assessment report in its determination of the offender's risk of reoffending and community safety: at [287], [291].

When deciding whether to make an ICO, the court must also consider the purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act*, any relevant common law principles, and may consider any other matters thought relevant: s 66(3).

Section 3A and other considerations subordinate to community safety

When the court is deciding the discrete question whether or not to make an ICO, community safety is the consideration to which other considerations are to be subordinated, although other considerations must or may be taken into account as prescribed by s 66(3): *Stanley v DPP* at [73]; *Zheng v R* at [277], [291]; *R v Pullen* at [86]; *Mandranis v The Queen* [2021] NSWCCA 97 at [50]–[51].

Therefore, in accordance with s 66(3), community safety is the paramount, but not the sole, consideration. The power to make an ICO is an evaluative exercise that treats

community safety as the paramount consideration, with the benefit of the assessment mandated by s 66(2): *Stanley v DPP* at [75]; *Zheng v R* at [282]. The s 66(2) assessment, however, is not determinative of whether an ICO should be made and, in this respect, the nature and content of the conditions that might be imposed by an ICO will be important in measuring the risk of offending. Notwithstanding, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the evidence is inconclusive: *Stanley v DPP* at [75]–[76]; *Zheng v R* at [284], [286]. See also *SR v R* [2024] NSWCCA 43 at [3]–[4]; [70]–[71]; *Khanat v R* [2024] NSWCCA 41 at [96]–[99].

While aspects of community safety underpin some of the general purposes of sentencing in s 3A, such as specific and general deterrence and protection of the community from the offender, and will have been considered in deciding whether to impose a sentence of imprisonment, community safety is required to be considered *again* and in a different manner under s 66 when considering whether to make an ICO. Here, it is given its principal content by s 66(2), namely, the safety of the community from harms that might result if the offender reoffends, whether while serving the term of imprisonment that has been imposed or after serving it: *Stanley v DPP* at [77]. Also see *Mandranis v R* at [50]–[51]; *Zheng v R* at [282]–[283], [287]–[291].

Controversy concerning a restrictive interpretation of s 66(2)

Cases since *R v Fangaloka* have expressed concern about what was described by Basten JA (Johnson and Price JJ agreeing) in *R v Fangaloka* at [63] as "an alternative reading of s 66" which was "restrictive rather than facilitative". His Honour said:

> Thus, the paramount consideration in considering whether to make an ICO is the assessment of whether such an order, or fulltime detention, is more likely to address the offender's risk of reoffending. *That is, unless a favourable opinion is reached in making that assessment, an ICO should not be imposed. At the same time, the other purposes of sentencing must all be considered and given due weight*. [emphasis added]

In *Casella v R* [2019] NSWCCA 20 at [108], Beech-Jones J (Bathurst CJ and N Adams J agreeing) expressed "significant doubts" about the correctness of the emphasised statement, observing "[n]othing in s 66 purports to operate as a prohibition to that effect": see also *Wany v DPP* at [62] (McCallum JA; Simpson AJA agreeing, Meagher JA not deciding) and *Mandranis v R* at [49] (Simpson AJA; Garling and N Adams JJ agreeing) which support this proposition.

Arguably, however, the impugned comments in *R v Fangaloka* do not represent Basten JA's concluded view on this issue as his Honour went on to state at [65]:

> *The better view* is that the legislature has, appropriately, acted upon the available evidence by requiring the court to have regard to a specific consideration, namely the likelihood of a particular form of order addressing the offender's risk of reoffending. That obligation, imposed by s 66(2), is not stated to be in derogation of the more general purposes of sentencing outlined in s 3A, nor in derogation of other relevant matters: s 66(3). Nor does the legislation limit the consideration of community safety to a means more likely to address the risk of reoffending; it merely identifies that as a mandatory element for consideration. [emphasis added]

In *Mourtada v R*, Basten JA, after acknowledging the controversy resulting from his observations at [63] of *R v Fangaloka*, went on to say:

> No doubt the judgment could have been more clearly expressed, but the view accepted at [65]–[66] did *not* include the proposition that a positive favourable opinion was

> required before an ICO should be imposed. Rather, a more nuanced approach was adopted to the weighing of the various considerations required to be taken into account under s 66. At [66] the reasoning noted that the purpose of s 66 was "to ensure that the court does not assume that full-time detention is more likely to address a risk of reoffending than a community-based program of supervised activity." The sentencing court was not required to favour an ICO over full-time custody but it was required to have specific regard to community protection and to bear in mind that short sentences were not necessarily effective as a means of deterring further offending.

An application for special leave to appeal against the "restrictive" interpretation of s 66 was refused by the High Court on the basis it had no prospect of success: *Fangaloka v The Queen* [2020] HCASL 12. The majority in the High Court decision of *Stanley v DPP* does not comment on the "restrictive" interpretation of s 66, however, they state at [75]–[76] that although the s 66(2) assessment is not determinative of whether an ICO should be made, community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO, unless the evidence is inconclusive. Also see *Zheng v R* at [286].

[3-634] ICOs available for sentences of 6 months or less

Nothing in s 5(2) or Pt 5 of the *Crimes (Sentencing Procedure) Act 1999* precludes imposing an ICO for a sentence of 6 months or less: *Casella v R* [2019] NSWCCA 201 at [105], [110]. In *Casella v R*, the applicant's appeal was allowed and he was re-sentenced to 6 months imprisonment which the court directed was to be served by way of an ICO. Beech-Jones J, with whom Bathurst CJ and N Adams J agreed, concluded that the statement in *R v Fangaloka* [2019] NSWCCA 173 at [56] that "in practice, Pt 5 is unlikely to be applied to very short sentences (for 6 months or a lesser period)" should not be regarded as having any binding effect on either the CCA or lower courts as this issue was not essential to the outcome in that case: at [105].

[3-635] ICO assessment reports

In deciding whether or not to make an ICO, the court is to have regard to the contents of an assessment report and such evidence from a community corrections officer as the court considers necessary: s 69(1) *Crimes (Sentencing Procedure) Act 1999*.

The relevant statutory requirements for assessment reports are contained Pt 2, Div 4B (ss 17B–17D) *Crimes (Sentencing Procedure) Act*.

An assessment report may be requested:

- after an offender has been found guilty and before imposing sentence: s 17C(1)(b)(i)
- during sentencing proceedings after a sentence of imprisonment has been imposed: s 17C(1)(b)(ii)
- during proceedings to correct a sentencing error: s 17C(1)(b)(iv).

If a sentence of imprisonment has been imposed and the court then requests an assessment report for the purpose of considering whether the sentence should be served by way of an ICO, the referral acts as a stay on the sentence and the offender should either be remanded in custody or granted bail: s 17C(2). If the offender subsequently fails to appear, the court may issue a warrant: *Bail Act 2013*, s 77A.

A court must not:

- make an ICO unless it has obtained a relevant assessment report in relation to the offender (although it is not required to obtain an assessment report if satisfied there is sufficient information before it to justify making the ICO): s 17D(1), s 17D(1A)
- impose a home detention or community service work condition on an ICO unless it has obtained an assessment report relating to the imposition of such a condition: s 17D(2), 17D(4)
- request an assessment report concerning the imposition of a home detention condition unless it has imposed a sentence of imprisonment on the offender for a specified term: s 17D(3).

It is important to comply with the mandatory requirements of s 17D(4) as that will enable proper consideration of the appropriate sentence: *RC v R* [2020] NSWCCA 76 at [223]–[228]. The court is not bound by the assessment report except in the circumstances identified in s 73A(3): s 69(2). Section 73A(3) provides that a court must not impose a home detention condition or community service work condition on an ICO unless an assessment report states the offender is suitable.

A court may form the view that an ICO is not appropriate where a report indicates the offender will be unable to comply with the conditions of an ICO or if he or she is likely to breach the conditions: *R v Zreika* [2012] NSWCCA 44 at [67].

For the matters the assessment report must address, see **Requirements for assessment reports** at **[3-510]** in **Community-based orders generally**.

[3-640] ICO conditions

ICO conditions are imposed by the court under Pt 5, Div 4 *Crimes (Sentencing Procedure) Act 1999*, and may be imposed, varied or revoked by the Parole Authority or, in some circumstances, Community Corrections: *Crimes (Administration of Sentences) Act 1999*, ss 81, 81A, 164.

An ICO is subject to:

- standard conditions (s 72(3) *Crimes (Sentencing Procedure) Act*)
- additional conditions (s 73A)
- any further conditions imposed by the court (s 73B)
- any conditions imposed by the Parole Authority under ss 81A or 164 *Crimes (Administration of Sentences) Act 1999*.

The court must, at the time of sentence, impose on the ICO the standard conditions, at least one additional condition and may impose further conditions: s 73.

Range of conditions

Standard conditions

The court must, at the time of sentence, impose on an ICO the standard ICO conditions, which are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(1), 73(2).

Additional conditions

In addition to the standard conditions, the court must, at the time of sentence, impose at least one of the additional conditions referred to in s 73A(2), unless satisfied there

are exceptional circumstances: s 73A(1A). In *Casella v R* [2019] NSWCCA 201, the fact that the offender had been on conditional bail while his appeal was pending was found to be an exceptional circumstance for the purposes of s 73A: at [100].

In *Zheng v R* [2023] NSWCCA 64, where the offender was sentenced for reckless wounding under s 35(4) *Crimes Act*, exceptional circumstances for the purposes of s 73A were also found as there had been no issues between the applicant and the victim regarding contact with their son, and in light of the Community Corrections' supervision plan, the applicant's compliance with onerous bail conditions for over four years, that the offending was not drug or alcohol-related, and the applicant's low intellectual functioning and major depressive disorder: at [290].

The additional conditions available include:

(a) home detention

(b) electronic monitoring

(c) a curfew

(d) community service work requiring the performance of community service work for a specified number of hours

(e) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment

(f) abstention from alcohol or drugs or both

(g) a non-association condition prohibiting association with particular persons

(h) a place restriction condition prohibiting the frequenting of or visits to a particular place or area.

If the court determines not to impose an additional condition, it must record its reasons for doing so, however, the failure to record reasons does not invalidate the sentence: s 73A(1B).

The court must not impose a home detention or community service work condition on an ICO unless an assessment report states the offender is suitable to be the subject of such a condition: s 73A(3). The court may limit the period during which an additional condition is in force: s 73A(4).

Maximum hours and minimum periods for community service work

The maximum number of hours that may be specified for community service work in an additional condition of an ICO are set out in cl 14(1) *Crimes (Sentencing Procedure) Regulation 2017*:

(a) 100 hours for offences with a maximum term of imprisonment of 6 months or less

(b) 200 hours for offences with a maximum term of imprisonment exceeding 6 months but not 1 year

(c) 750 hours for offences with a maximum term of imprisonment exceeding 1 year.

The minimum period that a community service work condition of an ICO must be in force is set out in cl 14(2):

(a) 6 months if the hours of work do not exceed 100 hours

(b) 12 months if the hours of work exceed 100 hours but not 300 hours

(c) 18 months if the hours of work exceed 300 hours but not 500 hours

(d) 2 years if the hours of work exceed 500 hours.

Further conditions

The court may impose further conditions on an ICO but these must not be inconsistent with any standard or additional conditions (whether or not they are imposed on the particular ICO): s 73B.

Offenders' obligations under ICO conditions

The obligations of offenders subject to the standard ICO conditions are set out in cll 186, 187 *Crimes (Administration of Sentences) Regulation 2014*: s 82 *Crimes (Administration of Sentences) Act*. Their specific obligations with respect to home detention, electronic monitoring, curfew, community service work, rehabilitation or treatment, abstention, non-association, and place restriction conditions are set out in cll 189–189G.

Power of Parole Authority and Community Corrections to vary conditions

The Parole Authority may, on application of a community corrections officer or the offender, impose, vary or revoke any conditions of an ICO, including those imposed by the sentencing court: s 81A(1) *Crimes (Administration of Sentences) Act*. However, the Parole Authority must not vary or revoke a standard condition, or impose or vary any other condition unless the sentencing court could have imposed or varied the condition under Pt 5 *Crimes (Sentencing Procedure) Act*: s 81A(2). If the Parole Authority revokes an additional condition on an ICO, it must replace it with another additional condition, unless there is already another additional condition in force with respect to the order, or unless there are exceptional circumstances: s 81A(3)–(4).

The Parole Authority must not impose a period of home detention or a condition requiring community service work unless a report from a community corrections officer states that imposing such a condition is appropriate: s 81A(2)(d).

A condition of an ICO relating to supervision, curfew, non-association and place restriction (ss 73(2)(b), 73A(2) *Crimes (Sentencing Procedure) Act*) may be suspended by a community corrections officer: s 82A. The factors to be taken into account before suspending a supervision condition are found in cl 189I *Crimes (Administration of Sentences) Regulation 2014*.

An ICO expires at the end of the sentence to which it relates unless it is sooner revoked: s 83.

Care must be exercised in the administration of the conditions. The capacity to direct the offender must be confined to a legitimate purpose in furtherance of the specific court order: *R v Pogson* [2012] NSWCCA 225 at [101]. For example, requiring an offender to submit to breath testing where the offender is not subject to a court-ordered condition prohibiting the use of alcohol may be beyond power: *R v Pogson* at [101].

[3-650] Multiple orders

Last reviewed: May 2023

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). "Relevant order" is defined as an ICO, CCO or CRO: s 17E. If an

offender is subject to multiple orders at the same time, an ICO (and its conditions) prevails over a CCO (and its conditions) and a CCO (and its conditions) prevails over a CRO (and its conditions): s 17F(3),(4). Despite this, a standard condition prevails over a condition that is not standard: s 17F(4)(c). For community service work and curfew conditions under multiple orders, see **Multiple orders** at **[3-520]**.

[3-660] Pronouncement of ICO by court, terms and commencement

Last reviewed: November 2023

The form of order is that the court pronounces the offender is sentenced to a term of imprisonment for a particular duration and then directs that it be served by way of an ICO. The court must not set a non-parole period: s 7(2). At the time of sentence, the court must impose on the ICO the standard conditions, additional conditions and any further conditions: s 73.

The Local Court cannot make an ICO in the offender's absence: s 25(1)(b) *Crimes (Sentencing Procedure) Act 1999*.

The term of an ICO is the same as the term of imprisonment in respect of which the order is made: s 70; s 83 *Crimes (Administration of Sentences) Act 1999*.

An ICO must commence on the date it is made (unless it is made in relation to a sentence of imprisonment that is to be served consecutively, or partly consecutively, with another sentence of imprisonment the subject of an ICO): s 71. It cannot be backdated: *Mandranis v R* [2021] NSWCCA 97 at [55]–[56]; *R v Edelbi* [2021] NSWCCA 122 at [79]–[80]. The term of the ICO may be reduced for pre-sentence custody to enable the ICO to commence on the day that sentence is imposed: *Mandranis v R* at [61]; *Zheng v R* [2023] NSWCCA 64 at [298]. However, in determining the length of imprisonment, it is impermissible to deduct pre-sentence custody to circumvent the ceiling at which an ICO becomes unavailable: *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25]. See also **[3-630]**, **[12-500] Counting pre-sentence custody**.

See **ICOs not available where imprisonment exceeds limits** at **[3-620] Restrictions on power to make ICO** regarding the duration of an ICO.

Explaining the order

The court must ensure that all reasonable steps are taken to explain to the offender the ICO obligations and the consequences of a failure to comply: s 17I(1).

A court must cause written notice of the order to be given to the offender and to Corrective Services as soon as practicable after making an ICO: s 17J(1).

[3-670] Breaches of ICOs

Last reviewed: May 2024

Where the Commissioner of Corrective Services or a community corrections officer is satisfied an offender has failed to comply with their obligations under an ICO, a community corrections officer may, pursuant to s 163(2) *Crimes (Administration of Sentences) Act 1999*:

- record the breach and take no formal action
- give an informal warning to the offender

- give a formal warning that further breaches will result in referral to the Parole Authority
- give a direction about the non-compliant behaviour
- impose a curfew.

If the breach is more serious, the Commissioner or a community corrections officer can refer the breaches to the Parole Authority: s 163(3). In that case, where the Parole Authority is satisfied an offender has failed to comply with their obligations under an ICO (s 164(1)), it may, pursuant to s 164(2):

- record the breach and take no further action
- give a formal warning
- impose any conditions on the ICO
- vary or revoke the conditions of the ICO, including those imposed by the court
- revoke the ICO.

Section 164(6) prescribes certain restrictions on the power of the Parole Authority to vary, revoke or impose conditions following the breach of an ICO. They are the same as those applying where the Parole Authority varies, revokes or imposes conditions generally (without a breach) under s 81A: see **ICO conditions** at **[3-640]**.

Where an ICO is revoked, a warrant is issued for the offender's arrest and the sentence ceases to run. A revocation order takes effect on the date on which it is made or on such earlier date as the Parole Authority thinks fit: s 164A(1). The earliest date on which the revocation order may take effect is the first occasion on which it appears to the Parole Authority that the offender failed to comply with their obligations under the order: s 164A(2). If an offender is not taken into custody until after the day on which the revocation order takes effect, the term of the offender's sentence is extended by the number of days the person was at large after the order took effect: s 164A(3).

For a discussion of sentencing for a fresh offence following the revocation of an ICO, see **[12-510] What time should be counted?**

[3-680] Federal offences

Last reviewed: May 2024

Sentencing alternatives under State or Territory law are available to federal offenders if prescribed under s 20AB *Crimes Act 1914* (Cth) and/or reg 6 *Crimes Regulations 1990* (Cth). The *Crimes Amendment Regulations 2010* (No 4) (Cth) amended reg 6 *Crimes Regulation 1990* (Cth) to enable an ICO to be imposed for a Commonwealth offence.

Section 20AB provides, inter alia, "such a sentence or order may in *corresponding cases* be passed or made" [emphasis added]. The question that arises is the extent to which the phrase "corresponding cases" in s 20AB can be read to refer to equivalent State offences.

Neither reg 6 C*rimes Regulation* nor s 20AB exclude specific offences from an ICO. However, s 67(1) *Crimes Sentencing Procedure Act 1999* (NSW) purports to exclude a number of Commonwealth offences from an ICO: see **Restrictions on power to make ICO** at **[3-620]**.

When considering whether to impose an ICO for a federal offence in accordance with *Stanley v DPP* [2023] HCA 3, in addition to considering s 16A *Crimes Act 1914*, the court must have regard to the purposes of sentencing in s 3A in accordance with s 66(3): *Chan v R* [2023] NSWCCA 206 at [79], [100]; *AM v R* [2024] NSWCCA 26 at [36]–[39]; see **[3-632] Mandatory considerations when determining whether to impose ICO**.

Section 20AC *Crimes Act 1914* addresses the circumstance where a Commonwealth offender has failed to comply with an ICO, made under s 20AB(1).

[3-710] Additional references

Last reviewed: May 2023

- P Mizzi, "The sentencing reforms — balancing the causes and consequences of offending with community safety" (2018) 30 *JOB* 73
- Judicial Commission of NSW, Local Court Bench Book, 1988–, "Intensive correction orders" at **[16-340]**
- H Donnelly, "Fitting intensive correction orders within the statutory scheme" (2010) 22 *JOB* 90.

[The next page is 3401]

Community correction orders (CCOs)

[4-400] Introduction

Community correction orders (CCOs) were introduced as a sentencing option following the commencement of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* on 24 September 2018.

They replaced what were previously known as community service orders and good behaviour bonds made on conviction. In the Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2, the Attorney General (NSW), the Hon M Speakman SC, said the new CCO was a "more flexible order" and a non-custodial alternative to full-time imprisonment so "offenders can receive supervision to tackle their offending behaviour and be held accountable".

Summary of CCO essentials

A CCO:

- may be made without first obtaining an assessment report, unless the court intends to impose a community service work condition: ss 17C(1), 17D(4). See [4-420].
- may be made following conviction, as an alternative to imprisonment: s 8(1). A conviction must be formally recorded. See [4-410].
- must not be made by the Local Court in the offender's absence: s 25(1). See [4-410].
- cannot exceed three years: s 85(2). See [4-410].
- can only be made with respect to a domestic violence offender if the order includes a supervision condition (s 4A(3)) and the court has considered the safety of any victim of the offence/s (s 4B(3)). See [4-410] and [63-505].
- must include the two standard conditions and may be subject to additional and/or further conditions: ss 87, 88. See [4-420].

[4-410] The legislative requirements

The statutory scheme for CCOs is found in the following:

- *Crimes (Sentencing Procedure) Act 1999*, s 8, Pt 7
- *Crimes (Sentencing Procedure) Regulation 2017*, Pt 3, in particular, cl 14
- *Crimes (Administration of Sentences) Act 1999*, Pt 4B
- *Crimes (Administration of Sentences) Regulation 2014*, Pt 10.

Section 8 *Crimes (Sentencing Procedure) Act* empowers a court which has convicted an offender to make a CCO instead of imposing a sentence of imprisonment. A CCO

is defined in s 3(1) to mean an order referred to in s 8. A conviction must be formally recorded before a CCO can be made, including when a child is being dealt with for a "serious children's indictable offence": *R v AR* [2022] NSWCCA 5 at [17], [27].

A court can only impose a CCO for a domestic violence offence if the order includes a supervision condition: s 4A. The safety of the victim of the domestic violence offence must be considered before a CCO is made for a domestic violence offender: s 4B(3).

The sentencing procedures associated with making a CCO are set out in Pt 7. An offender's obligation with respect to any of the conditions imposed on the order are set out in Pt 10 *Crimes (Administration of Sentences) Regulation*.

The Local Court cannot impose a CCO in the absence of the offender: s 25(1)(d).

The powers of a court to deal with breaches of a CCO are set out in Pt 4B *Crimes (Administration of Sentences) Act*.

[4-420] Procedures for making a CCO

Assessment reports

See generally **Requirements for assessment reports** at [3-510].

While a court is not required to obtain an assessment report before imposing a CCO, it is important to obtain one as it informs consideration of, not only appropriate sentence options, but the availability of particular conditions such as community service work, a condition in respect of which a report must be obtained: *RC v R* [2020] NSWCCA 76 at [223]–[228]. Community service work cannot be a condition of a CCO unless, pursuant to s 89(4) *Crimes (Sentencing Procedure) Act 1999*:

1. an assessment report has been obtained (ss 17C(1), 17D(4)), and
2. the report states the offender is suitable to be the subject of such a condition.

The times at which the request for the report may be made are set out in s 17C(1)(b) and relevantly include:

- after an offender has been found guilty of an offence and before imposing sentence
- during proceedings to impose, vary or revoke an additional or further condition on a CCO
- during proceedings to correct a sentencing error in accordance with s 43
- during proceedings to re-sentence an offender after a court has revoked the offender's community correction order.

Duration and commencement

A CCO cannot exceed 3 years (s 85(2)) and commences on the date it is made (s 86).

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). Relevant orders are defined as ICOs, CCOs or conditional release orders (CROs): s 17E. If an offender is subject to multiple orders at the same time, the conditions of an ICO take priority over a CCO. However, a CCO takes priority over a CRO: s 17F(3).

See further **Multiple orders** at [3-520] in **Community-based orders generally**.

Fixing appropriate conditions

Under s 87, a CCO is subject to the following conditions:

(a) the standard conditions in s 88

(b) any additional conditions imposed under s 89

(c) any further conditions imposed under s 90.

The standard conditions are that the offender must not commit any offence and must appear before the court if called upon during the term of the order: s 88(2).

Section 89(1) provides that the court may impose additional conditions, which are identified under s 89(2) as:

(a) a curfew condition (the specified curfew not exceeding 12 hours in any 24-hour period)

(b) a community service work condition, not exceeding 500 hours, requiring the offender to perform community service work (although this condition cannot be imposed without first having obtained an assessment report which states the offender is suitable for such a condition): s 89(4)

(c) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment

(d) a condition requiring the offender to abstain from alcohol or drugs or both

(e) a non-association condition prohibiting association with particular persons

(f) a place restriction condition prohibiting the frequenting of or visits to a particular place or area

(g) a supervision condition.

The following additional conditions ***must not*** be imposed on a CCO, pursuant to s 89(3):

- a home detention condition
- an electronic monitoring condition, or
- a curfew which exceeds 12 hours in any 24-hour period.

Clause 14(1) *Crimes (Sentencing Procedure) Regulation 2017* provides that the following are the maximum number of hours for community service work when it is a condition of a CCO:

- 100 hours — for offences with a maximum penalty of up to 6 months imprisonment
- 200 hours — for offences with a maximum penalty of between 6 months and 12 months imprisonment
- 500 hours — for offences with a maximum penalty of more than 12 months imprisonment.

The minimum period a community service work condition is in force is associated with the specified hours. Clause 14(2) *Crimes (Sentencing Procedure) Regulation* prescribes the minimum periods as follows:

- 6 months — for up to 100 hours
- 12 months — for hours exceeding 100 hours but not exceeding 300 hours
- 18 months — for hours exceeding 300 hours but not exceeding 500 hours.

Further conditions may also be imposed, but these must not be inconsistent with the standard or additional conditions, whether or not such conditions have actually been imposed: s 90(1)–(2).

The court may limit the period during which either additional or further conditions on a CCO are in force: ss 89(5), 90(3).

Explaining the order

The court must ensure reasonable steps are taken to explain to the offender their obligations under the order and the consequences that may flow from a failure to comply with those obligations: s 17I(1). Failing to comply with the requirements of s 17I(1) does not invalidate the order: s 17I(2).

See also the *Local Court Bench Book* in **Community Correction Order (CCO)** at [**16-320**].

The precise nature of the offender's obligations under the order are identified in Pt 10 *Crimes (Administration of Sentences) Regulation 2014*: see, in particular, cll 186, 188, 189B–189H.

The court must also give the offender and Corrective Services notice of the relevant order if it is subject to a supervision or community service work condition: s 17J(1), 17J(3). Failing to do so does not invalidate the order: s 17J(4).

[4-430] Variation and revocation of CCO conditions

A court may vary or revoke any additional or further conditions imposed by it on a CCO if a community corrections officer, juvenile justice officer or the offender makes an application: ss 89(1)(b), 90(1)(b) *Crimes (Sentencing Procedure) Act 1999*.

The application does not have to be dealt with by the court as constituted at sentence: s 91(3).

The application must be in writing: cl 13(1) *Crimes (Sentencing Procedure) Regulation 2017*. The hearing must be listed between 14 days and 3 months (but not later than 3 months) from the time the application was filed: cl 13(2). A copy of the application must be given to the other party no later than 5 days before the hearing using any of the methods described in cl 13(5): cl 13(4).

The court may refuse to consider an offender's application under ss 89 (for additional conditions) or 90 (for further conditions) if satisfied it is without merit: s 91(1).

If the community corrections officer (or juvenile justice officer) ***and*** the offender consent, an application can be dealt with in the parties' absence, in open court or in the absence of the public: s 91(2).

The offender must be given notice of the outcome of the application: cl 13(7)(a). If the court imposes, adds or varies a condition, it must take reasonable steps to provide the offender with an explanation of their obligations under the condition and the consequences that may follow from a failure to comply: cl 13(8). However, failing to comply with cl 13(8) does not invalidate the order: cl 13(9).

Notice must be given to Community Corrections if the court, pursuant to cl 13(7)(b):

- adds, varies or revokes a condition of a CCO that is subject to a supervision or community service work condition, or
- imposes a supervision condition on a CCO, or
- imposes a community service work condition on a CCO.

[The next page is 3461]

Conditional release orders (CROs)

[4-700] Introduction

Conditional release orders (CROs) were introduced as a sentencing option on 24 September 2018 by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*. They replace the good behaviour bonds which could be imposed with or without conviction under either ss 9 or 10(1)(b) *Crimes (Sentencing Procedure) Act 1999* as in force before that date.

In the Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 2, the Attorney General (NSW), the Hon M Speakman SC, said CROs were: "a community-based sentence for the lowest level of offending".

This chapter deals with CROs made on conviction. For CROs made without proceeding to conviction under s 10(1)(b), see also **Section 10(1)(b) conditional release orders operate with s 9** at **[5-010]**.

Summary of significant CRO provisions

A CRO:

- may be made without first obtaining an assessment report: s 17C(1). See **[4-720]**.
- must not be made by the Local Court in the offender's absence: s 25(1). See **[4-720]**.
- may be imposed with or without conviction: s 9(1). See **[4-710]**.
- if imposed without conviction is made under s 10(1)(b). See **[5-010]**.
- cannot be imposed together with a fine for the same offence: s 9(3). See **[4-720]**.
- cannot exceed 2 years: s 95(2). See **[4-720]**.
- can only be made with respect to a domestic violence offender if the order includes a supervision condition (s 4A(3)) and the court has considered the safety of any victim of the offence/s (s 4B(3)). See **[4-710]** and **[63-505]**.
- must include the two **standard conditions** and may be supplemented by **additional and further conditions**: s 97. See **[3-500]**.

[4-710] The legislative requirements

The entire statutory scheme for the 2017 sentencing reforms is contained in the relevant provisions of the following:

- *Crimes (Sentencing Procedure) Act 1999*, s 9, Pt 8
- *Crimes (Sentencing Procedure) Regulation 2017*, Pt 3
- *Crimes (Administration of Sentences) Act 1999*, Pt 4C
- *Crimes (Administration of Sentences) Regulation 2014*, Pt 10.

Section 9 *Crimes (Sentencing Procedure) Act 1999* empowers a court to make a conditional release order (CRO) either with or without proceeding to a conviction. A CRO is defined in s 3(1) to mean an order referred to in s 9.

A court can only impose a CRO for a domestic violence offence if the order includes a supervision condition: s 4A. A court must consider the safety of the victim of the domestic violence offence before making a CRO for a domestic violence offender: s 4B(3).

The sentence procedures associated with making a CRO are set out in Pt 8. An offender's obligations with respect to the order are set out in Pt 10 *Crimes (Administration of Sentences) Regulation*.

The Local Court cannot impose a CRO in the offender's absence: s 25(1)(e) *Crimes (Sentencing Procedure) Act*.

The powers of a court with respect to the breach of a CRO are in Pt 4C *Crimes (Administration of Sentences) Act*.

[4-720] Procedures for making a CRO

Last reviewed: August 2023

Assessment reports

See **Requirements for assessment reports** at **[3-510]**.

Unlike other community-based sentence options such as an ICO, a court is not required to obtain an assessment report before imposing a CRO: s 17C(1)(a) *Crimes (Sentencing Procedure) Act 1999*. The times at which the request may be made are set out in s 17C(1)(b) and relevantly include:

- after an offender has been found guilty and before imposing sentence: s 17C(1)(b)(i)
- during proceedings to impose, vary or revoke an additional or further condition of a CRO made in respect of the offender: s 17C(1)(b)(iii)
- during proceedings to correct a sentencing error: s 17C(1)(b)(iv)
- during proceedings to re-sentence an offender after a court has revoked the offender's CRO: s 17C(1)(b)(v).

Deciding to convict the offender and make a CRO

Section 9(2) requires a court deciding whether to convict an offender and make a CRO to have regard to the following:

(a) the person's character, antecedents, age, health and mental condition

(b) whether the offence is of a trivial nature

(c) the extenuating circumstances in which the offence was committed

(d) any other matter the court thinks proper to consider.

As a "general proposition" the fact a conviction is recorded is a matter of special significance: *R v Mauger* [2012] NSWCCA 51 at [37]–[39]. Courts recognise that recording a conviction involves a more serious sentencing option and reflects the gravity of an offence. For example, the court in *TC v R* [2016] NSWCCA 3 held that

despite the impact of a conviction for the offences on the applicant's employment prospects, the seriousness of the conduct and circumstances of the offending meant the sentencing judge properly exercised his discretion to record a conviction: *TC v R* at [59], [85]; see also *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [20]. Similarly, in *R v Stephenson* [2010] NSWSC 779, Fullerton J held the principle of general deterrence would be undermined if a conviction was not recorded for an insider trading offence: *R v Stephenson* at [67].

Sections 9(2) and 10(3) require a court to have regard to the same factors when determining whether to impose a conditional release order under s 9(1) or not to proceed to conviction under s 10(1). Therefore, the case law concerning the operation of s 10(3) may therefore guide the approach a sentencing court should take to this provision: see **Application of factors in s 10(3)** at **[5-030]**.

Duration and commencement

The maximum term of a CRO is 2 years: s 95(2).

A CRO commences on the day it is made: s 96.

Only one "relevant order" can be in force for an offender at the same time for the same offence: s 17F(1). Relevant orders are defined as ICOs, CCOs or CROs: s 17E. If an offender is subject to multiple orders at the same time, conditions of an intensive correction order (ICO) and community correction order (CCO) take priority over a CRO: s 17F(4).

See further **Multiple orders** at **[3-520]**.

Fixing appropriate conditions

Section 97 provides that a CRO is subject to the following conditions:

(a) the standard conditions under s 98

(b) any additional conditions, as to which see s 99

(c) any further conditions, as to which see s 99A.

The court may limit the period during which an additional or further condition on a CRO is in force: ss 99(4), 99A(3).

A CRO must include the standard conditions which are that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the CRO: s 98(1), 98(2).

Section 99(1) provides that a court may impose additional conditions on a CRO which are identified in s 99(2) and include:

(a) a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment

(b) a condition requiring the offender to abstain from alcohol or drugs or both

(c) a non-association condition prohibiting association with particular persons

(d) a place restriction condition prohibiting the frequenting of, or visits to, a particular place or area

(e) a supervision condition.

A supervision condition may be made in relation to an offender who was under 18 years when the condition was imposed. They are supervised by a juvenile justice officer: s 99(2)(e)(ii).

The following cannot be a condition of a CRO pursuant to s 99(3):

- home detention
- electronic monitoring
- curfew
- community service work order.

Further conditions may be imposed at the time of sentence but any further conditions cannot be inconsistent with the standard conditions of a CRO or any of the additional conditions (whether or not imposed on the CRO): s 99A.

The court may limit the period during which either additional or further conditions on a CRO are in force: ss 99(4), 99A(3).

Explaining the order

The sentencing court must ensure reasonable steps are taken to explain to the offender their obligations under the order and the consequences that may follow if they fail to comply with those obligations: s 17I(1). Failing to comply with the requirements of s 17I(1) does not invalidate the order: s 17I(2).

The offender's particular obligations under the order are identified in Pt 10 *Crimes (Administration of Sentences) Regulation 2014*: see, in particular, clls 186, 188, 189D–189H.

[4-730] Variation and revocation of CRO conditions

A court may vary or revoke any additional or further conditions imposed by it on a CRO if a community corrections officer, juvenile justice officer or the offender makes an application: ss 99(1), 99A(1) *Crimes (Sentencing Procedure) Act 1999*.

The application does not have to be dealt with by the court as constituted at sentence: s 100(3).

The application must be in writing: cl 13(1) *Crimes (Sentencing Procedure) Regulation 2017*. The date set for hearing must not be earlier than 14 days after, and not later than 3 months after, the application was filed: cl 13(2). A copy of the application must be given to the other party no later than 5 days before the hearing using any of the methods described in cl 13(5): cl 13(4).

If the offender makes the application under ss 99 (for additional conditions) or 99A (for further conditions) the court may refuse to consider it if satisfied it is without merit: s 100(1).

If the community corrections officer (or juvenile justice officer) ***and*** the offender consent, an application can be dealt with in the parties' absence, in open court or in the absence of the public: s 100(2).

The offender must be given notice of the outcome of the application: cl 13(7)(a). If the court imposes, adds or varies a condition, it must take reasonable steps to

provide the offender with an explanation of their obligations under the condition and the consequences that may follow from a failure to comply: cl 13(8). However, failing to comply with cl 13(8) does not invalidate the order: cl 13(9).

Notice must be given to Community Corrections if the court:

- adds, varies or revokes a condition of a CRO that is subject to a supervision or community service work condition, or
- imposes a supervision condition on a CRO: cl 13(7)(b).

[4-740] Transitional provisions for orders in force before 24 September 2018

Schedule 2, Pt 29, cl 75 *Crimes (Sentencing Procedure) Act* sets out the relevant transitional provisions.

A s 10(1)(b) good behaviour bond imposed before 24 September 2018 is taken to be a CRO made under s 9 without proceeding to conviction and subject to the standard conditions of a CRO, any conditions imposed on the original bond and any other conditions prescribed by the regulations. The order expires on the date set by the sentencing court which imposed the original bond.

[The next page is 3521]

Dismissal of charges and conditional discharge

Note: This chapter needs to be read with Conditional release orders (CROs) at [4-700]ff.

[5-000] Introduction

Section 10 *Crimes (Sentencing Procedure) Act 1999* identifies the following three orders which may be made when a court decides not to convict an offender:

- s 10(1)(a) order, dismissing the relevant charges
- s 10(1)(b) order, discharging the person under a conditional release order (CRO)
- s 10(1)(c) order, discharging the person on condition of participation in an intervention program.

A CRO may be made under s 10(1)(b) if the court is satisfied under s 10(2):

(a) that it is inexpedient to inflict any punishment (other than nominal punishment) on the person, or

(b) that it is expedient to discharge the person under a CRO.

An order under s 10(1)(c) may be made if the court is satisfied that it would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person: s 10(2A).

Section 10(1) orders can be made with or without conditions: see **[4-720]** in **Conditional release orders (CROs)**.

Section 10(3) sets out the factors a court must consider when determining whether or not to make such an order: see **Application of factors in s 10(3)** at **[5-030]**.

In *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [8], Basten JA explained the structure of s 10:

> Section 10 is relevantly broken into three parts, the first conferring a power to make an order of a particular kind; the second prescribing that the order "may be made" if the court is satisfied of certain matters, although not stating that the court must be so satisfied to make such an order, and the third identifying factors which, in considering whether to make such an order, the court "is to have regard to". While the logic of the new structure is apparent, its effect is obscured.

[5-005] Orders made under s 10(1)(b) before 24 September 2018

A good behaviour bond imposed without proceeding to conviction pursuant to s 10(1)(b) was replaced with a conditional release order (CRO) on 24 September 2018 when the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* commenced.

A s 10(1)(b) bond in force before 24 September 2018 is subject to the transitional provision in Sch 2, Pt 29, cl 75 *Crimes (Sentencing Procedure) Act 1999*, which provides that this type of good behaviour bond is taken to be a CRO made under s 9 without proceeding to conviction: cl 75(2). The order will expire on the date set by the sentencing court which imposed the original bond.

Pursuant to Sch 2, Pt 29, cl 75(3), s 10(1)(b) orders in force before 24 September 2018 are subject to:

- standard CRO conditions
- any conditions imposed on the original bond under s 95(c) in force before 24 September 2018 *and*
- any other conditions prescribed by the regulations.

[5-010] Power to make s 10(1)(b) orders operates with s 9

Last reviewed: August 2023

Under s 9 *Crimes (Sentencing Procedure) Act 1999*, a court may make a conditional release order (CRO) if it determines not to convict the offender but make an order under s 10(1)(b). A CRO, whether or not a conviction is recorded, is limited to a maximum period of 2 years: s 95(2). The only relevant distinction between a CRO made under s 9 and a s 10(1)(b) order is that a conviction is not recorded when the order is made under s 10(1)(b).

As a "general proposition", the fact a conviction is recorded is a matter of special significance: *R v Mauger* [2012] NSWCCA 51 at [37]–[39]. However, the fact a conviction is not recorded should not "dilute or downgrade the significance of the imposition of a [s 10] bond": *R v Mauger* per Harrison J (Beazley JA and McCallum J agreeing) at [37]. The court observed there were onerous consequences if an offender failed to comply with an order made under the previous s 10(1)(b) and it should not be assumed that because a court decided not to record a conviction that the sentence is automatically inadequate or lenient: *R v Mauger* at [37].

See **Procedures for making a CRO** at **[4-720]** for the various statutory requirements.

[5-020] Use of s 10 orders generally

Last reviewed: August 2023

The task of the court applying s 10 was described by McClellan CJ at CL as a "deliberative process" in *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [29].

Sentencers should be particularly cautious in the use of s 10 orders since excessive or inappropriate use can undermine confidence in the administration of justice. Section 10 provides a useful safety valve for ensuring that justice can be served in circumstances where, despite a breach of the law, there are such extenuating circumstances or the matter is so trivial that punishment does not seem appropriate. In *R v Ingrassia* (1997) 41 NSWLR 447 at 449, Gleeson CJ said of the statutory predecessor of s 10, s 556A *Crimes Act*:

> The legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a court. As Windeyer J said in *Cobiac v Liddy* (1969) 119 CLR 257 at 269, "a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice".

In *R v Mauger* [2012] NSWCCA 51, the court applied *R v Ingrassia* and held that the legal and social consequences of recording a conviction far outweighed the requirements of punishment, denunciation and (specific and general) deterrence: *R v Mauger* at [40]; see also **[5-030] Application of factors in s 10(3)** .

Impermissible to use s 10 order merely to circumvent operation of statute

It is improper and undesirable to dismiss a matter under s 10(1) without a conviction merely to avoid some other legislative provision which is otherwise applicable: *R v Fing* (unrep, 4/10/94, NSWCCA); *R v Stephenson* [2010] NSWSC 779 at [66]. In *R v Fing*, the former s 229 *Corporations Law* 1989 (Cth) provided that a person convicted of serious fraud could not, within five years after conviction, manage a corporation without the leave of the court (see now Pt 2D.6 *Corporations Act 2001* (Cth)). The recording of a conviction in effect prevented the applicant from being involved in the management of corporations he established. He argued that it was an added penalty which should be avoided by applying the statutory predecessor of s 10, s 556A. The court rejected this submission, holding that if the appropriate penalty is a fine (other than a nominal fine), the appropriate course is to convict the offender and impose a fine rather than apply s 556A (rep).

[5-030] Application of factors in s 10(3)

Last reviewed: August 2023

Section 10(3) provides:

> In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:
>
> (a) the person's character, antecedents, age, health and mental condition,
>
> (b) the trivial nature of the offence,
>
> (c) the extenuating circumstances in which the offence was committed,
>
> (d) any other matter that the court thinks proper to consider.

The court *must* have regard to all of the factors set out in s 10(3) in deciding whether to make an order under s 10. Notwithstanding the phrase "the court is to have regard to", the factors in s 10(3) are not in truth mandatory considerations as para (d) includes "any other matter that the court thinks proper to consider" and, as such, the purpose of s 10 is to ensure that the court considers the full range of factors it considers relevant: *R v Mauger* at [41]. Care must still be taken to expressly consider each s 10 factor: *R v Paris* [2001] NSWCCA 83 at [42]. It is impossible and inappropriate to delineate all the situations that could warrant an order under s 10 notwithstanding the objective seriousness of the offence. Extenuating circumstances may or may not justify an order under s 10. For example, where a person is suddenly compelled in an emergency situation to drive someone to hospital.

In *R v Mauger*, the subjective feature of the offender's employment, where his contract of employment enabled the termination of his employment upon being charged with a criminal offence if his employer reasonably believed his employment could be negatively affected was found to be a matter the court was entitled to take into account pursuant to s 10(3)(d): at [28]. The court rejected the Crown's argument that being charged automatically led to dismissal and therefore was not relevant to the court's assessment of the impact of a conviction: *R v Mauger* at [27]–[28].

The scope for the application of s 10 decreases where the offence is objectively serious and general deterrence and denunciation are important factors in sentencing for the offence: *Application by the Attorney General under Section 37 of the Crimes Sentencing Procedure Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport*

(Safety and Traffic Management) Act 1999 (No 3 of 2002) (2004) 61 NSWLR 305 (the High Range PCA Guideline Judgment) per Howie J at [131]–[132] (see, for example, *TC v R* [2016] NSWCCA 3 at [58] involving historical child sexual assault committed by a juvenile offender where a conviction and s 9 good behaviour bond (as was then available) was held not to be unreasonable or plainly unjust).

However, the focus must be on the particular conduct of the offender and the circumstances of the offending, rather than the "abstract" offence itself: *R v Mauger* at [19] applying *Walden v Hensler* (1987) 163 CLR 561 at 577. At times, the requirement of punishment, denunciation or deterrence are outweighed by the non-recording of a conviction: *R v Mauger* at [40]. See also, for example, the "unique" case of *R v AB* [2022] NSWCCA 3 at [53]–[54], [60] where a conditional release order without conviction under s 10(1)(b) imposed for a number of child sexual offences was held not to be manifestly inadequate.

First offenders

It has been held that the dismissal of charges against first offenders in certain circumstances is appropriate. This power reflects the willingness of the legislature and the community to provide first offenders, in certain circumstances, a second chance to maintain a reputation of good character: *R v Nguyen* [2002] NSWCCA 183 at [50]. In *R v Ingrassia* (1997) 41 NSWLR 447 at 449, the court acknowledged that the "legal and social consequences of being convicted of an offence often extend beyond any penalty imposed by a court" and the fact that a person is subject to these additional adverse consequences is a relevant consideration in the exercise of the statutory discretion.

"Mental condition" in s 10(3)(a)

For a court to take into account "mental condition" in s 10(3)(a), it is not necessary that "the illness was causally connected with the offence": *David Morse (Office of State Revenue) v Chan* [2010] NSWSC 1290 at [66]. Nor is it restricted to the offender's mental condition at the time of the offence: *Morse v Chan* at [66]. Section 10(3)(a) permits consideration of the consequences of suffering the mental condition and allows the court to have regard to offender's condition "at the time of sentence": *Morse v Chan* at [74].

"Trivial nature of the offence" in s 10(3)(b)

The decision of *Walden v Hensler* (1987) 163 CLR 561, which dealt with a materially similar provision to s 10 (s 675A Criminal Code (Qld), as it was then), has been used to inform the meaning of "the trivial nature of the offence". Brennan J said, at [25]:

> Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It was erroneous to ascertain the triviality of the offence by reference simply to the statutory provision which prescribes the maximum penalty.

In *R v Paris* [2001] NSWCCA 83 at [42], Simpson J said:

> It is not necessary to the application of s 10 that the offence be characterised as trivial; the four factors mentioned in subs 3 are, in my view, intended to be disjunctive and nonexhaustive.

R v Paris is to be contrasted with the majority view in *R v Piccin (No 2)* [2001] NSWCCA 323 at [22] where the court held it is necessary to find that the offence is trivial before a s 10 order can be made. But in *Chin v Ryde City Council* [2004]

NSWCCA 167, the court accepted the appellant's submission, based upon Hulme J's dissenting opinion in *R v Piccin (No 2)* at [25]. Hodgson JA said, in *Chin v Ryde City Council*, at [38]: "… s 10 may be applied even if the offence is not found to be trivial".

In *Morse v Chan*, above at [65], Schmidt J observed that the approach to the construction of s 10(3) by the majority in *R v Piccin (No 2)* does not accord with the High Range PCA Guideline Judgment at [131] (quoted below).

[5-035] Corporations and s 10 orders

Section 21(1) *Interpretation Act 1987* provides that "person" in any Act or instrument includes an individual, a corporation and a body corporate or politic. Section 10 dismissals have been imposed on corporations: see *DPP (NSW) v Roslyndale Shipping Pty Ltd* (2003) 59 NSWLR 210; *Environment Protection Authority v Allied Industrial Services Pty Ltd* [2005] NSWLEC 501 at [35].

The Commonwealth equivalent to s 10 — s 19B *Crimes Act 1914* (Cth) — has also been applied to corporations: see *R v On Clinic Australia Pty Ltd* (unrep, 6/11/96, NSWCCA).

For a discussion of the application of s 10 to corporations, see *Environment Protection Authority v Fernando* [2003] NSWLEC 281 at [32].

Section 10 orders with conditions have not been imposed on corporations. An order with conditions may present practical problems including how proceedings for any breach of a condition would be conducted.

[5-040] Use of s 10 orders for particular offences

High range PCA offences

It has been held that an order dismissing a charge under s 10 has been used too frequently in high range prescribed content of alcohol (PCA) cases and a guideline for sentencing for this offence has been promulgated: *Application by the Attorney General under Section 37 of the Crimes Sentencing Procedure Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 (the High Range PCA Guideline Judgment). In that case, Howie J (Spigelman CJ, Wood CJ at CL, Grove and Dunford JJ agreeing) said at [130]–[132]:

> I accept that s 10 must apply to the offence of high range PCA and there may be cases where, notwithstanding the objective seriousness of the offence committed, it is appropriate in all the circumstances to dismiss the charge or to discharge the offender. But those cases must in my view be rare. They must be exceedingly rare for a second or subsequent offence. I accept that the court must concentrate on the particular conduct of the offender and the circumstances of offending rather than on the nature of the offence in determining whether the particular offence before the court is trivial: *Walder v Hensler* (1987) 163 CLR 561 at 577. I am prepared to acknowledge the possibility that there may be cases where the offending is technical (rather than trivial), there being no real risk of damage or injury arising from the driving, so that the highly exceptional course in making an order under the section would be justified.
>
> The court must also have regard to all of the criteria in s 10(3) in determining whether a dismissal of the offence or a discharge of the offender is appropriate: *R v Paris* [2001] NSWCCA 83. I recognise that there can be cases where there were such

> extenuating circumstances that a dismissal or a discharge under s 10 might be justified. It is impossible and inappropriate to delineate the situations in which an order under s 10 might be warranted notwithstanding the objective seriousness of the offence. One example might be where the driver becomes compelled by an urgent and unforseen circumstance to drive a motor vehicle, say, to take a person to hospital.
>
> But where the offence committed is objectively a serious one and where general deterrence and denunciation are important factors in sentencing for that offence, the scope for the operation of the section decreases. The section must operate in the context of the general principle that the penalty imposed for any offence should reflect the objective seriousness of the offence committed. To recognise this fact is not to impose an undue restriction upon the section or to change the criteria for its operation on an offence by offence basis. Such an approach would clearly be erroneous. It is simply to apply normal sentencing principles to the offence under consideration. However, just as the discretion inherent in the section cannot be limited by the application of some overreaching general principle, neither can it be broadened simply because a court does not agree with Parliament's view of the seriousness of a particular offence or believes that in general the penalties imposed under the scheme of the legislation are unduly harsh or unpalatable.

A study by the Judicial Commission of NSW in 2005 found that since the High Range PCA Guideline Judgment, and the empirical research and educational programs leading up to it, there had been a decline in the use by magistrates of s 10 dismissals for high range PCA offences: P Poletti, "Impact of the High Range PCA Guideline Judgment on sentencing drink drivers in New South Wales", *Sentencing Trends & Issues*, No 35, Judicial Commission of NSW, 2005. This trend was confirmed in a later study: M Karpin and P Poletti, "Common offences in the NSW Local Court: 2007", *Sentencing Trends & Issues*, No 37, 2008.

Intentionally or recklessly destroying or damaging property

In *Hoffenberg v District Court of NSW* [2010] NSWCA 142 at [25], it was held that a finding of the Chief Judge (in a severity appeal from the Local Court) that a deliberate act of vandalism placed the s 195(1)(a) *Crimes Act 1900* offence beyond the "trivial" was open. The Chief Judge discharged the obligation to consider the statutory factors in s 10(3) and "there was no error in the deliberative process followed": per McClellan CJ at CL at [29].

Aggravated break and enter with intent to commit a serious indictable offence

In *R v Lord* [2001] NSWCCA 533 at [18], it was held that the sentencing judge erred in finding extenuating circumstances under s 10(3). There was a failure to approach s 10 with the required two-step process. Nor did her Honour identify the provision within s 10 to which she had regard. Inadequate weight was given to the objective seriousness of the offence by reason of the offender's subjective circumstances.

Affray

In *R v Goh* [2002] NSWCCA 234, a Crown appeal where a charge of affray was dismissed pursuant to the provisions of s 10, Blanch AJ (Spigelman CJ and Adams J agreeing) observed at [15]:

- the exercise of a discretion not to record a conviction under s 10 is not common for an offence tried on indictment
- there are strong policy reasons for imposing sentences reflecting general deterrence where an affray takes place in an area with an unfortunate history of violence.

However, taking into account the respondent's antecedents and youth, the extenuating circumstances, and the sentencing judge's characterisation of the offence as at the bottom of the scale of seriousness, it could not be said that the order of the judge was manifestly inadequate: *R v Goh* at [15].

Marine pollution

There is no practice in cases of marine pollution for a "blameless" master to be discharged without conviction whenever the company is convicted. Each case requires the exercise of discretion on the basis of the entire circumstances: *Thorneloe v Filipowski* (2002) 52 NSWLR 60 at [113]. It was further held in that case that even in the context of a strict liability offence like s 27 *Marine Pollution Act 1987*, the risk to which society was subjected is a proper matter to be taken into account when considering whether the charge should be dismissed under s 10: *Thorneloe v Filipowski* at [156].

Thorneloe v Filipowski was applied in *DPP (NSW) v Roslyndale Shipping Pty Ltd* (2003) 59 NSWLR 210, where the court held that a dismissal of a strict liability pollution offence was a permissible sentencing option. The sentencing judge's conclusion that "neither of the defendants could have done anything to avert the event that occurred" was open to her Honour. There was no visible warning of a character sufficient, in all the circumstances, to put the respondent on notice of a likely equipment failure: *DPP (NSW) v Roslyndale* at [21], [23].

Sexual intercourse with child between the age of 10 and 16 yrs

In *R v KNL* (2005) 154 A Crim R 268, the court held that the sentencing judge erred in the manner he approached the imposition of the s 10 bond (as then available) by failing to observe the factors a court is to have regard to in deciding whether to make an order under s 10. One of these factors is whether the offence is trivial: s 10(3)(b). The Crown referred to *R v McClymont* (unrep, 17/12/92, NSWCCA) where the general policy underlying the response to offences of this nature was said to reside in the need to protect children from sexual conduct, even though they may be willing participants. The NSWCCA re-sentenced the respondent by recording a conviction and imposing a s 9 bond (as then available).

[5-050] Meaning and effect of s 10 orders

Section 10(4) provides:

> An order under this section has the same effect as a conviction:
>
> (a) for the purposes of any law with respect to the revesting or restoring of stolen property, and
>
> (b) for the purpose of enabling a court to give directions for compensation under Part 4 of the *Victims Compensation Act 1996*, and
>
> (c) for the purpose of enabling a court to give orders with respect to the restitution or delivery of property or the payment of money in connection with the restitution or delivery of property.
>
> **Note.** Certain other Acts and regulations contain provisions to the effect that an order under this section made in respect of an offence is to be treated as a conviction for certain

> purposes of the legislation concerned. Accordingly, those provisions apply to an order under subsection (1)(b) in respect of the offence and a conditional release order made pursuant to that paragraph.

A person subject to a s 10 order "has the same right to appeal on the ground that the person is not guilty of the offence as the person would have had if the person had been convicted of the offence": s 10(5).

In *R v Ingrassia* (1997) 41 NSWLR 447 at 450, Gleeson CJ stated, albeit in the context of s 556A (long since repealed), that:

> … it is contrary to common law principle that a person who has not been convicted of an offence should be punished by order of a court.

It follows that conditions which may be imposed in respect of a conditional release order made under s 10(1)(b) should not be of such a nature that they involve further punishment.

There may be statutory exceptions to this common law principle. These include those specifically referred to in s 10(4). For example, a condition that an offender pay a donation cannot be made under s 10(1)(b): *R v Ingrassia* (1997) 41 NSWLR 447 at 450. Chief Justice Gleeson said of the statutory predecessor of s 10 that it "is not a provision to be used for the purpose of soliciting gifts, whether to the revenue, to charities, or to anyone else": *R v Ingrassia* at 451.

[5-060] Demerit points and s 10 orders

Section 31(4) *Road Transport Act 2013* states that the Authority (as defined in s 4(1) *Road Transport Act*) cannot record demerit points against a person in respect of an offence if the court makes an order under s 10 *Crimes (Sentencing Procedure) Act 1999*.

[5-070] Restriction on use of s 10 orders for s 203 Road Transport Act 2013

Under s 203 *Road Transport Act 2013* — a section dealing with a court's power to impose penalties and disqualify offenders from holding a driver's licence — there is a restriction on the court's power to make an order under s 10 where the offender has had the benefit of one in the previous five years.

Section 203 provides:

(1) Section 10 of the *Crimes (Sentencing Procedure) Act 1999* does not apply if a person is charged before a court with an applicable offence if, at the time of or during the period of 5 years immediately before the court's determination in respect of the charge, that section is or has been applied to or in respect of the person in respect of a charge for another applicable offence (whether of the same or a different kind).

(2) Each of the following is an "applicable offence" for the purposes of subsection (1):

(a) an offence against section 110, 111, 112(1), 118 or 146 or clause 16(1)(b), 17 or 18 of Schedule 3,

(b) an offence against section 117(1) of driving negligently (being driving occasioning death or grievous bodily harm),

(c) an offence against section 117(2) of driving a motor vehicle on a road furiously or recklessly or at a speed or in a manner which is dangerous to the public,

(d) an offence under section 52AB of the *Crimes Act 1900*,

(e) (repealed)

(f) (repealed)

(g) an offence against a provision of an Act or statutory rule that is a former corresponding provision in relation to a provision referred to in paragraph (a), (b), (c) or (d),

(h) an offence of aiding, abetting, counselling or procuring the commission of an offence referred to in paragraph (a), (b), (c), (d) or (g).

[The next page is 3555]

Conviction with no other penalty

[5-300] Terms and scope

Section 10A *Crimes (Sentencing Procedure) Act 1999* provides:

> (1) A court that convicts an offender may dispose of the proceedings without imposing any other penalty.
>
> (2) Any such action is taken, for the purposes of the *Crimes (Appeal and Review) Act 2001* and the *Criminal Appeal Act 1912*, to be a sentence passed by the court on the conviction of the offender.

Section 10A was inserted by the *Crimes and Courts Legislation Amendment Act 2006*, which commenced on 29 November 2006 (GG No 175 of 8 December 2006, p 10,385).

Section 10A, according to the explanatory note to the Bill, has been added for circumstances where a court considers a s 10 bond is inappropriate because an offence is not trivial and it is inconvenient to impose any further penalty.

Laura Wells, Crown Prosecutor and Director of the Criminal Law Review Division of the Attorney General's Department, in "*Crimes and Courts Legislation Amendment Act 2006*" (2006) 18(11) *JOB* 91, provided the following rationale for the amendment, the circumstances in which the penalty could be used and its relationship with automatic statutory periods of licence disqualification:

> The use of the new option may be appropriate where the offence is not trivial enough to be dismissed under s 10 of the *Crimes (Sentencing Procedure) Act* or where it is inconvenient to impose any further penalty. An example would be when an offender has been sentenced to imprisonment for one or more principal offences, and other minor charges carrying a maximum penalty of a fine are dealt with at the same time.
>
> The commonly-imposed penalty of "imprisonment until the rising of the court" has not been abolished, and remains available in appropriate cases. However, as the penalty is a term of imprisonment (albeit a short one) it must only be imposed in those matters where, having considered all available alternatives, no penalty other than imprisonment is appropriate [s 5(1) *Crimes (Sentencing Procedure) Act*].
>
> It should be noted that making an order under the new s 10A does *not* operate to defeat automatic statutory periods of licence disqualification that are imposed upon conviction for certain driving offences.

In the second reading speech for the amending Act, Mr Neville Newell (on behalf of the Attorney General), said that s 10A was introduced to address an anomaly in relation to fines:

> This option addresses an anomaly in the sentencing regime to overcome situations where inappropriate sentences have been imposed such as fines of 50¢. Imposing very small nominal fines costs the courts, and State Debt Recovery Office, more to administer and recover, than the value of the fine; and where the offender is already serving a sentence of imprisonment, the fine is rarely recovered in any event. This amendment will address such cases.
>
> [*Hansard*, 27 October 2006]

[The next page is 3581]

Deferral for rehabilitation or other purpose

Section 101 *Crimes (Sentencing Procedure) Act 1999* abolished the common law power that a court had to:

- require a person to enter into a recognisance to be of good behaviour or to keep the peace, or
- take surety from a person for the performance of an obligation imposed (whether on that or any other person) by such a recognisance.

Prior to this, the so-called *Griffiths* remand was a device sometimes employed to remand an offender for behavioural assessment before he or she is called up for sentence: *Griffiths v The Queen* (1977) 137 CLR 293.

Section 11 *Crimes (Sentencing Procedure) Act* was introduced as a replacement for the *Griffiths* remand and provides the court with the power to defer sentencing for rehabilitation, participation in an intervention program or other purposes.

[5-400] Preliminary

Following a finding of guilt a court may make an order adjourning the proceedings for a maximum of 12 months (s 11(1) *Crimes (Sentencing Procedure) Act 1999*) for a number of specific purposes set out in s 11(1):

> (1) A court that finds a person guilty of an offence (whether or not it proceeds to conviction) may make an order adjourning proceedings against the offender to a specified date:
>
> (a) for the purpose of assessing the offender's capacity and prospects for rehabilitation; or
>
> (b) for the purpose of allowing the offender to demonstrate that rehabilitation has taken place; or
>
> (b1) for the purpose of assessing the offender's capacity and prospects for participation in an intervention program, or
>
> (b2) for the purpose of allowing the offender to participate in an intervention program, or
>
> (c) for any other purpose the court considers appropriate in the circumstances.

Proceedings must not be adjourned under s 11 unless bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*: s 11(1A) (inserted by Sch 2.13[2] *Bail (Consequential Amendments) Act 2014*). Therefore, an adjournment under s 11 cannot be made for offenders remanded in custody at sentence unless the court formally grants the offender bail for the offence(s) pursuant to the *Bail Act*.

At the expiration of the period of remand the defendant is required to reappear for sentencing. The defendant's progress during the adjournment is assessed and the court may take this into account when he or she comes back to court for sentencing. This (common law) procedure was said to be a valid one by the High Court in *Griffiths v The Queen* (1977) 137 CLR 293.

The rationale for a s 11 adjournment

The rationale for deferring proceedings is that it may aid in the final determination of an appropriate sentence: *R v Farrell* (2014) 239 A Crim R 212 at [58] quoting *R v Rayment* (2010) 200 A Crim R 48 at [18], [25], [159]. This rationale bears upon the decision of whether to exercise the discretion afforded by s 11: *R v Farrell* at [61]. There must be good reason for concluding that a s 11 adjournment is likely to assist the court in determining whether a custodial sentence should be imposed and, if so, in assessing the length of the sentence or non-parole period: *R v Farrell* at [51]. Before consideration can be given to making an order under s 11 there must be some assessment of the objective gravity of the offence: *R v Farrell* at [27], [52]; *R v Palu* (2002) 134 A Crim R 174 at [38].

In *R v Trindall* (2002) 133 A Crim R 119, Smart AJ (Spigelman CJ and Grove J agreeing), explained the purpose behind and object of s 11 at [60]–[61]:

> Often a Court experiences difficulty when sentencing an offender in determining the offender's prospects of rehabilitation and whether the foreshadowed rehabilitation will occur. In many instances it will be of great assistance to the sentencing judge if there is an adjournment to enable the offender to demonstrate that rehabilitation has taken place or is well on the way. That was the present case. It is so much better for the court to have evidence of what has actually taken place than to have to base its decision on the opinions of experts, assertions by the offender and what has happened over a short period of time, that is, since the commission of the offence or the offender's arrest.
>
> The addition in s 11(1)(c) of any other purpose which may be appropriate as the basis for granting a *Griffiths* remand extends the generally understood purposes for which such a remand may be granted. I have earlier referred to one example [significant risk of suicide]. Another is to enable recommended and important surgery to take place. There would be other instances where it would be appropriate to grant a *Griffiths* remand.

The examples cited in *R v Trindall* above would not necessarily require an adjournment under s 11 for the purpose of determining the final sentence: *R v Farrell* at [61].

A failure on the part of the court to set an adjournment date is not such a defect as to render the order invalid. It is a slip capable of restoration by remitting the matter to the judge for a date to be fixed: *R v Trindall* at [39].

Section 11 adjournments and full-time custody

The fact that a full-time custodial sentence is inevitable does not preclude, in exceptional cases, the grant of an order under s 11: *R v Brown* (2009) 193 A Crim R 574 at [22]; *R v Rayment* (2010) 200 A Crim R 48 at [22], [160]. A s 11 remand is not confined to cases where the court contemplates a sentence other than full-time imprisonment if rehabilitation is successful: *R v Farrell* (2014) 239 A Crim R 212 at [55]. This is in contrast to a common law *Griffiths* remand. In *R v Trindall* (2002) 133 A Crim R 119, Smart AJ (with whom Spigelman CJ and Grove J agreed) stated at [62], [64]:

> I do not share the view that it necessarily imposes undue hardship on the offender to grant a *Griffiths* remand and warn him that he may still go to gaol, or that he will go to gaol and that the remand is for the purpose of determining a non-parole period. From my experience many offenders prefer to take their chances. Most believe that they will be able to demonstrate marked improvement or rehabilitation … After all, going straight to gaol gives them no opportunity of avoiding that devastating experience or reducing the extent of that experience. …

…

> The granting of a *Griffiths* remand [that is an order under s 11] is likely to arise for consideration in a relatively small number of cases. Generally, such a remand should not be granted unless there are good reasons for concluding that it is likely to assist the court in *determining whether an offender should be sent to gaol or in fixing the length of the sentence or the non-parole period. If the latter be the case, the judge should, as here, make it clear to the offender that he will be going to gaol and that the purpose of the remand is to assist the court in fixing the non-parole period*. This Court should not seek to circumscribe the wide statutory discretion given to the sentencing judge. (Emphasis added.)

R v Trindall has been quoted with approval in: *R v Farrell* at [55]; *R v Di Gregorio* [2004] NSWCCA 9; *R v Williams* [2004] NSWCCA 64; *R v Leahy* [2004] NSWCCA 148; *R v Kipic* [2004] NSWCCA 452; *R v Brown* [2009] NSWCCA 6 at [22].

The court still, however, persisted with a strong cautionary note about the use of s 11. In *R v Palu* Howie J (Levine and Hidden JJ agreeing) said at [29]:

> … the section can only be utilized in a principled way and upon proper material placed before the court otherwise it becomes an instrument of injustice, either by raising false expectations in the mind of the offender as to the sentence which will ultimately be imposed upon him or by becoming the justification for the imposition of a sentence which fails to meet legitimate expectations of the community as to the punishment to be imposed upon the offender.

The judge in *R v ABS* [2005] NSWCCA 255 erred by suggesting that some form of sentence other than full-time custody might well be available at the end of the remand period. Rather, the serious objective criminality of the offences required significant full-time custodial sentences.

In *R v MRN* [2006] NSWCCA 155 at [114], the court held that the judge should have explained to the applicant that despite the grant of bail for rehabilitation purposes he should expect a substantial period of full-time custody.

Requirement to consider the effect of delay

The court must be satisfied that the delay that will inevitably result from an adjournment is wholly justified in order to ensure proper exercise of the sentencing discretion: *R v Farrell* [2014] NSWCCA 30 at [53]. The court must take into account any unfairness that may be caused by the delay.

In *R v Palu* Howie J (Levine and Hidden JJ agreeing) said at [30]:

> The exercise of the power given under s 11 will inevitably result in delay in the finalisation of the prosecution of the offender. On many occasions, as in the present case, that delay will be substantial. Unless the further delaying of the sentencing of the offender is wholly justified in order to ensure that the sentencing discretion is properly exercised, there will be a miscarriage of justice. Time and again sentencing courts are asked to have regard to the delay in sentencing an offender as a matter of mitigation because of the adverse effects of delay upon the well-being of the offender and the disruption it causes to his or her everyday life. Delay unavoidably results in unfairness: unnecessary delay results in injustice. Steps have been taken throughout the criminal

justice process to eliminate unnecessary delay wherever possible. Unless delay in the sentencing of the offender is essential in order to ensure a just result, the court has failed in its duty both to the offender and the community.

Crown appeals

Section 5D(1) *Criminal Appeal Act 1912*, provides that the Attorney General or Director of Public Prosecutions may appeal to the Court of Criminal Appeal against "any sentence pronounced by the court of trial in any proceedings to which the Crown was a party". The definition of "sentence" in s 2 of that Act includes any order made by the court of trial in respect of a person under s 11.

It is trite that the question as to whether an order is made under s 11 depends on the facts of the case. The following are some examples of Crown appeals. In *R v Pulliene* [2009] NSWCCA 47 the court held that it was within the sentencing judge's discretion to make an order under s 11 where the offender, who had committed an armed robbery, was "at the crossroads". This was because, although her prospects were difficult to predict, she was a young person with a troubled background who had showed signs of rehabilitation: *R v Pulliene* at [27]. The court in *R v Rayment* (2010) 200 A Crim R 48 held at [27], [173] that it was within the sentencing judge discretion to make an order under s 11 where the offender had committed an aggravated detain for advantage (inflict actual bodily harm) offence. Johnson J dissented (see [123]–[124]). In *R v Farrell* [2014] NSWCCA 30 at [67], the judge failed to fully consider the objective seriousness of the offence; to properly assess the evidence relating to the respondent's surgery; and, to adequately take into account the rationale for a s 11 disposition for the purpose of rehabilitation. The Crown appeal was dismissed because the intervention of the court would have served no practical purpose given the scheduled date of sentencing proceedings: *R v Farrell* at [68].

[5-410] Terms and conditions

When deferring sentence pursuant to s 11 *Crimes (Sentencing Procedure) Act 1999*, the court may impose such terms or conditions and also in accordance with the *Bail Act 2013*.

[5-420] Breach

If the bail is breached during its term, the matter is governed by the *Bail Act 2013*. The court can issue a warrant for the apprehension of the offender. When the offender appears before the court, the court can then proceed to deal with the matter immediately and sentence the offender or re-release him or her on bail, subject to the 12 month limit from the date of the finding of guilt: s 11(2).

[5-430] Intervention programs

The law relating to intervention programs is set out in Ch 7, Pt 4 *Criminal Procedure Act 1986*. The Diversionary programs on JIRS explains the main features of each intervention program and provides links to additional information. The objectives of such programs are contained in s 345 of the Act. In summary, intervention programs are intended to provide a framework for the recognition and operation of certain alternative measures for those who have committed or are alleged to have committed

an offence; such programs should apply fairly to participants and be properly managed and administered, and participation in the programs is intended to reduce the likelihood of future offending. A court may adjourn proceedings to allow the accused person to be assessed for, or to participate in, an intervention program: see s 350 *Criminal Procedure Act 1986*.

Section 350(1A) provides proceedings must not be adjourned unless bail for the offence is or has been granted or dispersed with under the *Bail Act* 2013.

Offenders or alleged offenders may be referred to intervention programs at several points in criminal proceedings, these points are described by a note to Ch 7, Pt 4 *Criminal Procedure Act 1986*, as follows:

(a) a court that grants bail to a person may impose a bail condition requiring the person to be assessed for, or to participate in, an intervention program or other program,

(b) a court may adjourn criminal proceedings against a person before any finding as to guilt is made and grant bail to the person for the purpose of assessing the person's capacity and prospects for participation in an intervention program or to allow the person to participate in an intervention program (and to comply with any plan arising out of the program) under this Act,

(c) a court that finds a person guilty of an offence may make an order requiring the person to participate in an intervention program (and to comply with any plan arising out of the program) under s 10(1)(c) of the *Crimes (Sentencing Procedure) Act 1999*,

(d) sentencing of an offender may be deferred for the purpose of assessing an offender for participation in an intervention program, or for allowing an offender to participate in an intervention program (and to comply with any plan arising out of the program) under s 11 of the *Crimes (Sentencing Procedure) Act 1999*.

[5-440] Declaration and regulation of intervention programs

The regulations may declare certain programs to be intervention programs: s 347 *Criminal Procedure Act 1986*.

The purposes of intervention programs are enumerated under s 347(2) *Criminal Procedure Act 1986* and, in summary, include promoting:

- treatment or rehabilitation of offenders
- respect for the law
- maintenance of a just and safe community
- remedial action to victims and the community
- the acceptance of accountability and responsibility for the behaviour
- the reintegration of offenders into the community.

The following intervention programs have been declared under the *Criminal Procedure Regulation 2017*: circle sentencing intervention program (Pt 7) and traffic offender intervention program (Pt 9). Former Pt 8, dealing with the forum sentencing intervention program, was repealed as from 29 June 2018.

The processes involved in referring an offender for participation in the circle sentencing and traffic offender intervention programs are summarised below.

Circle sentencing intervention program: Pt 7 Criminal Procedure Regulation 2017

- A suitability assessment order is made.
- A Program Officer convenes a meeting of the Aboriginal Community Justice Group.
- The Aboriginal Community Justice Group assesses the offender.
- A court determines whether a program participation order should be made.
- The offender enters into an agreement to participate.
- The Program Officer convenes a circle sentencing group.
- The offender must comply with the program and any intervention plan.
- The court may pronounce a sentence.

Traffic offender intervention program: Pt 9 Criminal Procedure Regulation 2017

- A court determines whether an offender may be referred for participation.
- A court makes a program participation order.
- A traffic offender enters into an agreement to participate.
- A traffic offender must comply with the requirements of an approved traffic course.

[5-450] Restrictions on the power to make intervention program orders

Generally, offences for which an intervention program may be conducted are summary offences and indictable offences that may be dealt with summarily: s 348(1) *Criminal Procedure Act 1986*. Subsection 348(2), however, lists the following offences that may *not* be the subject of intervention programs:

(a) an offence under section 35 (Malicious wounding or infliction of grievous bodily harm) or 35A(1) (Maliciously cause dog to inflict grievous bodily harm) of the *Crimes Act 1900*,

(b) an offence under Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault etc) or 15 (Child prostitution and pornography) of Part 3 of the *Crimes Act 1900*,

(c) an offence under section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900* (Stalking or intimidation with intent to cause fear of physical or mental harm),

(d) an offence under section 91H (Production, dissemination or possession of child pornography), 578B (Possession of child pornography) or 578C(2A) (Publishing child pornography) of the *Crimes Act 1900*,

(e) any offence involving the use of a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*,

(f) an offence under section 23(1)(b) or (2)(b) (Offences with respect to prohibited plants), 25 (Supply of prohibited drugs) or 25A (Offence of supplying prohibited drugs on an ongoing basis) of the *Drug Misuse and Trafficking Act 1985*,

(g) any other offence prescribed by the regulations for the purposes of this subsection.

[The next page is 4001]

Fines

[6-100] Generally

Last reviewed: March 2024

Part 2, Div 4 (ss 15 to 17 inclusive) *Crimes (Sentencing Procedure) Act 1999* sets out the statutory scheme for fines. The *Fines Act 1996* also applies and establishes a Commissioner of Fines Administration (previously the State Debt Recovery Office).

A fine is a monetary penalty and is noted in Acts as a number of penalty units.

The value of one penalty unit is prescribed in s 17 *Crimes (Sentencing Procedure) Act* and, currently, one penalty unit is equal to $110. See **[6-160]** for the value of a Commonwealth penalty unit.

[6-110] Availability

Last reviewed: March 2024

Any offence

A fine can be imposed if it is specified as a penalty for the offence.

Indictable offences

A judge sentencing a person convicted on indictment may, in addition to or instead of any other punishment, impose a fine up to 1,000 penalty units: s 15(2) *Crimes (Sentencing Procedure) Act 1999*. Section 15 does not apply where another provision empowers the imposition of a fine for the offence: s 15(1). Fines may be imposed in addition to or instead of any other penalty that may be imposed for the offence: s 15(3). Therefore, fines may be imposed under s 15 in addition to, or instead of, any of the following dispositions:

- imprisonment
- intensive correction order (ICO)
- community correction order (CCO).

A fine cannot be imposed in addition to a conditional release order (CRO) in respect of the same offence: s 9(3) *Crimes (Sentencing Procedure) Act*.

Certain indictable offences may be heard summarily under the *Criminal Procedure Act 1986*. The maximum fine that a magistrate hearing such matters may impose is set out in s 267(3) *Criminal Procedure Act* (maximum penalties for Table 1 Offences), being 100 penalty units or the maximum fine provided by law for the offence, whichever is the smaller fine. Section 268 *Criminal Procedure Act* sets out the maximum penalties for the specified Table 2 offences.

The maximum amount of a fine is generally the amount prescribed for the offence. Where a person is convicted of an offence at common law or indictment, the penalty is at large. The fine imposed should not be excessive: *Smith v The Queen* (1991) 25 NSWLR 1 per Kirby P at 13–18, and Mahoney JA at 24.

Discretion

Section 21(3) *Crimes (Sentencing Procedure) Act* provides:

> If by any provision of an Act or statutory rule an offender is made liable to a fine of a specified amount, a court may nevertheless impose a fine of a lesser amount.

Therefore, unless the amount of the fine is mandatory, any fine may be less than that specified for the offence in the legislation.

Consideration of an accused's means to pay

There are restrictions imposed on the court in exercising the discretion to impose a fine. Section 6 *Fines Act 1996* provides that:

> In the exercise by a court of a discretion to fix the amount of any fine, the court is required to consider:
>
> (a) such information regarding the means of the accused as is reasonably and practicably available to the court for consideration, and
>
> (b) such other matters as, in the opinion of the court, are relevant to that fixing of the amount.

Section 6 is materially similar to s 16C(1) *Crimes Act 1914* (Cth) and the approach taken at common law: see *Flego v Lanham* (1983) 32 SASR 361 at 365–367. The expression "is required to" in s 6 indicates that the court must have regard to the issue, that is, it is a mandatory consideration: *Retsos v R* [2006] NSWCCA 85 at [14]. The judge erred in *Retsos v R* because there was no credible evidence which established that the applicant had the capacity to pay fines totalling $80,000. It has been held in the context of applying s 16C(1) to Commonwealth offences that although the means of an offender to pay is a mandatory consideration it is not a decisive factor: *Jahandideh v R* [2014] NSWCCA 178 at [16]–[17].

Other considerations that are relevant in determining the amount of a fine include the seriousness of the offence, its prevalence and deterrence: *Jahandideh v R* at [16]–[17]; *Darter v Diden* (2006) 94 SASR 505 at [20]; *Smith v The Queen* (1991) 25 NSWLR 1 at 17–18. In some cases, consideration of the financial circumstances of an offender may increase, rather than decrease, a fine in order for it to be a deterrent: *Jahandideh v R* at [17].

Time to pay

Section 5 *Fines Act* provides a period of 28 days to pay the fine and a person may apply to the court registrar for additional time to pay. However, a court may, for special reasons, direct payment before 28 days: s 7(3) of the Act.

Accumulation of fines

Where there is more than one offence, there is no statutory limit on the aggregate of fines which may be imposed.

Corporations

Where a penalty for an offence committed by a body corporate is a term of custody only, the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission or the District Court, may instead impose a fine up to 2,000 penalty units, and any other court may impose a fine up to 100 penalty units: s 16 *Crimes (Sentencing Procedure) Act*.

Other general considerations

When imposing more than one fine or a fine with another sentence, the court should consider the totality of the conduct and the total sentence imposed: *Sgroi v The Queen* (1989) 40 A Crim R 197. See also **Applications of the totality principle** at **[8-210]**.

It is not inappropriate to order the payment of a fine simply because it will be paid by another person in circumstances where that "would create obligations and concern" to the offender: *R v Repacholi* (1990) 52 A Crim R 49 at 63.

A fine may be appropriate in addition to a term of imprisonment where the offender has benefited financially from the crime: *R v Rahme* (1989) 43 A Crim R 81.

Although there is a jurisdictional limit for the Local Court in terms of the maximum fine that may be imposed, where such a penalty is being considered, the court should "impose a penalty reflecting the objective seriousness of the offence … taking care not to exceed the maximum jurisdictional limit": *Roads and Maritime Services v L & M Scott Haulage Pty Ltd* [2013] NSWCCA 107 at [20]; *R v Doan* (2000) 50 NSWLR 115 at [35].

[6-120] Summary of procedure

Last reviewed: March 2024

The following is a summary of the procedure for the payment of fines imposed by courts under s 5(1) *Fines Act 1996*.

(a) **Payment details**

A fine imposed by a court is payable within 28 days after it is imposed.

(b) **Notification of fine**

The person on whom the fine is imposed is to be notified of the fine, the arrangements for payment and the action that may be taken under this Act to enforce the fine.

(c) **Time to pay**

A court registrar may allow further time to pay the fine on the application of the person.

(d) **Enforcement order**

If payment of the fine is not made by the due date, a court fine enforcement order may be made against the person. If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action authorised by the Act may be taken (see Part 4 *Fines Act*).

(e) **Withdrawal of enforcement order**

A court fine enforcement order may be withdrawn if an error has been made.

[6-130] Fine(s) imposed with other orders

Last reviewed: March 2024

Where more than one order is imposed for a single offence, a separate order must be given for each as per the form of order for each disposition. The fine is separate: *R v McGovern* [1975] 1 NSWLR 642.

Often a maximum penalty provision for an offence stipulates that a fine or a period of imprisonment, "or both", can be imposed. The use of the word "both" entitles the court to make more than one order.

Section 9(3) *Crimes (Sentencing Procedure) Act 1999* explicitly provides that a fine and a conditional release order (CRO) cannot be imposed in relation to the offender in respect of the same offence. A CRO with a conviction may be made as an alternative to imposing a fine: s 9(3)(b).

[6-140] Default provisions

Last reviewed: March 2024

The fine enforcement procedure under the *Fines Act 1996* is set out in Pt 4. A summary of the procedure appears in s 58(1):

(a) Service of fine enforcement order

Notice of the fine enforcement order is served on the fine defaulter and the fine defaulter is notified that if payment is not made enforcement action will be taken (see Div 2).

(b) Licence and registration enforcement action

If the fine is not paid within the period specified, Transport for NSW takes action against the fine defaulter's driver licence, vehicle registration, visitor privileges or marine safety licence (see Div 3).

(c) Civil enforcement

Civil enforcement action in the form of a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter is taken if enforcement action under Div 3 is unavailable or unsuccessful, or if the Commissioner is satisfied that civil enforcement action is preferable (see Div 4).

(d) Order requiring community service

Civil enforcement action in the form of a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter is taken if enforcement action under Div 3 is unavailable or unsuccessful, or if the Commissioner is satisfied that civil enforcement action is preferable (see Div 5).

(e) Fines payable by corporations

The procedures for fine enforcement (other than orders requiring community service and imprisonment) apply to fines payable by corporations (see Div 7).

(f) Fine mitigation

The Commissioner of Fines Administration may allow further time to pay a fine, write off unpaid fines or make a work and development order in respect of the fine defaulter for the purposes of satisfying all or part of the fine. Applications for review may be made to the Hardship Review Board (see Div 8).

Part 4, Div 8, Subdiv 1 of the *Fines Act* provides for a "work and development order" scheme to divert vulnerable people from the fine enforcement process.

The Commissioner of Fines Administration may issue a fine enforcement order where a determination is made to make an order under s 100 (the "Centrepay" scheme), or a work and development order: ss 14(1A), 42(1AA). In either case, the Commissioner must postpone the enforcement costs payable and waive those costs if such orders are complied with: cl 6(2) *Fines Regulation 2015*.

The registrar of a court that has imposed a fine, or to which a fine is payable, may now refer a matter to the Commissioner where a person is eligible for the Centrepay scheme, or where the person is seeking a work and development order, even if the person has not defaulted on the fine: s 13 *Fines Act*. The Commissioner's power to write off unpaid fines can apply to part, or the whole, of an unpaid fine: see s 101(1A), (1B), (3), (4) *Fines Act*.

It is an offence for a person to drive if their licence has been suspended or cancelled as a result of a fine default under s 66 *Fines Act*: s 54(5) *Road Transport Act 2013*.

[6-150] Financial payment in lieu of fines

Last reviewed: March 2024

A court cannot require some other financial payment to be made in lieu of a fine, such as a donation to a charity: *Griffiths v Hutchison* (unrep, 1/2/91, NSWSC) per McInerney J.

See further compensation orders in **Victims and victim impact statements** at **[12-860]**.

[6-160] Fines for Commonwealth offences

Last reviewed: March 2024

Availability

Fines are noted in the Acts as numbers of penalty units. The value of one penalty unit is prescribed in s 4AA *Crimes Act 1914* (Cth) (currently $313). A fine can be imposed if a fine is specified as a penalty for the offence or pursuant to s 4B(2) *Crimes Act 1914*:

> Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:
>
> Term of Imprisonment x 5
>
> where:
>
> *Term of Imprisonment* is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

As to corporations, see s 4B(3).

Section 4AA(3) *Crimes Act* provides that on 1 July 2018 and every third 1 July thereafter (an indexation day) the penalty unit amount is to be replaced by an amount calculated using the prescribed formula (the indexation factor for the indexation day multiplied by the dollar amount immediately before the indexation day).

Relevant definitions for the indexation formula are contained in s 4AA(4). When the penalty unit amount is increased in accordance with s 4AA(3), the increased amount applies only to offences committed on or after the indexation day: s 4AA(8). For offences committed on or after 1 July 2023 a penalty unit is $313; for offences committed on or after 1 January 2023 until 30 June 2023 a penalty unit is $275; for offences committed from 1 July 2020 to 31 December 2022, a penalty unit is $222; for offences committed from 1 July 2017 until 30 June 2020 a penalty unit is $210.

Amount

The maximum amount of a fine that can be imposed is the maximum fine specified for the particular offence, or the amount specified in s 4B. Penalties attracting a maximum term of life imprisonment may also attract a pecuniary penalty of up to 2000 penalty units: s 4B(2A).

Constraints

Matters to be taken into account

In determining a sentence, including whether to impose a fine, there are matters which the court must take into account under s 16A *Crimes Act 1914*.

Consideration of defendant's means to pay

The court must take into consideration the offender's means to pay: s 16C *Crimes Act 1914*. That requirement does not dictate that the offender's financial circumstances will determine the fine imposed: *Jahandideh v R* [2014] NSWCCA 178 at [15]. See **Fines** at **[16-030]**.

Enforcement and recovery

Section 15A *Crimes Act 1914* picks up State law in relation to the enforcement and recovery of fines imposed on Commonwealth offenders. For the NSW laws, see above at **[6-100]**ff.

As condition of recognizance

A pecuniary penalty may be imposed in relation to conditional release pursuant to s 20(1)(a) *Crimes Act 1914* and s 20(5).

[6-170] Children's Court

Last reviewed: March 2024

Where the Children's Court finds a person guilty of an offence it may impose a fine, being the lesser of the maximum fine prescribed by law for the offence or 10 penalty units: s 33(1)(c) *Children (Criminal Proceedings) Act 1987*. As to the type of offence, see s 32. Orders made under s 33(1) are dependent on guilt, not conviction, and in determining the appropriate disposition the court must take into account any plea of guilty.

***Good behaviour bond*:** A fine may be imposed with a good behaviour bond: s 33(1)(d).

***Disqualification*:** The power to order disqualification from driving is not limited by s 33: s 33(5)(a).

***Forfeiture*:** The power to order forfeiture is not limited by s 33: s 33(5)(b). Similar ancillary orders relating to drugs and implements may be made.

[The next page is 4061]

Non-association and place restriction orders

The *Justice Legislation Amendment (Non-association and Place Restriction) Act 2001* was introduced, along with a series of other Acts, with the intention of reducing gang-related crime. The Act, which chiefly amended the *Crimes (Sentencing Procedure) Act 1999*, provided that on sentencing a court may, in addition to any other penalty or order, impose on the offender a "place restriction order" and/or a "non-association order". By targeting the "elements that are central to gang activity" — group association and territory — the orders are intended to limit the offender's opportunity to reoffend by reducing his or her exposure to high risk situations.

The Act also amended the *Bail Act 1978* (since repealed and replaced by the *Bail Act 2013*), *Crimes (Administration of Sentences) Act 1999* and the *Children (Detention Centres) Act 1987* to provide for non-association and/or place restriction orders as conditions of bail, parole and leave. These amendments commenced on 13 May 2002.

The amendments to the *Crimes (Sentencing Procedure) Act 1999* discussed below, commenced on 19 July 2002.

Since 24 September 2018, similar types of restrictions may be imposed on an offender at sentence as a condition of a community-based order such as an intensive correction order (ICO) (see [3-600]ff), a community correction order (CCO) (see [4-400]ff) or a conditional release order (CRO) (see [4-700]ff).

[6-500] Availability of orders

A non-association and/or place restriction order may be imposed where the court "is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences": s 17A(2) *Crimes (Sentencing Procedure) Act 1999*. While these provisions were introduced ostensibly to "target gangs [and] break down criminal associations", there are no specific limits on the circumstances in which a non-association and/or place restriction order can be made other than the following:

- non-association and/or place restriction orders may only be imposed on sentencing for any offence that carries a maximum penalty of six months' imprisonment or greater or to an aggregate sentence of imprisonment in respect of two or more offences any one of which is an offence to which s 17A applies: s 17A(1)
- an order may *not* be made where the only other penalty imposed on an offender is under s 10 *Crimes (Sentencing Procedure) Act 1999* (dismissal of charges and discharge of an offender on a CRO (but note that a non-association or place restriction may be a condition of such an order)) or s 11 (deferral of sentencing for rehabilitation and other purposes): s 17A(4), and
- orders are made *in addition to* (not instead of) any other sanction imposed, and do not limit the availability of any other orders or restrictions that may be imposed under any other Act: s 17A(4).

Non-association and/or place restriction orders may also be made a condition attaching to bail or parole or unescorted leave from custody, and since 24 September 2018, as a condition of an ICO, CCO and CRO.

[6-510] Restriction

The Local Court is not empowered to impose a non-association order and/or place a restriction order if the offender being dealt with is absent: s 25(1)(f) *Crimes (Sentencing Procedure) Act 1999*.

[6-520] Types of orders

A **non-association** order prohibits the subject from associating with a specified person for a specified term, and may be in one of two forms:

- a **limited non-association order**, which prohibits personal contact: s 17A(3)(a) and
- an **unlimited non-association order**, which prohibits personal contact and communication by any means, including post, telephone, facsimile and email: s 17A(3)(b).

A **place restriction order** prohibits the subject from entering specific places or districts for a specified term: s 17A(2)(b).

Constraints on content of orders under s 17A

A place restriction order may not be framed so as to prevent the subject from accessing his or her place of residence, place of regular employment, education or worship: s 100A(2).

A non-association order may not be framed so as to prevent the subject from contacting "close family" members including spouses, parents, grandparents, children and grandchildren, brothers and sisters and guardians or carers: s 100A(1).

The term of the non-association/place restriction order is not limited by the length of sentence imposed, but may not exceed 12 months: s 17A(5).

Suspension while subject in custody

A non-association/place restriction order is suspended while the subject is in lawful custody, or in the case of juveniles, while the subject is on an approved supervised leave of absence from a detention centre as provided for by s 24 *Children (Detention Centres) Act 1987*: s 100D(1).

A suspension in these circumstances does not postpone the concluding date of the term of the original order: s 100D(2).

Contravention, breach and penalty

The subject may not, without reasonable excuse, contravene a non-association/place restriction order. Breach of an order is punishable by six months imprisonment, a fine of 10 penalty units, or both: s 100E(1).

It is not a breach if the subject unintentionally crosses paths with a prohibited person, provided that the subject terminates such contact immediately: s 100E(2).

It is not a breach of an order to contact a person or attend a place in compliance with an order of the court where otherwise such contact/attendance would be prohibited: s 100E(3).

Variation and revocation

On sentencing an offender for a new offence, the court may vary or revoke a pre-existing non-association/place restriction order as it sees fit, whether or not the order had been imposed by that same court: s 100F(2).

The subject of an order may also apply to the Local Court for variation/revocation of the order. If the Local Court grants leave to entertain the application for variation/revocation, it must notify the Commissioner of Police who is then entitled to be heard in any proceedings on the subject's application: s 100G.

Where an appeal against an order is unsuccessful, the period of the original order will run from the date of the appeal. This provision is designed to prevent the effect of the orders imposed being circumvented through suspension, pending hearing of the appeal: s 100C(b).

Non-association and place restrictions as conditions of community-based orders

Non-association and/or place restrictions may also be imposed on sentence as additional conditions of a community-based order (intensive correction order (ICO), community correction order (CCO) or conditional release order (CRO)): ss 73A(2), 89(2), 99(2) *Crimes (Sentencing Procedure) Act 1999*.

An offender subject to a non-association condition on a community-based order is obliged "not to be in the company of any person specified in the non-association condition or communicate with that person by any means, except as specified in the condition": cl 189F *Crimes (Administration of Sentences) Regulation 2014*.

An offender subject to a place restriction condition is obliged "not to frequent or visit a specified place or area specified in the place restriction condition, except as specified in the condition": cl 189G *Crimes (Administration of Sentences) Regulation*.

When imposed as a condition of a community-based order, such restrictions are not subject to the 12-month limitation in s 17A(5) *Crimes (Sentencing Procedure) Act* that applies when a separate order is made under s 17A. Rather, when part of a community-based order, the condition may be in force for the period of the order or a limited period ordered by the court: ss 73A(4), 89(5), 99(4).

Non-association and place restriction conditions under community-based orders are not subject to the requirements of Pt 8A *Crimes (Sentencing Procedure) Act*.

[The next page is 4101]

Breaches of non-custodial community-based orders

A court's power to deal with breaches of community correction orders (CCOs) and conditional release orders (CROs) is contained in respectively ss 107C and 108C *Crimes (Administration of Sentences) Act 1999*. The procedures for dealing with breaches of these orders are set out in cl 329 *Crimes (Administration of Sentences) Regulation 2014*.

[6-600] Commencing breach proceedings

A court that suspects an offender may have failed to comply with any condition of a CCO or CRO may call on the offender to appear before it: ss 107C(1), 108C(1) *Crimes (Administration of Sentences) Act 1999*. The court that made the order may deal with a breach even though constituted differently from the court that made the order: ss 107C(6), 108C(6).

If a community corrections officer is satisfied an offender has failed to comply with any conditions of a CCO or CRO, the officer may file a written breach report with the relevant court: cl 329(1) *Crimes (Administration of Sentences) Regulation 2014*.

A court can still deal with a suspected breach even if a report has not been filed: cl 329(11).

The court must fix a date for hearing, not earlier than 14 days after and no later than 3 months, after the breach report was filed but may waive or vary this requirement: cl 329(2)–(3).

If the matter is set down for hearing, a copy of the breach report must be given to the offender at least 5 days before the hearing either by the court or the community corrections officer: cl 329(4), (5).

A breach of a CCO or CRO may be dealt with by the court with or without the parties being present and in open court or in the absence of the public: cl 329(6) *Crimes (Administration of Sentences) Regulation 2014*. However, neither the *Crimes (Administration of Sentences)* Act 1999 nor the regulations provide guidance as to the factors a court might consider when deciding whether to deal with such a matter in the offender's absence.

The court may issue a warrant for the offender's arrest if their location is unknown or they fail to appear: s 107C(2)–(3) *Crimes (Administration of Sentences)* Act for CCOs, s 108C(2)–(3) for CROs.

[6-610] Jurisdiction

A breach of either a CCO or CRO may be dealt with by the court that made the order, any other court of like jurisdiction or, with the offender's consent, any court of superior jurisdiction: s 107C(1) *Crimes (Administration of Sentences) Act 1999* for CCOs; s 108C(1) for CROs.

The distinction between a court "of like jurisdiction" and a court "of superior jurisdiction" was discussed in *DPP (NSW) v Jones* [2017] NSWCCA 164 in the context of the previous legislative provisions concerning breach of a good behaviour bond. The expression "court of like jurisdiction" empowers the Local Court to call up and, if

satisfied there had been a failure to comply with a condition or conditions, to revoke a good behaviour bond imposed by the District Court in an appeal against sentence: *DPP (NSW) v Jones* at [28]. Where a failure to comply with a condition of the bond involved the commission of further offences, it was open to the Local Court when sentencing for those further offences to deal with the failure to comply with the bond, even though it was imposed in the District Court pursuant to an appeal against an earlier sentence: *DPP (NSW) v Jones* at [26].

Section 71 *Crimes (Appeal and Review) Act 2001* is headed "Variation of sentences of Local Court" and s 71(3) provides:

> Any sentence varied or imposed by an appeal court, and any order made by an appeal court under this Act, has the same effect and may be enforced in the same manner as if it were made by the Local Court.

The language of these provisions is said to suggest that the Local Court and District Court are courts "of like jurisdiction" in circumstances where a bond, imposed in the District Court following a sentence appeal, is breached: *DPP (NSW) v Jones* at [22]–[25]. Section 71(1)–(2) precludes the District Court imposing any sentence that could not be imposed by the Local Court: *DPP (NSW) v Jones* at [24].

Further, s 71(3) indicates that an order imposed in the District Court has the same effect and may be enforced in the same manner as if it had been imposed by the Local Court: *DPP (NSW) v Jones* at [25].

However, it has also been held that "relevant court" (that is, the court "with which" the offender entered into the bond) was the Local Court in circumstances where the bond was imposed by that court, and the sentence was confirmed on appeal by the District Court: *DPP (NSW) v Jones* at [20], referring to *Yates v The Commissioner of Corrective Services, NSW* [2014] NSWSC 653 at [43].

Under the previous legislative provisions (in relevantly similar terms to ss 107C(1) and 108C(1)), it was held that a court of superior jurisdiction must obtain the express consent of the offender before it was permitted to deal with a suspected breach of an order (such as a bond imposed by a lower court): *Yates v The Commissioner of Corrective Services, NSW* at [43]. Informal or implied consent will not suffice: *Yates v The Commissioner of Corrective Services, NSW* at [43]. The consent must occur at a time when the offender is called upon to appear before the court rather than at the appearance: *Yates v The Commissioner of Corrective Services, NSW* at [41].

[6-620] Determining the breach

Sections 107C(5) and 108C(5) require a court to be "satisfied" the offender "has failed to comply with any of the conditions" of the particular order before deciding the appropriate action to be taken. If the court is satisfied the offender has failed to comply with any of the conditions of the CCO or CRO, it may, pursuant to s 107C(5) *Crimes (Administration of Sentences) Act 1999* for CCOs, s 108C(5) for CROs:

(a) decide to take no action, or

(b) vary or revoke any conditions of the order (other than standard conditions) or impose further conditions, or

(c) revoke the order.

In *DPP (NSW) v Caita-Mandra* [2004] NSWSC 1127 at [14], which concerned a now repealed but similarly expressed provision (s 115(3) (rep) *Crimes (Administration of Sentences) Act*), the court concluded the provision first required the court to determine whether the application for revocation had been established. If the grounds are established, the legislation permitted the court, in its discretion, to revoke the order and, if appropriate, deal with the offender as though the order had not been made.

The two decisions — revocation and whether a consequential order should be made — should not be conflated. If the particular order is revoked the court then determines in the exercise of its discretion whether to make any consequential order. A number of relevant facts and circumstances can be taken into account in exercising that discretion including whether the circumstance giving rise to revocation is, or is not, the offender's fault: *DPP (NSW) v Caita-Mandra* at [15] and the cases cited therein. Subsequently, in *DPP v Brasher* [2016] NSWSC 1707 at [25], the court concluded that it was clear in such circumstances that the court had a discretion to re-sentence the offender and may exercise that discretion in a manner favourable to the offender provided adequate reasons are given. These decisions may continue to provide some guidance.

Where the particular order is revoked, the offender is dealt with for the original offence: *Bonsu v R* [2009] NSWCCA 316 at [9].

[6-630] Consequences of determining a breach

If the order is revoked, the court may re-sentence the offender: ss 107D(1), 108D(1). The court must take into account any time for which the offender was held in custody for the offence: s 24(a) *Crimes (Sentencing Procedure) Act 1999*. Further, when sentencing for a breach of obligations under the particular order, the sentencer must take into account the fact the offender was subject to such an order and anything done in compliance with their obligations under the order: s 24(b).

In cases involving a breach of a bond, it has been held that the sentence imposed must not exceed the sentence that is appropriate for the original offence. However, it may reflect the fact the offender has rejected the trust placed in him or her by the previous sentencing court, that this shows a lack of remorse and casts doubt on the offender's prospects for rehabilitation: *R v Morris* (unrep, 14/7/95, NSWCCA). Kirby ACJ, Badgery-Parker and Bruce JJ added:

> Two things need to be borne in mind by any court which is called upon to sentence an offender in circumstances where that offender is called before the court by reason of such a breach. The first and fundamental is that that offender comes to be punished not for the breach but, following the breach, for his other original offence in respect of which the recognizance was imposed. Secondly, in assessing the appropriate punishment for that original offence, the court must not ignore whatever penalty, whether by way of imprisonment or otherwise, may have been imposed by it or by some other court in respect of the conduct constituting the breach. The principle of totality clearly applies to the sentences to be imposed in respect of the breach and thereafter in respect of the original offence.

The offender has the same rights of appeal as if the offender was sentenced by that court on conviction of the offence: ss 107D(3), 108D(3) *Crimes (Administration of Sentences) Act*.

If the court imposes, adds or varies a condition of the order, it must take reasonable steps to explain to the offender (in language they can understand), pursuant to cl 329(8) *Crimes (Administration of Sentences) Regulation 2014*:

- the offender's obligations under the condition, and
- the consequences of a failure to comply with those obligations.

However, a court may vary or waive this requirement: cl 329(10). An order of the court is not invalidated by failure to comply with cl 329(8): cl 329(9).

The court must cause notice of the outcome of the matter to be given to the offender, although the court may also vary or waive this requirement: cl 329(7)(a), (10).

Notice of the outcome of the proceedings must be given to Community Corrections if the court, pursuant to cl 329(7)(b):

- adds, varies or revokes a condition of a CCO or CRO that is subject to a supervision condition or community service work condition, or
- imposes a supervision condition on a CCO or CRO or a community service work condition on a CCO.

Note: community service work cannot be imposed as a condition of a CRO in any circumstance and can only be imposed as a condition of a CCO if an assessment report has been obtained: see **Requirements for assessment reports** at [3-510].

[6-640] Breaches should be regarded seriously

Cases which addressed the approach to be taken to the breach of a formerly available community-based order such as a community service order (CSO) or a good behaviour bond (bond) may provide some guidance to the approach to be taken to breaches of CCOs and CROs imposed from 24 September 2018. However, a cautious approach to those cases may be warranted given one of the purposes of the reforms was said to be to "help offenders receive the supervision and programs that address their offending behaviour": Second Reading Speech for the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill and cognate legislation, NSW, Legislative Assembly, Debates, 11 October 2017, p 2.

In *R v Cicekdag* (2004) 150 A Crim R 299 (a case where the offender committed a similar offence when subject to a CSO), Hoeben J at [52], Grove and James JJ agreeing, likened a CSO to conditional freedom by way of bail, recognizance or parole, a breach of which was akin to, citing Wood CJ at CL in *R v Tran* [1999] NSWCCA 109 at [15], a "betrayal of the opportunity for rehabilitation". Justice Hoeben, in *R v Cicekdag*, added at [53] that:

> If such a circumstance is not to be regarded as an aggravating feature, it is certainly to be regarded as a strong indication that further attempts at rehabilitation by way of conditional liberty are likely to be unsuccessful.

It has been said that it is important that breaches of non-custodial sentencing options should be dealt with promptly and regarded seriously. In *R v Morris* (unrep, 14/7/95, NSWCCA), Kirby ACJ, Badgery-Parker and Bruce JJ said that if leniency is extended inappropriately:

> there is a very real risk that the whole regimen of non-custodial sentencing options will be discredited both in the eyes of those members of the community who might otherwise

> have continued to support them and in the eyes of magistrates and judges; and there is a substantial risk that courts, of their own motion but also reflecting in a general way community opinion, may become increasingly reluctant to extend to offenders those lesser sentencing options which the legislature has provided. It is therefore extremely important that breaches of non-custodial sentencing orders be brought promptly to the notice of the sentencing court and there be dealt with swiftly and, generally speaking, in a manner which will demonstrate how seriously such breaches are regarded and must be regarded in the community interest.

The above passage was cited with approval in *DPP v Brasher* [2016] NSWSC 1707 at [29]. In that case the court held a magistrate erred in law in failing to make any order consequential upon the revocation of the offender's CSO in accordance with s 115(3) (rep) *Crimes (Administration of Sentences) Act 1999*. The decision of the magistrate not to impose a penalty for a mid-range Prescribed Concentration of Alcohol (PCA) offence following the revocation was held to be so unreasonable as to amount to an error of law: *DPP v Brasher* at [29]. The fact that the offender had received a $500 fine in lieu of a s 9 bond in the same proceedings was an irrelevant consideration: *DPP v Brasher* at [30].

[The next page is 4601]

Sentencing procedures for imprisonment

Appendix B: Legislative amendments relevant to the Pt 4 Div 1A Table — standard non-parole periods

Concurrent and consecutive sentences

Mandatory life sentences under s 61

[The next page is 4651]

Setting terms of imprisonment

Part 4 Div 1 *Crimes (Sentencing Procedure) Act 1999* (ss 44–54, inclusive) contains provisions for setting terms of imprisonment, including non-parole periods, the conditions relating to parole orders, and fixed terms. Different provisions apply depending on whether the court imposes a sentence for a single offence or an aggregate sentence, and whether the offence is in the standard non-parole period Table of Pt 4 Div 1A. Unless the court is imposing an aggregate sentence, it must comply with the requirements of Pt 4 Div 1 by imposing a separate sentence for each offence: s 53(1).

[7-500] Court to set non-parole period

Last reviewed: August 2023

Section 44(1)–(3) *Crimes (Sentencing Procedure) Act 1999* provides:

> (1) Unless imposing an aggregate sentence of imprisonment, when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
>
> (2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).
>
> (2A) Without affecting the requirement to set a non-parole period for a sentence, a court imposing an aggregate sentence of imprisonment in respect of 2 or more offences on an offender may set one non-parole period for all the offences to which the sentence relates after setting the term of the sentence.
>
> (2B) The term of the sentence that will remain to be served after the non-parole period set for the aggregate sentence of imprisonment is served must not exceed one-third of the non-parole period, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).
>
> (2C) The court need not indicate the non-parole period that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence unless it is required to do so by section 54B.
>
> (3) The failure of a court to comply with subsection (2), (2B) or (2C) does not invalidate the sentence.

Use of "first required to set" in s 44(1) does not mean "determine"

The fact s 44(1) provides that "the court is first required to set a non-parole period" does not mean the non-parole period must first be determined: *Musgrove v R* [2007] NSWCCA 21 at [44], or that a non-parole period should be set first which is thereafter immutable: *R v Way* (2004) 60 NSWLR 168 at [111]–[113], citing *R v Moffitt* (1990) 20 NSWLR 114 with approval; *Perry v R* [2006] NSWCCA 351 at [14]. It is well established that s 44(1) does not require that the reasoning process begin with the selection of the non-parole period; it is the pronunciation of orders that is required to be done in that way: *Eid v R* [2008] NSWCCA 255 at [31]. Simpson J added in *Musgrove v R* at [44] that a literal reading of s 44(1) may lead the court into error:

> To determine, initially, the non-parole period, before determining the total sentence, would, in my opinion, (where special circumstances are then found) be conducive

> to error of the kind exposed in *Huynh* [[2005] NSWCCA 220]. A finding of special circumstances, after the determination of the non-parole period, would provoke an extension, beyond proper limits, of the balance of term. Sentencing judges need to be wary of taking a course that might lead to that error.

Section 44(1) error in pronouncement of individual sentence

The failure to follow the terms of s 44(1) by pronouncing the non-parole period first and then the balance of term is a technical error which must be corrected: *R v Cramp* [2004] NSWCCA 264; *Itaoui v R* [2005] NSWCCA 415 at [17]–[18]; *Eid v R* [2008] NSWCCA 255 at [31]. If that is the only error, the appellate court should not proceed on the assumption that the exercise of the sentencing discretion miscarried: *R v Cramp* at [44]; *R v Smith* [2005] NSWCCA 19 at [10].

Considerations relevant to setting the non-parole period

The non-parole period is imposed because justice requires that the offender serve that period in custody: *Muldrock v The Queen* (2011) 244 CLR 120 at [57]. It is the minimum period of actual incarceration that the offender must spend in full-time custody having regard to all the elements of punishment including rehabilitation, the objective seriousness of the crime and the offender's subjective circumstances: *Power v The Queen* (1974) 131 CLR 623 at 628–629, applied in *Deakin v The Queen* [1984] HCA 31; *R v Simpson* (2001) 53 NSWLR 704 at [59]; *R v Ogochukwu* [2004] NSWCCA 473 at [33]; *R v Cramp* [2004] NSWCCA 264 at [34]; *Caristo v R* [2011] NSWCCA 7 at [27]; *R v MA* [2004] NSWCCA 92 at [34]; *Hili v The Queen* (2010) 242 CLR 520 at [40]. This principle sets a lower limit to any reduction that might be thought appropriate on the basis of converting punishment into an opportunity for rehabilitation: *R v MA* at [33].

The risk of re-offending is a relevant factor in setting the minimum term: *Bugmy v The Queen* (1990) 169 CLR 525 at 537. However, while great weight may be attached to the protection of society in an appropriate case, the sentence imposed should not be more severe than that which would otherwise be appropriate: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

The factors relevant to fixing the term of the sentence are the same as the non-parole period, but the weight given to each factor may differ: *R v MA* at [33]. For example, a serious offence warrants a greater non-parole period due to its deterrent effect upon others, but the nature of the offence does not assume the importance it has when the head sentence is determined: *R v MA* at [33], citing *Bugmy v The Queen* at 531–532. Chief Justice Spigelman said of the factor general deterrence in *R v Simpson* at [64]:

> Considerations of general deterrence are at least equally significant to both decisions [fixing the term of the sentence and the non-parole period] which are, in any event, interrelated. Indeed the purport of the High Court's decision in *Power* was to reject the proposition that considerations of punishment and deterrence were of primary relevance to the determination of the head sentence and of lesser relevance to the specification of the non-parole period.

In *R v Hall* [2017] NSWCCA 313, the offender was sentenced to an aggregate sentence of 5 years with a non-parole period of 1 year for historical offences of violence and sexual assault. The judge said the head sentence recognised the objective seriousness

of the offences and the non-parole period reflected "considerations of leniency". That approach was found by the Court of Criminal Appeal to be contrary to the principles in *Power v The Queen* and *R v Simpson*: *R v Hall* at [90].

[7-505] Aggregate sentences

Last reviewed: August 2023

Section 53A(1) *Crimes (Sentencing Procedure) Act 1999* enables a court sentencing an offender for multiple offences to impose an aggregate sentence of imprisonment instead of separate individual sentences.

The aggregate sentencing provisions were not intended to create a substantive change to sentencing law: *PG v R* [2017] NSWCCA 179 at [90]. The scheme was introduced to remove some of the complexity involved when sentencing for multiple offences, while preserving the transparency of the sentencing process. It was intended to overcome the difficulties of applying *Pearce v The Queen* (1998) 194 CLR 610 and the requirement to set commencement and expiry dates for each sentence: *JM v R* [2014] NSWCCA 297 at [39]; *R v Rae* [2013] NSWCCA 9 at [45]; *Truong v R* [2013] NSWCCA 36 at [231]. The overriding principle is that an aggregate sentence must reflect the totality of the offending behaviour: *Burgess v R* [2019] NSWCCA 13 at [40]; *Aryal v R* [2021] NSWCCA 2 at [46]. See **[8-220] Totality and sentences of imprisonment**.

Section 53A(2) requires a court imposing an aggregate sentence to indicate to the offender, and make a written record of:

- the fact an aggregate sentence is being imposed: s 53A(2)(a)
- the sentence that would have been imposed for each offence (after taking into account relevant matters in Pt 3 or any other provision of the Act) had separate sentences been imposed: s 53A(2)(b).

Failure to comply with s 53A does not invalidate an aggregate sentence: s 53A(5).

An aggregate sentence imposed by the Local Court must not exceed 5 years: s 53B.

A court may impose one non-parole period "*after* setting the term of the [aggregate] sentence" [emphasis added]: s 44(2A).

Use of the word "after" in s 44(2A) is an indication that it is only possible to determine an aggregate non-parole period after deciding the sentence that would have been imposed for each offence. However, failure to comply with s 44(2A) by pronouncing the non-parole period before the total aggregate sentence is a technical error that does not invalidate the sentence: *Hunt v R* [2017] NSWCCA 305 at [79].

Section 49(2) sets limits as to the duration of the term of an aggregate sentence of imprisonment stating that it:

> (a) must not be more than the sum of the maximum periods of imprisonment that could have been imposed if separate sentences of imprisonment had been imposed in respect of each offence to which the sentence relates, and
>
> (b) must not be less than the shortest term of imprisonment (if any) that must be imposed for any separate offence or, if the sentence relates to more than one such offence, must not be less than the shortest term of imprisonment that must be imposed for any of the offences.

The expression in s 49(2)(a) "maximum periods of imprisonment that could have been imposed" appears to mean the maximum penalties for the offences in question. This is based on the text of s 49(1) which provides a single sentence cannot exceed the maximum penalty for the offence.

The aggregate sentence cannot exceed the total of the indicative sentences which should, unless otherwise indicated, be regarded as head sentences for each offence: *Dimian v R* [2016] NSWCCA 223 at [49]. Indicative sentences should be regarded as head sentences for each of the offences: *Dimian v R* at [49]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly states the indicative sentence was to be treated as a fixed term: *Dimian v R* at [47] with reference to *McIntosh v R* [2015] NSWCCA 184. See **Indicative sentences: fixed term or term of sentence** at **[7-520]**.

[7-507] Settled propositions concerning s 53A

Last reviewed: August 2023

In *JM v R* [2014] NSWCCA 297, RA Hulme J (Hoeben CJ at CL and Adamson J agreeing) at [39], summarised the approach a court should take where it chooses to utilise s 53A:

> [39] A number of propositions emerge from the above legislative provisions [ss 44(2C), 53A, 54A(2) and 54B] and the cases that have considered aggregate sentencing:
>
> 1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 in sentencing for multiple offences: *R v Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: *R v Rae* [2013] NSWCCA 9 at [43]; *Truong v R*; *R v Le*; *Nguyen v R*; *R v Nguyen* [2013] NSWCCA 36 at [231]; *Behman v R* [2014] NSWCCA 239; *R v MJB* [2014] NSWCCA 195 at [55]–[57].
>
> 2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *R v Clarke* [2013] NSWCCA 260 at [50]–[52]. See also *Cullen v R* [2014] NSWCCA 162 at [25]–[40].
>
> 3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).
>
>   There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form 1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.

SHR v R [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [42]) to be in breach of the requirement in s 53A(2)(b) …

4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610. The criminality involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *R v Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]–[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]–[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]–[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": [*Khawaja v R*, [2014] NSWCCA 80] at [18].
5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]–[60].
6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].
7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].
8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]–[26].
9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

JM v R has been described as the seminal case explaining the aggregate sentencing scheme: *Vaughan v R* [2020] NSWCCA 3 at [92]; *Taitoko v R* [2020] NSWCCA 43 at [130]. However, cases since *JM v R* elaborate on aspects of the propositions summarised.

Purpose of indicative sentences (proposition 2)

Indicative sentences are required for the purpose of understanding the components of the aggregate sentence in general terms but have no practical operation: *Vaughan*

v R at [90]–[91]; *Aryal v R* [2021] NSWCCA 2 at [46]. Upon indicating the separate sentences that would have been imposed, the court must then apply the principal of totality to determine an appropriate aggregate sentence: *ZA v R* [2017] NSWCCA 132 at [70], [74]. There is no requirement to precisely specify any (notional) accumulation of the separate sentences: *Vaughan v R* at [97]. See further **Application of *Pearce v The Queen* and the totality principle** below.

Aggregate sentencing and applying discounts (proposition 3)

Where a court imposes an aggregate sentence it need only explicitly state a discount, or discounts, at the stage of setting each indicative sentence: *Glare v R* [2015] NSWCCA 194 at [12]; *PG v R* [2017] NSWCCA 179 at [71], [76]. Where there are multiple offences and the pleas are entered at different times, it is an error to apply an average discount to each indicative sentence: *Bao v R* [2016] NSWCCA 16 at [44]. All decisions of the court since *JM v R* are to the effect that a discount must be applied to the starting point of each sentence: for guilty plea discounts see *PG v R* at [71], [76]; *Berryman v R* [2017] NSWCCA 297 at [29]; *Elsaj v R* [2017] NSWCCA 124 at [56]; *Ibbotson (a pseudonym) v R* [2020] NSWCCA 92 at [138]; for discounts for assistance see *TL v R* [2017] NSWCCA 308 at [102]–[103].

Application of *Pearce v The Queen* and the totality principle (propositions 1, 4 and 6)

The principles of sentencing concerning accumulation and concurrency, explained in *Pearce v The Queen* (1998) 194 CLR 610, do not apply to an aggregate sentence: *Vaughan v R* [2020] NSWCCA 3 at [91]; *Aryal v R* [2021] NSWCCA 2 at [46]. However, it is still necessary to consider, albeit intuitively, the extent to which there should be a degree of accumulation between the indicative sentences to arrive at a sentence that reflects the totality of the offending in the particular case: *Vaughan v R* at [91]; *Tuite v R* [2018] NSWCCA 175 at [91]; *Burgess v R* [2019] NSWCCA 13 at [40]; *ZA v R* [2017] NSWCCA 132 at [70], [74]; *Kliendienst v R* [2020] NSWCCA 98 at [79]–[102]; see also **[8-200] The principle of totality**. There is no actual accumulation of the indicative sentences — each offence makes an additional contribution to the totality of the criminality reflected in the aggregate sentence: *Aryal v R* at [46].

There is no requirement to disclose the precise degree of accumulation between the indicative sentences since that would undermine the legislative purpose of the aggregate sentencing scheme: *Berryman v R* at [50]; *Vaughan v R* at [97]; *Noonan v R* [2021] NSWCCA 35 at [33]. Of this, RA Hulme J said in *Vaughan v R*, at [117], that:

> … a judge does not need to assess a precise degree of accumulation at all [but] simply determines the aggregate sentence by assessing what is appropriate to reflect the totality of criminality in all of the offending. Quite commonly, there are references to there being "notional accumulation" — but if such a reference is apt at all, sight should not be lost of the fact that it is truly something that is "notional".

Nor is there a requirement, where there are multiple offences committed against multiple complainants, to identify and state by use of "numbers" the notional cumulation internally for each complainant as well as the notional cumulation as between complainants: *Benn v R* [2023] NSWCCA 24 at [142].

As a result there may be less transparency than when imposing separate sentences: *Kliendiest v R* at [84]; *ZA v R* at [88]. Further, the degree of transparency achieved

will vary between cases: *PW v R* [2019] NSWCCA 298 at [6]–[10]. For example, in *PW v R*, the indicative sentences provided "limited assistance" in understanding the aggregate sentence because the offences were committed in a single, brief episode of criminal conduct where moral culpability and objective seriousness overlapped.

Specifying non-parole periods (proposition 7)

Proposition 7 concerning the requirement to specify a non-parole period for indicative sentences for standard non-parole period offences no longer applies. Since 2016, s 45(1A) *Crimes (Sentencing Procedure) Act 1999* permits a sentencing court to decline to set a non-parole period (ie impose a fixed term) for such offences.

Separately imposing a non-custodial sentence (proposition 9)

Proposition 9 was not applied in *RL v R* [2015] NSWCCA 106 at [63] where the Court of Criminal Appeal said in re-sentencing (for three of the counts) that an "indicative sentence which did not involve a full-time custodial penalty should be adopted".

Sentencing for backup and related charges

It is permissible to incorporate sentences for related summary offences transferred to the District or Supreme Court pursuant to s 166 *Criminal Procedure Act 1986* into a statutory aggregate sentence under s 53A: *R v Price* [2016] NSWCCA 50 at [76], [80].

Aggregate sentencing and Commonwealth offences

The aggregate sentencing scheme in s 53A can also be used for Commonwealth offenders being sentenced for more than one Commonwealth offence: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [146], [210]. However, an aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26].

See also **[16-035] Sentencing for multiple offences**.

For appeals against aggregate sentences see: **[70-035] Appellate review of an aggregate sentence** and **Aggregate sentences** in **[70-090] Purpose and limitations of Crown appeals**.

[7-510] Special circumstances under s 44(2) or (2B)

Last reviewed: August 2023

Section 44(2) and (2B) *Crimes (Sentencing Procedure) Act 1999* provide that the non-parole period for either a single sentence or an aggregate sentence must not fall below three-quarters of the term of the sentence unless there is a finding of special circumstances (in which case reasons must be recorded for the decision).

In *R v GDR* (1994) 35 NSWLR 376 at 381, a five-judge Bench said, after noting the limit of the restriction in the former s 5(2) *Sentencing Act 1989* (the statutory predecessor of s 44(2)):

> In practice, the principles of general law to which reference has been made, and which affect *the relationship between a minimum and an additional term, may well operate to produce the result that, in many cases, the additional term will be one-third of the minimum term, for the reason that the sentencing judge considers that the period available to be spent on parole should be not less than one-quarter of the total sentence*. What was said in *Griffiths* [(1989) 167 CLR 372] about the pattern of sentencing in this State before the enactment of the legislation there referred to suggests that this

> will frequently be so. That does not mean, however, that sentencing judges have been deprived, by s 5, of their discretion. It is, rather, the consequence of the fact that in many cases a proper exercise of discretion will dictate that the additional term be not less than one-third of the minimum term, or one-quarter of the total sentence. In a practical sense, therefore, in many cases, the result will be an additional term which is one-third of the minimum term. This will be because the statute says it cannot be more (in the absence of special circumstances), and because general sentencing principles dictate, in the particular case, that it should not be less [emphasis added].

The language of s 44(2) constrains or fetters the sentencing discretion by providing that the balance of term must not exceed the non-parole period by one-third unless the court finds special circumstances.

Balance of term in excess of one-third

There is no corresponding rule that the balance of term must not be less than one-third of the non-parole period: *Musgrove v R* [2007] NSWCCA 21 at [27]; *DPP (NSW) v RHB* [2008] NSWCCA 236 at [17], [19]; *Wakefield v R* [2010] NSWCCA 12 at [26]. However, it is advisable for the court to explain why a ratio in excess of 75% was selected to avoid an inference that an oversight must have occurred: *Wakefield v R* at [26]; *Briggs v R* [2010] NSWCCA 250 at [34] cited in *Russell v R* [2010] NSWCCA 248 at [41]; *Etchell v R* [2010] NSWCCA 262 at [49]–[50]; *Maglovski v R* [2014] NSWCCA 238 at [28]; *Brennan v R* [2018] NSWCCA 22 at [69]. An express comment is preferable because it makes clear the judge is aware of the impact of any accumulation: *GP v R* [2017] NSWCCA 200 at [22]. This is more than simply a salutary discipline; offenders should not be left to wonder whether the term of their incarceration was affected by inadvertent oversight or whether it was fully intended: *Huang v R* [2019] NSWCCA 144 at [52]. For example, the judge's silence in *Briggs v R* left "a sense of disquiet that he may have overlooked giving appropriate focus to the statutory ratio": per Fullerton J at [34]; see also *Huang v R* at [53] and *Hardey v R* [2019] NSWCCA 310 at [34]. This is especially the case where consecutive sentences are imposed: *Dunn v R* [2007] NSWCCA 312. The reasons do not need to be lengthy. In *Brennan v R*, the judge gave "short but adequate reasons" for imposing a non-parole period greater than 75%: at [40].

Even in circumstances where there is no specific reference to the requirements of s 44(2), consideration of the reasons as a whole may indicate there was no oversight. For example, in *Sonter v R* [2018] NSWCCA 228 at [23], the court found that although there was no specific reference to the ratio between the non-parole period and the head sentence, a number of factors identified by the judge during his reasons, including a specific reference to the need to have regard to totality, overwhelmingly pointed to a conclusion that no oversight had occurred.

Nonetheless, imposing a non-parole period greater than 75% is an adverse and exceptional outcome in NSW sentencing practice: *Brennan v R* at [72]–[90]. As a matter of procedural fairness, where a judge is considering whether to impose a non-parole period greater than 75%, the particular circumstances of the case may require the judge to invite submissions from the parties on the topic: *Brennan v R* at [96]–[97].

Section 44(2) and (2B) only require reasons to be given if a finding of special circumstances *is* made: *Rizk v R* [2020] NSWCCA 291 at [138]–[139]. However, it

is also advisable to do so where such a finding is *not* made to avoid an inference the matter was not considered: *Maglovski v R* at [28]; *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 at [30].

[7-512] Special circumstances generally

Last reviewed: August 2023

Parliament has not prescribed at which stage of the sentencing exercise the court must consider the issue of special circumstances. There is nothing in s 44 *Crimes (Sentencing Procedure) Act 1999* or the case law which mandates a method or, to adopt the High Court's term in *Markarian v The Queen* (2005) 228 CLR 357 at [27], the "path" the court must take.

See **What constitutes special circumstances?** (at **[7-514]** below) as to the factors that may be relevant in a particular case. An offender's legal representative is expected to make submissions addressing factors which may warrant a finding of special circumstances and particularly what is an appropriate period of supervision on parole for the offender: *Edwards v R* [2009] NSWCCA 199 at [11]; *Jinnette v R* [2012] NSWCCA 217 at [96].

If there are circumstances that are *capable* of constituting special circumstances, the court is not obliged to vary the statutory ratio. Before a variation is made "it is necessary that the circumstances be sufficiently special": *R v Fidow* [2004] NSWCCA 172 at [22]; *Langbein v R* [2013] NSWCCA 88 at [54]. The decision is — first, one of fact, to identify the circumstances, and secondly, one of judgment — to decide whether the circumstances justify a lowering of the non-parole period below the statutory ratio: *R v Simpson* (2001) 53 NSWLR 704 at [73]; *Fitzpatrick v R* [2010] NSWCCA 26 at [36].

A finding of special circumstances is a discretionary finding of fact: *R v El-Hayek* [2004] NSWCCA 25 at [103]; *Caristo v R* [2011] NSWCCA 7 at [28].

A finding of special circumstances permits an adjustment downwards of the non-parole period, but it does not authorise an increase in the term of the sentence: *R v Tobar* [2004] NSWCCA 391 at [36]–[37]; *R v Huynh* [2005] NSWCCA 220 at [35]–[39]; *Markham v R* [2007] NSWCCA 295 at [29]. As with the statutory predecessor (s 5(2) *Sentencing Act 1989* (rep)), ss 44(2) and 44(2A) should not be understood as statutory norms (75% or 3:1) in the sense that variation in either direction, up or down, absent special circumstances is contrary to law: *R v GDR* (1994) 35 NSWLR 376 at 380. The extent of the adjustment is not determined by any "norm" and the court is to be guided by general sentencing principles: *Caristo v R* at [28].

In setting an effective non-parole period for more than one offence the focus should not be solely upon the percentage proportions that the non-parole periods have to the total term. In *Caristo v R*, RA Hulme J said at [42]: "The actual periods involved are equally, and probably more, important."

When a court decides to reduce the non-parole period because of a finding of special circumstances, double counting matters already taken into account in calculating the head sentence should be avoided: *R v Fidow* at [18]; *Trindall v R* [2013] NSWCCA 229 at [17]; *Langbein v R* at [54]; *Ho v R* [2013] NSWCCA 174 at [33].

The degree or "extent of any adjustment to the statutory requirement is essentially a matter within the sentencing judge's discretion": *Clarke v R* [2009] NSWCCA 49 at [13]; *R v Cramp* [2004] NSWCCA 264 at [31]) including consideration of those circumstances which concern the nature and purpose of parole: *R v GDR* at 381.

Although the desirability of an offender undergoing suitable rehabilitative treatment is capable of being a special circumstance, where special circumstances are found on this basis, it is an error for a court to refrain from adjusting the sentence based on a view that the offender would benefit from treatment while in full-time custody: *Muldrock v The Queen* (2011) 244 CLR 120 at [57]–[58]. This is because full-time custody is punitive and treatment in prison is a matter in the executive's discretion. Also, an offender may not qualify for a program in custody or it may not be available: *Muldrock v The Queen* at [57].

A court can have regard to the practical limit of 3 years on parole supervision which an offender may receive under cl 214A *Crimes (Administration of Sentences) Regulation 2014*. With regard to the operation of cl 228 *Crimes (Administration of Sentences) Regulation 2008* (rep), which was in similar terms to cl 214A, see the discussion in: *AM v R* [2012] NSWCCA 203 at [90]; *Collier v R* [2012] NSWCCA 213 at [37]; *Jinnette v R* at [107]. However, cl 214A provides in the case of a "serious offender" (defined in s 3(1) *Crimes (Administration of Sentences) Act 1999*) that the period of supervision may be extended by, or a further period of supervision imposed of, up to 3 years at a time.

A purported failure to adjust a sentence for special circumstances raises so many matters of a discretionary character that the Court of Criminal Appeal has been reluctant to intervene. The court will only intervene if the non-parole period is manifestly inadequate or manifestly excessive: *R v Cramp* [2004] NSWCCA 264 at [31]; *R v Fidow* at [19]; *Jiang v R* [2010] NSWCCA 277 at [83]. Ultimately the non-parole period that is set is what the court concludes, in all of the circumstances, ought to be the minimum period of incarceration: *Muldrock v The Queen* at [57]; *R v Simpson* at [59].

[7-514] What constitutes special circumstances?

Last reviewed: August 2023

The full range of subjective considerations is capable of warranting a finding of special circumstances: *R v Simpson* (2001) 53 NSWLR 704 at [46], [60]. It will be comparatively rare for an issue to be incapable, as a matter of law, of ever constituting a "special circumstance": *R v Simpson* at [60]. Findings of special circumstances have become so common that it appears likely that there can be nothing "special" about many cases in which the finding is made: *R v Fidow* [2004] NSWCCA 172 at [20].

Rehabilitation

Generally speaking, the reform of the offender will often be the purpose in finding special circumstances, but this is not the sole purpose: *R v El-Hayek* [2004] NSWCCA 25 at [105]. In *Kalache v R* [2011] NSWCCA 210 at [2], Allsop P recognised that the concept of special circumstances "bears upon an important element and purpose

of the sentencing process, rehabilitation". However, the incongruity of tying s 44(2) *Crimes (Sentencing Procedure) Act* to rehabilitation was observed by Spigelman CJ in *R v Simpson* (2001) 53 NSWLR 704 at [58]:

> … the requirements of rehabilitation would be best computed in terms of a period of linear time, not in terms of a fixed percentage of a head sentence. The desirability of a longer than computed period of supervision will be an appropriate approach in many cases.

Nevertheless, an offender's good prospects of rehabilitation may warrant a finding of special circumstances: *Arnold v R* [2011] NSWCCA 150 at [37]; *RLS v R* [2012] NSWCCA 236 at [120]. It is not necessary to be satisfied rehabilitation is likely to be successful as opposed to a possibility, but merely that the offender has prospects of rehabilitation which would be assisted by a longer parole period: *Thach v R* [2018] NSWCCA 252 at [45]–[46]. However, if an offender has poor prospects of rehabilitation and shows a lack of remorse, protection of the society may assume prominence in the sentencing exercise and militate against a finding of special circumstances: *R v Windle* [2012] NSWCCA 222 at [55].

Risk of institutionalisation

The risk of institutionalisation, even in the face of entrenched and serious recidivism, may justify a finding of special circumstances: *Jackson v R* [2010] NSWCCA 162 at [24]; *Jinnette v R* [2012] NSWCCA 217 at [103]. However, the existence of the factor does not require a finding: *Dyer v R* [2011] NSWCCA 185 at [50]; *Jinnette v R* at [98]. If institutionalisation has already occurred, the focus may be on ensuring that there is a sufficient period of conditional and supervised liberty to ensure protection of the community and to minimise the chance of recidivism: *Jinnette v R* at [103].

Drug and alcohol addiction

A finding of special circumstances may be made where the offender requires substantial help to overcome drug and alcohol addiction: *Sevastopoulos v R* [2011] NSWCCA 201 at [84]–[85]; or where there is a recognition of an offender's efforts to rehabilitate himself or herself from drug addiction and a demonstrated need for continued assistance if those efforts are to be maintained: *R v Vera* [2008] NSWCCA 33 at [20].

First custodial sentence

It is doubtful whether the fact a sentence represents an offender's first time in custody may alone justify finding special circumstances: *Collier v R* [2012] NSWCCA 213 at [36]; *Singh v R* [2020] NSWCCA 353 at [79]; *R v Kaliti* [2001] NSWCCA 268 at [12]; *R v Christoff* [2003] NSWCCA 52 at [67]; *Langbein v R* [2008] NSWCCA 38 at [112]; *Clarke v R* [2009] NSWCCA 49 at [12]. Although such a finding may be made in combination with other factors: *Leslie v R* [2009] NSWCCA 203 at [37]; *R v Little* [2013] NSWCCA 288 at [30].

Ill health, disability or mental illness

There are many examples in which ill health, mental illness or a disability are found to be circumstances which may contribute to a finding of special circumstances: *R v Sellen* (unrep, 5/12/91, NSWCCA); *R v Elzakhem* [2008] NSWCCA 31 at [68]; *Muldrock v The Queen* (2011) 244 CLR 120 at [58]; *Devaney v R* [2012] NSWCCA 285 at [92]; *Morton v R* [2014] NSWCCA 8 at [19].

Accumulation of individual sentences

There is a conventional sentencing practice of finding special circumstances in cases where sentences imposed for multiple offences are served consecutively in order to apply the totality principle: *Hejazi v R* [2009] NSWCCA 282 at [36]. Sentencing judges are required to give effect to the principle of totality and therefore should have regard to the outcome of any such accumulation: *R v Simpson* (unrep, 18/6/92, NSWCCA); *R v Close* (1992) 31 NSWLR 743 at 748–749; *R v Clarke* (unrep, 29/3/95, NSWCCA); *R v Clissold* [2002] NSWCCA 356 at 19], [21]; *Cicekdag v R* [2007] NSWCCA 218 at [49]; *R v Elzakhem* [2008] NSWCCA 31 at [68]–[69]; *Hejazi v R* at [35]. However, in *Singh v R* at [77]–[79], RA Hulme J (Johnson J agreeing) observed that the rationale for finding special circumstances identified in *Simpson v R* did not apply when an aggregate sentence was imposed.

An accumulation of sentences does not automatically give rise to a finding that special circumstances exist: *R v Cook* [1999] NSWCCA 234 at [38]. Where the court utilises the power to impose an aggregate sentence under s 53A, the issue of special circumstances is governed by s 44(2B): see **Aggregate sentences** at **[7-505]**.

Protective custody

A court cannot find special circumstances on account of protective custody unless the offender provides evidence that his or her conditions of incarceration will be more onerous than usual: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *Langbein v R* [2008] NSWCCA 38 at [113] and cases cited therein: *Mattar v R* [2012] NSWCCA 98 at [23]–[25].

Care should be taken to avoid counting hardship of protective custody as a reason for discounting the total sentence and again as a factor establishing special circumstances: *R v S* [2000] NSWCCA 13 at [33]; *R v Lee* [2000] NSWCCA 392 at [80].

Similarly, where an offender has been given a generous discount on the head sentence for providing assistance to authorities (partly because of the resulting need to serve the sentence in protection) it is not then permissible to make a finding of special circumstances on the basis that the sentence will be served in virtual solitary confinement: *R v Capar* [2002] NSWCCA 517 at [28]–[29].

See **Hardship of custody** at **[10-500]** and **Hardship of custody for child sex offender** at **[17-570] Mitigating factors**.

Age

An offender's youth is a common ground for a finding of special circumstances: *Hudson v R* [2007] NSWCCA 302 at [6]; *MB v R* [2007] NSWCCA 245 at [23]; *R v Merrin* [2007] NSWCCA 255 at [55]; *Kennedy v R* [2008] NSWCCA 21 at [53]; *AM v R* [2012] NSWCCA 203 at [86].

Advanced age may similarly be a factor: *R v Mammone* [2006] NSWCCA 138 at [54].

Hardship to family members

Hardship to members of an offender's family is generally irrelevant and can only be taken into account in highly exceptional circumstances: *King v R* [2010] NSWCCA 202 at [18], [23], [25]. The care of young children is not normally an exceptional circumstance: *R v Murphy* [2005] NSWCCA 182 at [16]–[19].

However, in *R v Grbin* [2004] NSWCCA 220 at [33], special circumstances were found where there was evidence of the importance of the strong bond between the offender and his son, who suffered from clinical autism and other disabilities and required constant supervision. See also *R v Maslen* (unrep, 7/4/95, NSWCCA) where the child was severely disabled and *R v Hare* [2007] NSWCCA 303 where the child suffered from Asperger's Syndrome.

A finding that the offender has good prospects for rehabilitation and is a mother of a young child, may support a finding of special circumstances: *R v Bednarz* [2000] NSWCCA 533 at [13], [52] (a two-judge bench case referred to in *Harrison v R* [2006] NSWCCA 185 at [31]); *R v Gip* [2006] NSWCCA 115 at [28]–[30], [68].

Self-punishment

Special circumstances may be found where there is a degree of self-inflicted shame and guilt already suffered combined with a mental condition: *R v Dhanhoa* [2000] NSWCCA 257 at [16], [45]; *R v Koosmen* [2004] NSWCCA 359 at [34]; *R v Elkassir* [2013] NSWCCA 181 at [37]. However, the weight attributed to the factor cannot lead to the imposition of an inadequate non-parole period: *R v Elkassir* at [73]. Where the facts reveal gross moral culpability, judges should be wary of attaching too much weight to considerations of self-punishment. Genuine remorse and self-punishment do not compensate for, or balance out, gross moral culpability: *R v Koosmen* at [32].

Parity

The need in a particular case to preserve proper parity between co-offenders may itself amount to special circumstances but such an application of s 44(2) must be justified by the special requirements of a particular sentencing exercise: *Tatana v R* [2006] NSWCCA 398 at [33]; *Briouzguine v R* [2014] NSWCCA 264 at [67]. Generally disparity will not arise simply because the application of s 44 to particular offenders results in different sentences between co-offenders: *R v Do* [2005] NSWCCA 209 at [18]–[19]; *Gill v R* [2010] NSWCCA 236 at [60]–[62].

Sentencing according to past practices

Sentencing according to past practices may justify a finding of special circumstances in order to reflect the applicable non-parole period/head sentence ratio at the time: *AJB v R* [2007] NSWCCA 51 at [36]–[37]; *MJL v R* [2007] NSWCCA 261 at [42].

See **Sentencing for historical child sexual offences** at **[17-410]**.

[7-516] Giving effect to finding of special circumstances

Last reviewed: November 2023

Where a finding of special circumstances is expressed for an individual sentence or individual sentences, the ultimate sentence imposed should usually give effect to that finding unless there are express reasons for not doing so.

The *Crimes (Sentencing Procedure) Act 1999* contains no express requirement for a judge to apply the statutory ratio to an effective or overall sentence, but s 44(2) has been found to apply in that situation and also where a sentence is accumulated on an existing sentence: *Lonsdale v R* [2020] NSWCCA 267 at [65]; *GP v R* [2017] NSWCCA 200 at [16]; *Harris v R* [2023] NSWCCA 44 at [19], [30]; *Rizk v R* [2020] NSWCCA 291 (which also considers s 44(2B)).

While s 44(2) does not directly require a judge to give reasons for setting a non-parole period exceeding 75% of the total or effective sentence, it is advisable to do so: *Lonsdale v R* at [31]; [65]; *GP v R* at [22]; *CM v R* [2013] NSWCCA 341 at [39]. However, this does not require the performance of a mathematical calculation to the determination of the proportion of the non-parole period to a total term where a particular sentence is accumulated on an existing sentence: *Lonsdale v R* at [32]; *Zreika v R* [2020] NSWCCA 345 at [26].

On appeal, determining whether the lack of adjustment of the statutory ratio reflected in the overall term is intentional or the result of inadvertence or miscalculation often depends on what can be gleaned of the judge's intention from the sentencing remarks: *CM v R* at [40]; *Maglis v R* at [24]; *Harris v R* [2023] NSWCCA 44 at [19]. In *CM v R* there was nothing to indicate that the judge was aware of, or intended, the final result and so the ground that the judge failed to give practical effect to the finding of special circumstances in the total effective sentence was upheld: *CM v R* at [42]. In *AB v R* [2014] NSWCCA 31, even though the judge's finding of special circumstances was not reflected in the overall sentence, the final result was what the judge intended and there was no inadvertence or miscalculation: at [54], [57]; see also *Sampson v R* [2023] NSWCCA 239 at [6]–[13]. Similarly, in *Rizk v R* at [143], [146] and *Lonsdale v R* at [39], the particular sentencing judges did not err by not giving express reasons for imposing an effective non-parole period that exceeded 75%, to a modest degree.

On the other hand, the court found error in *Sabongi v R* [2015] NSWCCA 25, where the sentencing judge failed to give effect to an intention to vary the overall ratio to take account of the applicant's mental condition, the need for rehabilitation and supervision, and the accumulation of sentences. See also *Woods v R* [2020] NSWCCA 219 at [71], [73].

The focus of the inquiry should not be solely upon the percentage proportions that the non-parole and parole periods bear to the total term. The actual periods involved are equally, and probably more, important: *Woods v R* at [62]; *MD v R* [2015] NSWCCA 37 at [41]; *Caristo v R* [2011] NSWCCA 7 at [42]. Care may be required when an applicant is sentenced in NSW while serving a sentence in another State where the statutory ratio of non-parole period to sentence may vary: see, for example, *Ozan v R* [2021] NSWCCA 231.

The Sentencing calculator on JIRS may assist when considering the requirements of s 44.

[7-518] Empirical study of special circumstances

Last reviewed: August 2023

A 2013 study by the Judicial Commission examined sentencing cases finalised in the NSW District and Supreme Courts for the period 1 January 2005 to 30 June 2012: P Poletti and H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999", *Sentencing Trends & Issues*, No 42, Judicial Commission of NSW, 2013.

An analysis of the sentencing statutes of other Australian jurisdictions revealed that NSW is one of few jurisdictions with a statutory rule which constrains a court's discretion when it sets a non-parole period. Further, the ratio set in s 44(2) and s 44(2A) *Crimes (Sentencing Procedure) Act 1999* is comparatively high.

Special circumstances were found in the vast majority of cases (91.4%) and was found more frequently for the youngest offenders (98.8% for juveniles and 96.8% for offenders aged 18–20 years) and for the oldest offenders (100% for offenders aged over 70 years and 98.0% for offenders aged 66–70 years).

A random sample of 159 judgments was examined. The most common reasons for finding special circumstances was the offender's need for a lengthy period of supervision in the community after release (66.7%), followed by the lack of a prior criminal record (35.8%). These common reasons mostly referred to the offender serving their first prison sentence. Other common reasons include good prospects of rehabilitation (29.6%), age of the offender — particularly youth (25.8%), the effect of accumulation (23.3%) and hardship of custody (10.1%). The reasons given should not be viewed in isolation as there is a clear interrelationship between the different reasons.

The study (see table 3 in the study) analysed mean ratios for the basic and aggravated forms of robbery, break and enter, sexual assault and the supply of a prohibited drug. Subject to one (explicable) exception, the authors found that the longer the sentence and the more serious the crime, the lower the frequency of finding special circumstances. This is because for longer sentences the period of supervision was considered sufficient without a finding of special circumstances. More serious offences (such as murder and aggravated sexual assault in company) recorded the lowest frequency of special circumstances, which was unsurprising given the longer duration of their sentences and the limited utility of an extended period of supervision.

[7-520] Court may decline to set non-parole period

Last reviewed: August 2023

Section s 45(1) *Crimes (Sentencing Procedure) Act 1999* provides:

> When sentencing an offender to imprisonment for an offence, or in the case of an aggregate sentence of imprisonment, for offences, a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so:
>
> (a) because of the nature of the offence to which the sentence, or of each of the offences to which an aggregate sentence relates, or the antecedent character of the offender, or
>
> (b) because of any other penalty previously imposed on the offender, or
>
> (c) for any other reason that the court considers sufficient.

Section 45(1A) permits a court to decline to set a non-parole period (ie, impose a fixed term) for an offence to which a standard non-parole period applies. Section 45(1A) does not apply to sentencing for an offence dealt with summarily or if the offender is under 18 years of age: s 45(1B).

Where the court declines to set a non-parole period, it must make a record of its reasons for declining to do so: s 45(2). *R v Parsons* [2002] NSWCCA 296 and *Collier v R* [2012] NSWCCA 213 at [55] are examples of cases where the sentencing judge erred by not fixing a non-parole period and not giving reasons as to why he declined to do so. The discretion in s 45(1), construed literally, is simply a discretion to decline to set a non-parole period: *Collier v R* at [58]. However, the weight of authority (both in relation to s 45(1) and its statutory predecessor under s 6 *Sentencing Act 1989*) supports the view that where a fixed term is imposed it should be set at an

equivalent level, or equate to, what the non-parole period would have been: *Collier v R* at [56]–[58], citing *R v Dunn* [2004] NSWCCA 346 at [161]. The question whether s 45(1) also permits a court to impose a fixed term to reduce an otherwise appropriate sentence may be a future topic for resolution: *Collier v R* at [62]; see further below.

When sentencing an offender for multiple offences and where some accumulation is appropriate (assuming the aggregate sentence provision is not utilised), it is acceptable to impose fixed terms of imprisonment for some or most of the sentences. This is because, if a sentence containing a non-parole period and a parole period were set for each offence, the parole terms of many of these sentences would be subsumed in the non-parole period or fixed term of some longer sentence(s): *R v Dunn* at [161]. The judge in *R v Burgess* [2005] NSWCCA 52 decided that parole supervision would not be of any benefit to the offenders and imposed a fixed term under s 45(1): at [45].

For further discussion see **Concurrent and consecutive sentences** at **[8-200]**ff.

Indicative sentences: fixed term or term of sentence?

There is controversy as to whether or not an indicative sentence equates to a fixed term and whether a fixed term should be equated with a non-parole period. The divergent authority was summarised by N Adams J in *Waterstone v R* [2020] NSWCCA 117 at [62]–[73]. Although it did not arise in the appeal, her Honour observed that she doubted whether a fixed term should be equated with a non-parole period: at [81]–[90]; cf Johnson J at [4]ff.

In *McIntosh v R* [2015] NSWCCA 184, where the appeal concerned an aggregate sentence, the court (Basten JA, Wilson J agreeing; Hidden J dissenting on this point) held that where a sentence is indicated under s 53A(2)(b) for an offence that is not subject to a standard non-parole period, it is permissible to indicate a fixed term (or mandatory period of custody). Basten JA at [166]–[167] followed *R v Dunn*. His Honour held that there is nothing in the language of ss 44 and 45 which denies the court the power to approach the indication of a sentence under s 53A(2) in the manner described in *R v Dunn* and, unless there are compelling reasons to the contrary, *R v Dunn* should be followed: at [167].

Hidden J did not agree. In his Honour's view, the total term (or head sentence) for each offence should be indicated, not the minimum period of mandatory custody. The head sentence reflects the assessment of criminality of an offence taking into account all the relevant circumstances and it is that assessment which should be reflected in an indicative sentence: at [173], [174].

The approach taken by the court in *McIntosh v R* in relation to fixed terms and indicative sentences was the subject of comment in (2015) 22(8) *CrimLN* 127 at [3572] where it was argued that the "fixed term" indicative sentence approach begs error because it, inter alia, "may lead a court into error in not having regard to the full sentence for an offence in comparison to its maximum penalty" and prevents the community, particularly victims, from being informed "of the court's sentencing response to an individual offence". It is to be also noted that it is permissible under s 45(1) for a court to impose an aggregate fixed term sentence.

Subsequently in *Dimian v R* [2016] NSWCCA 223 at [46] the court held that on any proper construction of s 53A(2), seen in the context of the whole Act, the "sentence that would have been imposed" must be a reference to the overall, or term, of sentence.

Any suggestion that an indicative sentence is the non-parole period is inconsistent with the principles of aggregate sentencing set out in *JM v R* [2014] NSWCCA 297 at [39]: *Dimian v R* at [47]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly states that the indicative sentence was to be treated as a fixed term: *Dimian v R* at [47]. In *Dimian v R*, the court found the judge erred by imposing an aggregate sentence which exceeded the sum of the indicative sentences: at [49].

[7-530] Court not to set non-parole period for sentence of 6 months or less

Last reviewed: August 2023

Section 46 *Crimes (Sentencing Procedure) Act 1999* provides that a court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less. Section 46(1) does not apply if a court imposes an aggregate sentence of imprisonment in respect of two or more offences of more than six months, even if the individual sentences the court would have imposed would have been less than six months (as referred to in s 53A(2)(b)): s 46(2).

If the court decides to set a term of imprisonment of 6 months or less, then it must make a record of its reasons for doing so, including its reasons for deciding: that no penalty other than imprisonment is appropriate; and not to allow the offender to participate in an intervention program or other program for treatment and rehabilitation: s 5(2) *Crimes (Sentencing Procedure) Act*.

[7-540] Commencement of sentence

Last reviewed: August 2023

The law relating to commencement of sentence is set out in s 47 *Crimes (Sentencing Procedure) Act 1999*. In summary, every sentence or aggregate sentence passed takes effect from the time it is passed, unless the court otherwise directs. Thus, if the sentencer does not specify the date for commencement, it will be deemed to commence on the day on which the sentence or aggregate sentence was imposed. This section confers power to direct that a sentence may commence upon any determinate date either subsequent or prior to the time when it was imposed. Subject to a statutory provision(s) to the contrary, a sentence of imprisonment runs from the date it is imposed: *Whan v McConaghy* (1984) 153 CLR 631 at 636; *R v Hall* [2004] NSWCCA 127 at [28]; *Kaderavek v R* [2018] NSWCCA 92 at [19]. If the sentence commences *before* the date the sentence is imposed, s 47 provides no guidance except that the sentencing judge "must take into account any time for which the offender has been held in custody in relation to the offence". If the sentence commences *after* that date, there is less flexibility as a result of s 47(4) and s 47(5): *Kaderavek v R* at [19].

On the issues of:

- how to count pre-sentence custody and the necessity of backdating see **[12-500] Counting pre-sentence custody**
- forward dating sentences of imprisonment see **[7-547]**
- what time should be counted including offences committed whilst the offender was on parole see **[12-510] What time should be counted?**

- taking into account participation of the offender in intervention programs see **[12-520] Intervention programs**
- quasi-custody bail conditions such as the MERIT program see **[12-530] Quasi-custody bail conditions**
- having regard to the fact the offender will be serving his or her sentence in protective custody see **[10-500] Hardship of custody**.

[7-545] Rounding sentences to months

Last reviewed: August 2023

The court in *Rios v R* [2012] NSWCCA 8 raised the issue of rounding and whether a sentence should be expressed in terms of years, months and days, as opposed to just years and months. Adamson J said at [43] with reference to *Ruano v R* [2011] NSWCCA 149 at [20] that expressing a sentence with days "… ought be discouraged because it adds an unnecessary complication in the sentencing process". In appropriate cases an adjustment should be made by rounding the number of days down to a number of months: *Rios v R* at [43].

[7-547] Forward dating sentences of imprisonment

Last reviewed: August 2023

Section 47(2)(b) *Crimes (Sentencing Procedure) Act 1999* provides that a court may direct that a sentence of imprisonment commences "on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment".

Section 47(5) provides that a direction under s 47(2)(b) may not be made in relation to a sentence of imprisonment imposed on an offender who is serving some other sentence of imprisonment by way of full-time detention if:

(a) a non-parole period has been set for that other sentence, and

(b) the non-parole period for that other sentence has expired, and

(c) the offender is still in custody under that other sentence.

Section 47(5) governs a specific scenario where the offender is still in custody under what is described as the "other sentence". It is a statutory rule as to when the second sentence must commence where the statutory criteria are met. If the criteria in s 47(5) apply, the court does not have the power to impose a sentence in the terms of s 47(2)(b) "on a day occurring after the day on which the sentence is imposed": *Thompson-Davis v R* [2013] NSWCCA 75 at [52].

Section 47(5) focuses on the expiration of the non-parole period of the "other sentence" set by the first court and does not distinguish between the scenarios where the offender is in custody, parole not having been granted, or in custody following the grant of parole and its subsequent revocation: *White v R* [2016] NSWCCA 190 at [7], [118]–[119]. Therefore, a sentence of imprisonment may not be post-dated later than

the earliest date on which the offender will become entitled or eligible to release on parole for the first sentence: *White v R* at [118]. Basten JA dissented in *White v R* at [27] on the basis that the:

> reference to the offender being "still in custody" [in s 47(5)] is better understood as referring to a continuation of one period of custody rather than the situation where the period of custody has ceased upon his release and recommenced as a result of the revocation of parole.

Where an offender is bail refused for an offence and subject to a statutory parole order pursuant to s 158 *Crimes (Administration of Sentences) Act 1999* for a pre-existing sentence, the subject sentence should commence when the non-parole period for the pre-existing sentence expires: *Kaderavek v R* [2018] NSWCCA 92 at [17]–[22].

[7-550] Information about release date

Last reviewed: August 2023

Section 48(1) *Crimes (Sentencing Procedure) Act 1999* provides:

> When sentencing an offender to imprisonment for an offence, or to an aggregate sentence of imprisonment for 2 or more offences, a court must specify:
>
> (a) the day on which the sentence commences or is taken to have commenced, and
>
> (b) the earliest day on which it appears (on the basis of the information currently available to the court) that the offender will become entitled to be released from custody, or eligible to be released on parole, having regard to:
>
> (i) that and any other sentence of imprisonment to which the offender is subject, and
>
> (ii) the non-parole periods (if any) for that and any other sentence of imprisonment to which the offender is subject.

The three examples given in the Note to s 48(1) are not within the terms of the statute: *R v Kay* [2000] NSWSC 716. Hulme J said at [128] (affirmed in *R v Nilsson* [2005] NSWCCA 34):

> In specifying the days on which the Prisoner will become eligible for parole and release, I have departed from the examples provided under s 48 of the *Crimes (Sentencing Procedure) Act*, which reflect a misunderstanding of either simple counting or the law's measurement of time. Absent special circumstances, the law does not take account of parts of a day. Seven days' imprisonment commencing on a Monday expires at midnight on the following Sunday.

In *Farkas v R* [2014] NSWCCA 141, there was a division of opinion as to the appropriate eligibility date of parole. Campbell J at [103] (with whom RA Hulme J agreed at [40]) amended the proposed sentencing orders of Basten JA at [2] so that the applicant's eligibility for parole fell one day later. Basten JA considered the operation of ss 47 and 48 of the Act, and stated that the parole date which should be specified is that of the day prior to the anniversary of commencement of the sentence: *Farkas v R* at [29]. His Honour held that there is an inconsistency between the examples set out in the note to s 48 (which assume that the person becomes eligible to be released on parole on the day before the anniversary of the commencement of the sentence) and

the language of s 47(6) ("ends at the end of the day on which it expires"). Basten JA opined at [29] that the inconsistency should be resolved by following the approach adopted in the note to s 48 which is consistent with the conventional approach taken in *Ingham v R* [2014] NSWCCA 123, but see *R v Nilsson* [2005] NSWCCA 34 at [24], [27]–[29]. While Campbell J or RA Hulme J altered the sentencing orders, neither expressly addressed the operation of s 48.

In *R v BA* [2014] NSWCCA 148, the court made observations concerning the appropriate date which should be recorded in a parole order. McCallum J stated that the clear effect of s 47(4) is that the Act assumes sentences begin and end at midnight, and it is therefore not inconsistent with the Act to order a person's release on the last day of the non-parole period. However, such an order could give rise to a technical difficulty in entering the terms of the order into the court's computerised record system: at [19].

[7-560] Restrictions on term of sentence

Last reviewed: May 2023

Section 49(1) *Crimes (Sentencing Procedure) Act 1999* provides:

> (1) The term of a sentence of imprisonment (other than an aggregate sentence of imprisonment):
>
> (a) must not be more than the maximum term of imprisonment that may be imposed for the offence, and
>
> (b) must not be less than the shortest term of imprisonment (if any) that must be imposed for the offence.

Section 49(2), which relates to aggregate sentences, is discussed above at **[7-505]**.

[7-570] Court not to make parole orders

Last reviewed: May 2023

Where a non-parole period has been specified for a sentence of 3 years or less, the court must not make an order directing the release of the offender. Section 50 *Crimes (Sentencing Procedure) Act 1999*, which previously required a court to make such an order, was repealed on 26 February 2018: *Parole Legislation Amendment Act 2017*, Sch 3.2. However, a court must still comply with s 48(1) *Crimes (Sentencing Procedure) Act* by nominating when the sentence commences and, when it appears to the court, the offender will be eligible for release: see **[7-550] Information about release date**.

Section 158 *Crimes (Administration of Sentences) Act 1999* states that if a non-parole period has been specified for a sentence of 3 years or less, the offender is taken to be subject to a "statutory parole order", a parole order directing their release at the end of the non-parole period: s 158(1).

Whenever a court imposes a sentence of imprisonment for a term greater than 3 years, release on parole and the terms of the parole order are matters solely for the Parole Authority: *Muldrock v The Queen* (2011) 244 CLR 120 at [4]. If the court makes a parole order with conditions in circumstances where it does not have the power to do so "it has no effect": *Moss v R* [2011] NSWCCA 86 per Simpson J at [28].

Sections 126 and 158 *Crimes (Administration of Sentences) Act* are relevant. Section 158(2) provides that a statutory parole order in relation to a sentence is conditional on the offender being eligible for release on parole in accordance with s 126 *Crimes (Administration of Sentences) Act* at the end of the non-parole period of the sentence. Section 158(3) provides that if the offender is not eligible for release at that time, they are entitled to be released on parole as soon as they become so eligible. Section 158(4) provides that:

> This section does not authorise the release on parole of an offender who is also serving a sentence of more than 3 years for which a non-parole period has been set unless the offender is entitled to be released under Division 2.

Section 126 is entitled: "Eligibility for release on parole" and s 126(1) provides that: "Offenders may be released on parole in accordance with this Part". Section 126(2) provides:

> An offender is eligible for release on parole only if:
>
> (a) the offender is subject to at least one sentence for which a non-parole period has been set, and
>
> (b) the offender has served the non-parole period of each such sentence and is not subject to any other sentence.

Mixture of Commonwealth and State offences

In the case of Commonwealth offences, Pt IB *Crimes Act 1914* (Cth) makes exhaustive provision for fixing non-parole periods and making recognizance release orders: *Hili v The Queen* (2010) 242 CLR 520 at [22]. When a court imposes a sentence of 3 years or less (or sentences in aggregate that do not exceed 3 years) on a federal offender, the court must make a recognizance release order in respect of the instant sentence(s) and must not fix a non-parole period: s 19AC(1). The court need not comply with s 19AC(1) if satisfied such an order is not appropriate: s 19AC(4). For further guidance on sentencing, where there is a mixture of Commonwealth and State offences, see **Mixture of Commonwealth and State offences** at **[16-040] Sentencing for multiple offences**.

[7-580] No power to impose conditions on parole orders

Last reviewed: August 2023

Following the repeal of ss 51 and 51A *Crimes (Sentencing Procedure) Act 1999* on 26 February 2018, the court has no power to impose parole conditions, including conditions as to non-association and place restriction: Sch 3.2[2]–[3] *Parole Legislation Amendment Act 2017*.

[7-590] Warrant of commitment

Last reviewed: August 2023

As soon as practicable after sentencing an offender to imprisonment, a court must issue a warrant for the committal of the offender to a correctional centre: *Crimes (Sentencing Procedure) Act 1999*, s 62(1). The warrant must be in the approved form: *Crimes (Sentencing Procedure) Regulation 2017*, cl 7. Section 62 does not apply to imprisonment the subject of an intensive correction order: s 62(4)(b).

[7-600] Exclusions from Division

Last reviewed: August 2023

Part 4 Div 1 *Crimes (Sentencing Procedure) Act 1999* does not apply to offenders sentenced to life (or for any other indeterminate period), or to imprisonment under the *Fines Act 1996*, the *Habitual Criminals Act 1957*, or to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*: s 54 *Crimes (Sentencing Procedure) Act*.

[The next page is 4721]

Standard non-parole period offences — Pt 4 Div 1A

Unless stated otherwise, section numbers below refer to the *Crimes (Sentencing Procedure) Act 1999*.

[7-890] What is the standard non-parole period?

Last reviewed: August 2023

The standard non-parole period is a legislative guidepost to be considered when sentencing. Section 54A(2) provides it represents the non-parole period for an offence "that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness." The standard non-parole period for an offence is the non-parole period set out in the Table in Pt 4, Div 1A: s 54A(1).

"Objective factors" is not defined in the statute and, when assessing objective seriousness, general sentencing principles apply. See **Factors relevant to assessing objective seriousness** at **[10-012]**.

The Table

The offence to which a particular standard non-parole provision applies is identified by the section of the statute which is found opposite the standard non-parole period in the particular Table item: *Hosseini v R* [2009] NSWCCA 52 at [48]. The words within the brackets in the Table items do not identify or limit in any way the offence to which the standard non-parole period applies: *Hosseini v R* at [48]. Consequently, the judge did not err by finding in *Hosseini v R* that item 17 in the Table applies to the offence of knowingly taking part in the manufacture of a prohibited drug when the words in brackets in the Table described the offence under s 24(2) as "manufacture or production of commercial quantity of prohibited drug".

[7-900] Consideration of the standard non-parole period in sentencing

Last reviewed: August 2023

Section 54B governs how a court is to consider a standard non-parole period in the sentencing exercise and provides as follows:

> **54B(1)** This section applies when a court imposes a sentence of imprisonment for an offence, or an aggregate sentence of imprisonment with respect to one or more offences, set out in the Table to this Division.
>
> **54B(2)** The standard non-parole period for an offence is a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender.
>
> **54B(3)** The court must make a record of its reasons for setting a non-parole period that is longer or shorter than the standard non-parole period and must identify in the record of its reasons each factor that it took into account.
>
> **54B(4)** When determining an aggregate sentence of imprisonment for one or more offences, the court is to indicate and make a written record of, for those offences to which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence.

> **54B(5)** If the court indicates under subsection (4) that it would have set a non-parole period for an offence that is longer or shorter than the standard non-parole period for the offence, the court must make a record of the reasons why it would have done so and must identify in the record of its reasons each factor that it took into account.
>
> **54B(6)** A requirement under this section for a court to make a record of reasons for setting a non-parole period that is longer or shorter than a standard non-parole period does not require the court to identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.

The removal of the phrase "is to set" from s 54B(2) evinces an intention that a standard non-parole period is not to have determinative significance in the sentencing exercise. Section 54B(2) (quoted above) provides it is "a matter to be taken into account by a court in determining the appropriate sentence".

The standard non-parole period is to take its place as a legislative guidepost in accordance with *Muldrock v The Queen* (2011) 244 CLR 120 at [27]. The High Court in *Muldrock* at [26] advocated a holistic reading and application of s 54B consistent with the approach described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby 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.

The following terms of s 54B(2) are particularly important: "… *without limiting the matters that are otherwise required or permitted to be taken into account in determining the appropriate sentence for an offender*", accommodating the separate but related assessments of the objective seriousness of an offence and the moral culpability of an offender as part of the exercise of instinctive synthesis: *Tepania v The Queen* [2018] NSWCCA 247 at [112]–[119]. The section also acknowledges that other sentencing factors, sometimes powerful, can impact upon the sentence reached by the court: *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46]. For further discussion of the separate but related assessments of objective seriousness and moral culpability see:

- **Objective and subjective factors at common law** at **[9-700]**ff;
- **Factors relevant to assessing objective seriousness** at **[10-012]**; and
- **Subjective matters at common law** at **[10-400]**ff.

[7-920] Findings as to where an offence fits relative to the middle of the range

Last reviewed: August 2023

The High Court held in *Muldrock v The Queen* (2011) 244 CLR 120 at [28] that Div 1A does not require or permit a court to embark upon a two-stage approach to sentencing, involving first assessing whether the offence falls in the middle range of objective seriousness and, if it does, asking whether there are matters which warrant a longer or shorter non-parole period.

Section 54B(6) puts that into legislative effect. It provides that the requirement to give reasons for setting a non-parole period that is longer or shorter than the standard non-parole period does not require the court to "identify the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable".

While a sentencing judge is still required to assess the objective seriousness as an essential element of instinctive synthesis, they are not obliged to specify the seriousness of an offence by reciting "some mantra invoking comparisons about where the sentence… falls on some hypothetical arithmetical or geometrical continuum of seriousness". While it would not be an error to do so, a failure to do so does not constitute error: *DH v R* [2022] NSWCCA 200 at [31]–[33]; s 54B(6). Yehia J agreeing also stated there is no requirement for a sentencing judge to utilise the concept of mid-range offending and assess where on the scale of seriousness the offending, for the offences carrying a standard non-parole period, lay: at [58]–[60]; *Muldrock v The Queen* at [29].

See also "Judge's findings of objective seriousness of offence" in **Factors relevant to assessing objective seriousness** at **[10-012]**.

[7-930] Exclusions and inclusions from Pt 4 Div 1A

Last reviewed: November 2023

The standard non-parole scheme does not apply to:

- offences dealt with summarily: s 54D(2)
- the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*: s 54D(1)
- offenders who were under 18 years at the time the offence was committed: s 54D(3) (inserted by the *Crimes Amendment (Sexual Offences) Act 2008*, which commenced on 1 January 2009). If a court is sentencing an offender who was under 18 years at the time a standard non-parole period offence was committed, it is to "disregard [the standard non-parole] … entirely" and even "oblique usage … entails error": *BP v R* (2010) 201 A Crim R 379 at [36]; citing *McGrath v R* (2010) 199 A Crim R 527 at [37], [60]; *AE v R* [2010] NSWCCA 203 at [23].

Standard non-parole periods apply to the offences listed in the Table from the specific date each was inserted: *R v Lane* [2011] NSWSC 289 at [60]–[61] (see legislative history at **[7-970]** below). It is an error to take into account a standard non-parole period where the statutory scheme does not apply: *R v Ohar* (2004) 59 NSWLR 596 at [84]; *R v Wilkinson* [2004] NSWCCA 468 at [24].

The standard non-parole period for an offence is the standard non-parole period (if any) that applied at the time the offence was committed: s 21B(2). This includes where a standard non-parole period was increased after the offence was committed, and particular transitional provisions appear to provide otherwise: *AC v R* [2023] NSWCCA 133; *GL v R* [2022] NSWCCA 202 (both in relation to offences under s 61M(2) (rep) *Crimes Act*); see also *Smith v R* [2022] NSWCCA 88.

Generally standard non-parole periods do not apply to attempts, under s 344A *Crimes Act 1900*, to commit offences in the Table: *R v DAC* [2006] NSWCCA 265 at [10].

Nor do they apply to offenders charged with conspiracy to commit an offence: *Diesing v R* [2007] NSWCCA 326 at [53], [55]; *SAT v R* [2009] NSWCCA 172 at [51]. However, where the attempt or conspiracy is part of the substantive offence, for example, attempt to murder contrary to ss 27, 28, 29 or 30 *Crimes Act*, conspiracy

to murder contrary to s 26 *Crimes Act*, or attempt to supply a commercial or large commercial quantity of prohibited drug under ss 3(1) (definition of "supply") and 25(2) *Drug Misuse and Trafficking Act 1985*, the standard non-parole period provisions will apply: *Amiri v R* [2017] NSWCCA 157 at [6]–[9].

The courts are yet to determine whether the standard non-parole period provisions apply to attempts, under s 51CA *Firearms Act 1996*, to commit the *Firearms Act* offences specified in the Table: *Amiri v R* at [9].

The CCA has considered the effect of a judge making reference to a standard non-parole period which is inapplicable: *Nguyen v R* [2017] NSWCCA 39 at [105]–[112]; *Potts v R* [2017] NSWCCA 10 at [2]–[3], [8]–[10], [37]–[41]; *HJ v R* [2014] NSWCCA 21. Mere reference to a standard non-parole period by itself, and without more, does not always carry with it a finding of material error leading to re-sentencing: *Nguyen v R* at [103]–[104], [113]; *HJ v R* at [49]–[53]. The proper approach is for the CCA to enquire into all the facts and circumstances of the matter, the terms in which the standard non-parole period has been mentioned, erroneously, and to ask whether this court is satisfied that the erroneous reference had any effect upon the sentence. That effect does not have to be, but may be, a direct effect: *Nguyen v R* at [117].

[7-940] Use of cases decided before Muldrock v The Queen

Last reviewed: August 2023

The Court of Criminal Appeal has accepted that for comparative sentencing purposes cases decided before *Muldrock v The Queen* (2011) 244 CLR 120 "should be approached with caution": *Toole v R* (2014) 247 A Crim R 272 per Hulme AJ at [78]; see also *Atai v R* [2014] NSWCCA 210 at [14]–[18]. The court presumes "that most, if not all of them, were influenced by the erroneous *R v Way* principles": *Wang v R* [2017] NSWCCA 61 per RA Hulme J at [16] applying Simpson J in *Davis v R* [2015] NSWCCA 90 at [32]–[33]. This is because it is not to be lightly concluded that a sentencing judge, during the relevant period between *R v Way* (2004) 60 NSWLR 168 and *Muldrock v The Queen*, departed from the principles in *R v Way*. This is particularly so where the offender's conviction is after trial: see *R v Way* at [122]. Even if the language of *R v Way* is not reproduced in the sentencing remarks, there is a strong likelihood that it governed the sentencing: *Davis v R* at [33].

In *KB v R* [2015] NSWCCA 220 the sentencing judge had regard to two comparable cases (*RJA v R* (2008) 185 A Crim R 178 and *Ingham v R* [2011] NSWCCA 88) subsequently reconsidered following *Muldrock v The Queen*. The sentences in both cases were set aside: *KB v R* at [26]. The court held that it was necessary to reconsider KB's sentence on the basis that the judge took into account the original uncorrected CCA decisions in *Ingham v R* and *RJA v R*: *KB v R* at [27].

The **SNPP Appeals** on JIRS separates cases for each item in the Table according to whether they were decided before or after the *Muldrock* decision.

For a before and after comparison of sentencing patterns, see P Poletti and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Research Monograph 33, Judicial Commission of NSW, 2010.

[7-950] Fixed terms and aggregate sentences

Last reviewed: August 2023

Section 45(1A) provides that a court may decline to set a non-parole period (ie impose a fixed term) for an offence to which a standard non-parole period applies only if the term of the sentence is at least as long as the term of the non-parole period that the court would have set for the sentence if a non-parole period had been set. Prior to the insertion of s 45(1A) by the *Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016* on 25 October 2016, the text in brackets in s 45(1) "other than an offence or offences set out in the Table to Division 1A of this Part" precluded the imposition of a fixed term for the offences listed in the Table: see *Collier v R* [2012] NSWCCA 213 at [24], including where the offender pleads guilty: *Aguirre v R* [2010] NSWCCA 115 at [32].

Where an aggregate sentence is imposed by the court and one or more of the offences is a standard non-parole period offence, the court must indicate and make a written record of, for those offences to which a standard non-parole period applies, the non-parole period that it would have set for each such offence to which the aggregate sentence relates had it set a separate sentence of imprisonment for that offence: s 54B(4). The court is still obliged to make a record of its reasons for departure from the standard non-parole period where an aggregate sentence is imposed and must identify in the record of its reasons each factor that it took into account: s 54B(5).

A failure to comply with s 54B does not invalidate the sentence: s 54B(7).

[7-960] Court to give reasons if non-custodial sentence imposed

Last reviewed: August 2023

For a standard non-parole period offence, it is still permissible for the court to impose a non-custodial sentence (a sentence referred to in Pt 2 Div 3 *Crimes (Sentencing Procedure) Act* or a fine). The court must make a record of its reasons for doing so and identify in its record each mitigating factor it took into account: s 54C(1). Failure to comply does not invalidate the sentence: s 54C(2), but it can result in the erroneous exercise of the sentencing discretion: *R v Thawer* [2009] NSWCCA 158 at [41]. "Non-custodial sentence" in s 54C means a sentence referred to in Pt 2 Div 3 or a fine: s 54C(3).

Complying with s 54C

A court does not comply with s 54C simply by giving reasons for sentence but must according to Howie J in *R v Thawer* at [39]:

> … explain why it is that, despite the fact that the offence falls within the provisions dealing with the standard non-parole period, a sentence without a non-parole period is being imposed.

This statement from *Thawer* needs to be approached with some care because it reflects the previous approach whereby the court was required to make a finding as to where an offence fell relative to the mid-range: *R v Dungay* [2012] NSWCCA 197 at [32]. Although *Thawer* held that a judge, under s 54C, had to give reasons as to why a non-custodial sentence is imposed for an offence which carries a standard non-parole

period, "[t]he significance of that statutory fact [that is, the standard non-parole period] has been diluted [by *Muldrock v The Queen* (2011) 244 CLR 120] since *Thawer*": *R v Dungay* at [33]. A judge will not fail to comply with s 54C simply by omitting to explain why it is that a sentence without a non-parole period is being imposed "despite the fact" the offence carries a standard non-parole period: *R v Dungay* at [33]. However, a sentencing judge may not overlook the relevance of a standard non-parole period, which is to be taken into account as a guide: *R v Dungay* at [34]. Section 54C must be read being mindful of the context in which judges give their reasons: *R v Dungay* at [29].

[7-970] Brief history of Pt 4 Div 1A

Last reviewed: August 2023

Part 4 Div 1A (entitled "Standard non-parole periods") was inserted into the *Crimes (Sentencing Procedure) Act* by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.

The provisions created standard non-parole periods for several offences in a table located at the end of s 54D (the Table). The original items in the Table only apply to offences committed on or after 1 February 2003. The Table is reproduced at **[8-000]** with an additional column containing cross-references to commentary on specific offences in this publication. Legislative amendments relevant to the Table are outlined at **[8-100]**. Caution must be applied to Court of Criminal Appeal decisions decided before *Muldrock v The Queen* (2011) 244 CLR 120.

Part 4 Div 1A has been amended since 2003 to include more offences and to increase the standard non-parole period for existing offences.

Crimes (Sentencing Procedure) Amendment Act 2007

New standard non-parole periods were created for a further 11 offences by the *Crimes (Sentencing Procedure) Amendment Act 2007*. The amendments commenced on 1 January 2008. The amendments also increased the standard non-parole period for an offence under s 61M(2) *Crimes Act 1900* (indecent assault — child under 10 years) from 5 to 8 years. For amendments and items added by this amending Act, the transitional provisions found at Sch 2 Pt 17 cl 57 state:

> The amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment Act 2007* apply to the determination of a sentence for an offence whenever committed, unless:
>
> (a) the court has convicted the person being sentenced of the offence, or
>
> (b) a court has accepted a plea of guilty and the plea has not been withdrawn,
>
> before the commencement of the amendments [1 January 2008].

The 2007 Act, which added items to the Table, does not apply to offences committed before 1 February 2003: *R v Lane* [2011] NSWSC 289 at [60]–[61]. However, the increases to the standard non-parole periods for offences that were already in the Table committed after that date apply retrospectively: *GSH v R* [2009] NSWCCA 214 at [46]–[47]. It was held in *GSH v R* that the judge erred by referring to the 5-year standard non-parole period that existed at the time the offence was committed rather

than the later (increased) 8-year standard non-parole period. However, see also *AC v R* [2023] NSWCCA 133; *GL v R* [2022] NSWCCA 202 discussed at **[7-930] Exclusions and inclusions from Pt 4 Div 1A**.

Crimes Amendment (Sexual Offences) Act 2008

This amending Act, which commenced on 1 January 2009, introduced a new aggravated offence of sexual intercourse with a child under the age of 10 years under s 66A(2). The maximum penalty for the aggravated offence is life imprisonment, while the maximum penalty for the basic offence under s 66A(1) is 25 years. The amending Act assigned a standard non-parole period of 15 years for both offences.

The Act amended s 54D to make it clear that standard non-parole periods do not apply to persons under 18 years: see exclusions below.

Muldrock v The Queen (2011) 244 CLR 120

Special Bulletin 2, published at the time the judgment was delivered, explains the case in more detail. Given that Parliament amended the key standard non-parole period provisions after *Muldrock* (see below), it is only necessary to recount the key aspects of the case which remain relevant. The full Bench of the High Court in *Muldrock* held that *R v Way* (2004) 60 NSWLR 168 was wrongly decided. At the time s 54B(2) of the Act provided that "the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter". All justices of the High Court in a single judgment held, in *Muldrock* at [25]:

> … it was an error [of the court in *R v Way*] to characterise s 54B(2) as framed in mandatory terms. The court is not required when sentencing for a Div 1A offence to commence by asking whether there are reasons for not imposing the standard non-parole period nor to proceed to an assessment of whether the offence is within the midrange of objective seriousness.

The court said, at [26]: "It is a mistake to give primary, let alone determinative, significance to so much of s 54B(2) as appears before the word 'unless'." And at [32]:

> The Court of Criminal Appeal erred by treating the provision of the standard non-parole period as having determinative significance in sentencing the appellant.

The court held fixing the appropriate non-parole period is not to be treated as if it were the necessary starting point or the only important end-point in framing a sentence to which Div 1A applies: at [17].

Since the common law is preserved by the Act, sentencing for Div 1A offences must be consistent with the approach to sentencing described by McHugh J in *Markarian v The Queen* (2005) 228 CLR 357 at [51] whereby the judge identifies all the factors (including those at common law) 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: at [26].

The standard non-parole period and the maximum penalty are legislative guideposts (at [27]):

> The [standard non-parole period] requires that content be given to its specification as "the non-parole period for an offence in the middle of the range of objective seriousness". Meaningful content cannot be given to the concept by taking into account

> characteristics of the offender. The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending.

Section 54B(4) requires the court to make a record of its reasons for increasing or reducing the standard non-parole period. This does not require the court "… to attribute particular mathematical values to matters regarded as significant to the formation of a sentence that differs from the standard non-parole period, or the need to classify the objective seriousness of the offending": at [29].

The High Court rejected the proposition advanced by counsel for Mr Muldrock that the standard non-parole period only "applies" to offenders convicted following trial where the offence falls in the middle range of objective seriousness: at [24]. At [29], it was held that the obligation to give reasons

> … *applies* in sentencing for all Div 1A offences *regardless of whether the offender has been convicted after trial* or whether the offence might be characterised as falling in the low, middle or high range of objective seriousness for such offences. [Emphasis added.]

The position before *Muldrock* that the standard non-parole period applied to offenders convicted after trial as stated in *R v Way* at [68] and *FB v R* [2011] NSWCCA 217 at [150] is no longer good law. There are no gradations of application of the standard non-parole periods — it is a legislative guidepost for all cases

Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013

Special Bulletin 5 explains the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* in detail and there is a further discussion of the current law at **[7-890]** above. The amending Act was the legislative response by the NSW Parliament to the High Court decision of *Muldrock*. The amendments clarified the role of the standard non-parole period following the decision in *Muldrock*. The following notable provisions of Pt 4 Div 1A were repealed by the amending Act:

- **Section 54A(2)**, which provided "For the purposes of sentencing an offender, the standard non-parole period represents the non-parole period for an offence in the middle of the range of objective seriousness for offences in the Table to this Division".
- **Section 54B**, including:
  - **s 54B(2)**, which provided "When determining the sentence for the offence (not being an aggregate sentence), the court *is to set* the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period". [emphasis added]

    [The term "is to set" in s 54B(2) was a source of contention in *Muldrock* see: [25], [26], [32].]
  - **s 54B(3)**, which provided "The reasons for which the court may set a non-parole period that is longer or shorter than the standard non-parole period are only those referred to in s 21A".

The repeal of s 54B(2) and the phrase "is to set" evinces an intention that a standard non-parole period is not to have determinative significance in the sentencing exercise.

Under the new s 54B(2) (quoted above at **[7-900]**), it is "a matter to be taken into account by a court in determining the appropriate sentence". The standard non-parole period is to take its place as a legislative guidepost in accordance with *Muldrock* at [27].

The repeal of s 54B(3) was not surprising. The utility of s 54B(3) and its reference to s 21A was always questionable given the wide scope of matters that can be taken into account under s 21A. The High Court observed in *Muldrock* at [19] that s 54B(3) did not restrict the courts because the matters that can be taken into account under s 21A are extremely broad and include the common law.

Crimes Legislation Amendment (Child Sex Offences) Act 2015

This amending Act introduced standard non-parole periods for 13 child sexual offences. The amendments commenced on 29 June 2015 and apply to those 13 child sexual offences committed on or after that date. The Act also repealed the basic and aggravated offences of sexual intercourse with a child under 10, under ss 66A(1) and 66A(2), and replaced them with one consolidated offence, carrying a maximum penalty of life imprisonment. The standard non-parole period of 15 years continues to apply.

[7-980] Correcting sentences imposed pre-Muldrock

Last reviewed: August 2023

Muldrock v The Queen (2011) 244 CLR 120 resulted in a review by Legal Aid of cases to ascertain whether their clients were sentenced according to the erroneous principles in *R v Way* (2004) 60 NSWLR 168. See discussion in *Davis v R* [2015] NSWCCA 90 at [70]–[71]. Below describes the litigation that occurred after *Muldrock* and the means by which the cases were reviewed.

Re-opening not available

Section 43 *Crimes (Sentencing Procedure) Act 1999* empowers a court to re-open sentence proceedings where it has imposed a penalty that is contrary to law. Section 43 cannot be used to correct a purported sentencing error of applying *R v Way* (2004) 60 NSWLR 168, that is, it should not be used as an alternate to an appeal and to review standard non-parole period cases decided before *Muldrock v The Queen* (2011) 244 CLR 120: *Achurch v R (No 2)* (2013) 84 NSWLR 328 at [67] approved in *Achurch v The Queen* (2014) 253 CLR 141 at [37]. The appropriate course for cases decided before *Muldrock* is for an application for leave to appeal to the Court of Criminal Appeal to be made out of time: *Achurch (No 2)* at [67]. Section 43 cannot be used by first instance courts to review *Muldrock* appeals because a penalty is not "contrary to law" within the terms of the section only because it is reached by a process of erroneous legal reasoning or factual error: *Achurch v The Queen* at [37].

Applications for leave to appeal out of time

Section 10(1)(b) *Criminal Appeal Act 1912* provides the court may, at any time, extend the time within which a notice of intention to appeal is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice. An applicant for an extension of time to apply for leave to appeal against sentence is not required to demonstrate that substantial injustice was occasioned by the sentence and the CCA in *Abdul v R* [2013] NSWCCA 247 erred by imposing this requirement in *Muldrock* error cases: *Kentwell v The Queen* (2014) 252 CLR 601. The CCA must

consider what the interests of justice require. The merits of appeal and prospects of success are relevant to extension of time applications and should be addressed by reference to s 6(3) *Criminal Appeal Act*.

A contention by the Crown that "no *Muldrock* error is established" in respect of a sentence imposed in the relevant period is a contention that the sentencing judge failed to sentence in accordance with sentencing principles as they stood at that time: *Davis v R* [2015] NSWCCA 90 at [33]. The High Court in *Muldrock v The Queen* has declared the sentencing principles of NSW courts to have been fundamentally wrong. The interests of justice are not served by the Crown standing in the way of correction of the errors in sentencing that followed: *Davis v R* at [34]. Simpson J (Beazley P and Adamson J agreeing) held in *Aytugrul v R* [2015] NSWCCA 139 at [20]–[21] that if judges "sentenced in accordance with the law as it was then understood and stated in *Way*, then, axiomatically, by reason of *Muldrock*, they were in error. … It does not serve the administration of justice for the Crown to maintain that such error has not been shown".

The approach taken in *Davis v R*, and the cases which have applied it, is to be contrasted to earlier decisions such as *Butler v R* [2012] NSWCCA 23 at [26] and *McDonald v R* [2015] NSWCCA 80 which drew a clear distinction between cases where the standard non-parole period was applied by the judge following a trial from cases where it was used as a guidepost in guilty plea cases. The presumption of error approach in *Davis v R* can also be distinguished from the approach taken in *Aldous v R* (2012) 227 A Crim R 184 at [2], [10], [31]; *Zreika v R* (2012) 223 A Crim R 460 at [43]; *Bolt v R* [2012] NSWCCA 50 at [35]; *Black v R* [2013] NSWCCA 265 at [41]. It was accepted, however, that if a judge has placed too much significance on the standard non-parole period, resulting in a sentence that is not warranted in law, the court will intervene: *Ross v R* [2012] NSWCCA 161 at [22]; *Essex v R* [2013] NSWCCA 11 at [31]; *ZZ v R* [2013] NSWCCA 83 at [93]; *GN v R* [2012] NSWCCA 96 at [4], [12], [36].

If error is established, the court must exercise its discretion afresh to determine whether a lesser sentence is warranted in law: *Kentwell v The Queen*. See further the discussion in **Appeals** at **[70-020]**.

Part 7 Crimes (Appeal and Review) Act 2001

Section 78(1) *Crimes (Appeal and Review) Act 2001* allows an application for an inquiry into a conviction or sentence to be made to the Supreme Court where appeal avenues have been exhausted. Section 79(2) provides that action may only be taken by the Supreme Court "if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case". The text of s 79(2) includes errors of law such as adopting the two-stage approach to sentencing advocated in *R v Way*, later disapproved in *Muldrock*: *Sinkovich v Attorney General of NSW* (2013) 85 NSWLR 783. An error of law in the sentencing process which affected the severity of the sentence is capable of satisfying s 79(2): *Sinkovich v Attorney General of NSW* at [86].

Section 86 provides:

> On receiving a reference under section 77(1)(b) or 79(1)(b), the Court is to deal with the case … in the *same way as if the convicted person had appealed against the conviction or sentence under the Criminal Appeal Act 1912* … [Emphasis added.]

Application by Jason Clive McCall pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 [2014] NSWSC 1620 is an example of a referral for a purported *Muldrock* error.

CCA and referrals under s 79

Following the referral of the matter pursuant to s 79, where the CCA has previously allowed a Crown appeal, the proceedings are to be approached as though the CCA's substituted sentence was itself the subject of an appeal under s 5(1)(c) *Criminal Appeal Act 1912*: *Louizos v R* [2014] NSWCCA 242 at [6]. If error is detected, it is for the CCA to impose the appropriate sentence pursuant to s 6(3). The result of error is not restoring the original sentence; it is the exercise of the power under s 6(3), made applicable by ss 79(1)(b) and 86 *Crimes (Appeal and Review) Act 2001*: *Louizos v R* at [6].

The closing words of s 79(1)(b) and of s 86 (italicised above) give rise to a new statutory creature, a "quasi-appeal", which closely resembles an appeal created by the *Criminal Appeal Act*. The effect of ss 79(1)(b) and 86 is that the CCA has authority to review and, if appropriate, set aside the sentence it itself imposed in the past. The effect of s 79(1)(b), read with s 86, is that the past sentence imposed by the CCA is deemed to be the sentence to be dealt with following a reference: *Louizos v R* at [16]. The natural meaning of the *Criminal Appeal Act* is for the procedure created by ss 79(1)(b) and 86 to be determined by way of rehearing of the sentence imposed following the Crown appeal, and whose success depends on the identification of error: *Louizos v R* at [17], [37].

Section 78(1) *Crimes (Appeal and Review) Act* inquiries are identified in the SNPP appeal list on JIRS.

[7-990] Further reading

Last reviewed: August 2023

Articles

H Donnelly, "The diminished role of standard non-parole periods" (2012) 24(1) *JOB* 1

RA Hulme, "After Muldrock — sentencing for standard non-parole period offences in NSW" (2012) 24(10) *JOB* 81

Papers

R Wilson, "Sentencing since Muldrock", Public Defender Office Conference 2013

H Donnelly, Director, Research and Sentencing, Judicial Commission of NSW, "Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013", CLE talk, Aboriginal Legal Service (NSW/ACT), Redfern, 5 December 2013.

[The next page is 4751]

Appendix A: Pt 4 Div 1A Table — standard non-parole periods

[8-000] Pt 4 Div 1A Table — standard non-parole periods

For legislative amendments to the Table, see Appendix B at [8-100].

Item No	Offence	SNPP	Commentary
1A	Murder — where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work	25 years	[30-020]
1B*	Murder — where the victim was a child under 18 years of age	25 years	[30-020]
1	Murder — in other cases	20 years	[30-020]
2	Section 26 *Crimes Act 1900* (conspiracy to murder)	10 years	[30-090]
3	Sections 27, 28, 29 or 30 *Crimes Act 1900* (attempt to murder)	10 years	[30-100]
4	Section 33 *Crimes Act 1900* (wounding etc with intent to do bodily harm or resist arrest)	7 years	[50-080]
4AA	Section 33A(1) *Crimes Act 1900* (discharging a firearm with intent to cause grievous bodily harm)	9 years	[60-070]
4AB	Section 33A(2) *Crimes Act 1900* (discharging a firearm with intent to resist arrest or detention)	9 years	[60-070]
4A*	Section 35(1) *Crimes Act 1900* (reckless causing of grievous bodily harm in company)	5 years	[50-070]
4B*	Section 35(2) *Crimes Act 1900* (reckless causing of grievous bodily harm)	4 years	[50-070]
4C*	Section 35(3) *Crimes Act 1900* (reckless wounding in company)	4 years	[50-070]
4D*	Section 35(4) *Crimes Act 1900* (reckless wounding)	3 years	[50-070]
5	Section 60(2) *Crimes Act 1900* (assault of police officer occasioning bodily harm)	3 years	[50-120]
6	Section 60(3) *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer)	5 years	[50-120]
7	Section 61I *Crimes Act 1900* (sexual assault)	7 years	[20-640]
8	Section 61J *Crimes Act 1900* (aggravated sexual assault)	10 years	[20-660]
9	Section 61JA *Crimes Act 1900* (aggravated sexual assault in company)	15 years	[20-670]
9A^	**Until 30 November 2018** Section 61M(1) *Crimes Act 1900* (aggravated indecent assault)	5 years	[17-510] [20-690]

Item No	Offence	SNPP	Commentary
	On and from 1 December 2018 Section 61KD(1) *Crimes Act 1900* (aggravated sexual touching)	5 years	
9B*^	**Until 30 November 2018** Section 61M(2) *Crimes Act 1900* (aggravated indecent assault) [The standard non-parole period was increased from 5 to 8 years by the *Crimes (Sentencing Procedure) Amendment Act 2007*. This increase was held to have retrospective effect in *R v GSH* [2009] NSWCCA 214 at [46].]	8 years	[17-510] [20-690]
	On and from 1 December 2018 Section 66DA *Crimes Act 1900* (sexual touching — child under 10)	8 years	
10	Section 66A *Crimes Act 1900* (sexual intercourse with a child under 10)	15 years	[17-480]
10A	Section 66B *Crimes Act 1900* (attempt, or assault with intent, to have sexual intercourse with a child under 10 years)	10 years	[17-480]
10B	Section 66C(1) *Crimes Act 1900* (sexual intercourse with a child 10–14 years)	7 years	[17-490]
10C	Section 66C(2) *Crimes Act 1900* (aggravated sexual intercourse with a child 10–14 years)	9 years	[17-490]
10D	Section 66C(4) *Crimes Act 1900* (aggravated sexual intercourse with a child 14–16 years)	5 years	[17-490]
10E	Section 66EB(2) *Crimes Act 1900* (procure a child under 14 years for unlawful sexual activity)	6 years	[17-535]
10F	Section 66EB(2) *Crimes Act 1900* (procure a child 14–16 years for unlawful sexual activity)	5 years	[17-535]
10G	Section 66EB(2A) *Crimes Act 1900* (meet a child under 14 years following grooming)	6 years	[17-535]
10H	Section 66EB(2A) *Crimes Act 1900* (meet a child 14–16 years following grooming)	5 years	[17-535]
10I	Section 66EB(3) *Crimes Act 1900* (groom a child under 14 years for unlawful sexual activity)	5 years	[17-535]
10J	Section 66EB(3) *Crimes Act 1900* (groom a child 14–16 years for unlawful sexual activity)	4 years	[17-535]
10K	Section 91D(1) *Crimes Act 1900* (induce a child under 14 years to participate in child prostitution)	6 years	[17-540]
10L	Section 91E(1) *Crimes Act 1900* (obtain benefit from child prostitution, child under 14 years)	6 years	[17-540]
10M	Section 91G(1) *Crimes Act 1900* (use a child under 14 years for child abuse material purposes)	6 years	[17-541]
10N	Section 93GA(1) *Crimes Act 1900* (fire a firearm at a dwelling-house or other building with reckless disregard for the safety of any person)	5 years	[60-070]

Item No	Offence	SNPP	Commentary
10O	Section 93GA(1A) *Crimes Act 1900* (fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person)	6 years	[60-070]
10P	Section 93GA(1B) *Crimes Act 1900* (fire a firearm, in the course of an organised criminal activity, at a dwelling-house or other building with reckless disregard for the safety of any person)	6 years	[60-070]
11	Section 98 *Crimes Act 1900* (robbery with arms etc and wounding)	7 years	[20-270]
12	Section 112(2) *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)	5 years	[17-050]
13	Section 112(3) *Crimes Act 1900* (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)	7 years	[17-050]
14	Section 154C(1) *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board)	3 years	[20-400]
15	Section 154C(2) *Crimes Act 1900* (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)	5 years	[20-400]
15A*	Section 154G *Crimes Act 1900* (organised car or boat rebirthing activities)	4 years	[20-420]
15B	Section 203E *Crimes Act 1900* (bushfires)	5 years	[63-020]
15C*	Section 23(2) *Drug Misuse and Trafficking Act 1985* ((cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act)	10 years	[19-810]
16	Section 24(2) *Drug Misuse and Trafficking Act 1985* ((manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	10 years	[19-820]
17	Section 24(2) *Drug Misuse and Trafficking Act 1985* ((manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	15 years	[19-820]

Item No	Offence	SNPP	Commentary
18	Section 25(2) *Drug Misuse and Trafficking Act 1985* ((supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug)	10 years	[19-840]
19	Section 25(2) *Drug Misuse and Trafficking Act 1985* ((supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug)	15 years	[19-840]
20	Section 7 *Firearms Act 1996* (unauthorised possession or use of firearms) [The standard non-parole period was increased from 3 to 4 years by the *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015*. The 4-year standard non-parole period applies to offences committed on or after 21 August 2015]	4 years	[60-040]
21*	Section 51(1A) or (2A) *Firearms Act 1996* (unauthorised sale of prohibited firearm or pistol)	10 years	[60-050]
22*	Section 51B *Firearms Act 1996* (unauthorised sale of firearms on an ongoing basis)	10 years	[60-050]
23*	Section 51D(2) *Firearms Act 1996* (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)	10 years	[60-050]
24*	Section 7 *Weapons Prohibition Act 1998* ((unauthorised possession or use of prohibited weapon) — where the offence is prosecuted on indictment) [The standard non-parole period was increased from 3 to 5 years by the *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015*. The 5-year standard non-parole period applies to offences committed on or after 21 August 2015]	5 years	[60-060]

Extracted from Pt 4 Div 1A *Crimes (Sentencing Procedure) Act 1999*.

* The transitional provisions for the new and amended standard non-parole periods introduced in 2007 state:

> The amendments made to this Act by the *Crimes (Sentencing Procedure) Amendment Act 2007* apply to the determination of a sentence for an offence whenever committed, unless:
>
> (a) the court has convicted the person being sentenced of the offence, or
>
> (b) a court has accepted a plea of guilty and the plea has not been withdrawn,
>
> before the commencement of the amendments [1 January 2008].

^ The Table to Pt 4, Div 1A *Crimes (Sentencing Procedure) Act 1999*, as in force immediately before its amendment by the *Criminal Legislation Amendment (Child*

Sexual Abuse) Act 2018, continues to apply in respect of an offence against s 61M(1) or (2) *Crimes Act 1900* committed before the commencement of that amendment [1 December 2018].

[The next page is 4761]

Appendix B: Legislative amendments relevant to the Pt 4 Div 1A Table — standard non-parole periods

[8-100] Legislative amendments relevant to the Pt 4 Div 1A Table — standard non-parole periods

The full title of each Act is listed at the end of Appendix B.

ITEM 1A: Murder — where the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- "The victim's occupation" omitted and replaced with "the victim's occupation or voluntary work": Act 27 of 2006 (commenced 26 May 2006 and applying retrospectively).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act* amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).
- Item amended to include "council law enforcement officer": Act 28 of 2009 (commenced 9 June 2009). Previously, the murder of a council law enforcement officer was included in Item 1 below.

ITEM 1B: Murder — where the victim was a child under 18 years of age

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively). Previously, the murder of a child victim was included in Item 1 below.
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 1: Murder — in other cases

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 2: Section 26 Crimes Act 1900 (conspiracy to murder)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 3: Sections 27, 28, 29 or 30 Crimes Act 1900 (attempt to murder)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 4: Section 33 Crimes Act 1900 (wounding etc with intent to do bodily harm or resist arrest)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act* amended to include transmission of grievous bodily disease; offences under s 33 *Crimes Act* restructured to reflect the omission of "maliciously" and to separate the offence of causing grievous bodily harm from the offence of resisting or preventing arrest or detention; offence relating to discharging firearms transferred to s 33A (previously offence of discharging firearms included in Item 4): Act 38 of 2007 (commenced 15 February 2008).

ITEM 4AA: Section 33A(1) Crimes Act 1900 (discharging a firearm with intent to cause grievous bodily harm)

- Item inserted: Act 17 of 2015 (commenced 21 August 2015).

ITEM 4AB: Section 33A(2) Crimes Act 1900 (discharging a firearm with intent to resist arrest or detention)

- Item inserted: Act 17 of 2015 (commenced 21 August 2015).

ITEM 4A: Section 35(1) Crimes Act 1900 (reckless causing of grievous bodily harm in company)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Section 35 *Crimes Act* substituted (to reflect the omission of the term "maliciously"); maximum penalty for offences committed in company increased from 10 years to 14 years: Act 38 of 2007 (commenced 27 September 2007).

- Definition of "grievous bodily harm" in s 4(1) *Crimes Act* amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).
- Section 35(1)–(4) *Crimes Act* replaced to clarify fault element as "reckless as to causing actual bodily harm to that or any other person": Act 41 of 2012 (commenced 21 June 2012).

ITEM 4B: Section 35(2) Crimes Act 1900 (reckless causing of grievous bodily harm)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Section 35 *Crimes Act* substituted (to reflect the omission of the term "maliciously"); maximum penalty for recklessly causing grievous bodily harm increased from 7 years to 10 years: Act 38 of 2007 (commenced 27 September 2007).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act* amended to include transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).
- Section 35(1)–(4) *Crimes Act* replaced to clarify fault element as "reckless as to causing actual bodily harm to that or any other person": Act 41 of 2012 (commenced 21 June 2012).

ITEM 4C: Section 35(3) Crimes Act 1900 (reckless wounding in company)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Section 35 *Crimes Act 1900* substituted (to reflect the omission of the term "maliciously"): Act 38 of 2007 (commenced 27 September 2007).
- Section 35(1)–(4) *Crimes Act* replaced to clarify fault element as "reckless as to causing actual bodily harm to that or any other person": Act 41 of 2012 (commenced 21 June 2012).

ITEM 4D: Section 35(4) Crimes Act 1900 (reckless wounding)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Section 35 *Crimes Act 1900* substituted (to reflect the omission of the term "maliciously"): Act 38 of 2007 (commenced 27 September 2007).
- Section 35(1)–(4) *Crimes Act* replaced to clarify fault element as "reckless as to causing actual bodily harm to that or any other person": Act 41 of 2012 (commenced 21 June 2012).

ITEM 5: Section 60(2) Crimes Act 1900 (assault of police officer occasioning bodily harm)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 6: Section 60(3) Crimes Act 1900 (wounding or inflicting grievous bodily harm on police officer)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act* amended to include transmission of grievous bodily disease; and "maliciously" replaced with "recklessly" for offences under s 60(3) *Crimes Act 1900*: Act 38 of 2007 (commenced 15 February 2008).
- Section 60(3) *Crimes Act* replaced to clarify fault element as "reckless as to causing actual bodily harm to that officer or any other person": Act 41 of 2012 (commenced 21 June 2012).

ITEM 7: Section 61I Crimes Act 1900 (sexual assault)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 8: Section 61J Crimes Act 1900 (aggravated sexual assault)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "maliciously" repealed from the *Crimes Act 1900* and replaced with "intentionally or recklessly" for offences under s 61J: Act 38 of 2007 (commenced 15 February 2008).
- "Intellectual disability" replaced with the broader concept of "cognitive impairment" for offences under the *Crimes Act*: Act 74 of 2008 (commenced 1 December 2008).
- Two additional circumstances of aggravation for sexual assault offences inserted under s 61J *Crimes Act* (the offender broke and entered the building with the intention of committing a serious indictable offence; and the offender deprived the victim of his or her liberty): Act 105 of 2008 (commenced 1 January 2009).
- "Subdivision 4 of Division 1" omitted from s 61J(3) and replaced with "Division 4" so that it reads "in this section, 'building' has the same meaning as it does in Division 4 of Part 4": Act 99 of 2009 (commenced 22 February 2010).

ITEM 9: Section 61JA Crimes Act 1900 (aggravated sexual assault in company)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "maliciously" repealed from the *Crimes Act 1900* and replaced with "intentionally or recklessly" for offences under s 61JA: Act 38 of 2007 (commenced 15 February 2008).

ITEM 9A: Section 61M(1) Crimes Act 1900 (aggravated indecent assault)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- "Intellectual disability" replaced with the broader concept of "cognitive impairment" for offences under the *Crimes Act 1900*: Act 74 of 2008 (commenced 1 December 2008).
- "Age of 10 years" omitted from s 61M(2) *Crimes Act* and replaced with "the age of 16 years"; aggravating circumstance that "victim is under 16 years" in

s 61M(3)(b) omitted: Act 105 of 2008 (commenced 1 January 2009). The effect of the amendment is that aggravated indecent assault offences with a child under 16 years are now included in Item 9B (previously under Item 9A).

- Provision repealed: Act 33 of 2018 (commenced 1 December 2018). Continues to apply in respect of an offence against s 61M(2) committed before the amendment.

Section 61KD(1) Crimes Act 1900 (aggravated sexual touching)

- Item inserted: Act 33 of 2018 (commenced 1 December 2018).

ITEM 9B: Section 61M(2) Crimes Act 1900 (aggravated indecent assault)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Standard non-parole period increased from 5 to 8 years: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- "Intellectual disability" replaced with the broader concept of "cognitive impairment" for offences under the *Crimes Act 1900*: Act 74 of 2008 (commenced 1 December 2008).
- "Age of 10 years" omitted from s 61M(2) *Crimes Act* and replaced with "the age of 16 years"; aggravating circumstance that "victim is under 16 years" in s 61M(3)(b) omitted: Act 105 of 2008 (commenced 1 January 2009). The effect of the amendment is that aggravated indecent assault offences with a child under 16 years are now included in Item 9B which carries a longer maximum penalty and standard non-parole period than existed previously under s 61M(1) (Item 9A).
- "Child under 10" deleted from Item 9B (to clarify that the standard non-parole period for an aggravated indecent assault against a child between the ages of 10 and 16 years is 8 years): Act 27 of 2009 (commenced 19 May 2009).
- Provision repealed: Act 33 of 2018 (commenced 1 December 2018). Continues to apply in respect of an offence against s 61M(2) committed before the amendment.

Section 66DA Crimes Act 1900 (sexual touching — child under 10)

- Item inserted: Act 33 of 2018 (commenced 1 December 2018).

ITEM 10: Section 66A Crimes Act 1900 (sexual intercourse with a child under 10)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Between 1 January 2009 and 29 June 2015: s 66A *Crimes Act 1900* repealed and new aggravated offence of sexual intercourse with a child under 10 years was created under s 66A(2) (maximum penalty of life imprisonment) and s 66A(1) (maximum penalty of 25 years). Section 66A omitted from the Table and replaced with s 66A(1) and s 66A(2): Act 105 of 2008 (commenced 1 January 2009).
- Section 66A(3) amended to provide an additional circumstance of aggravation for aggravated sexual intercourse with a child under 10 years (that the offender breaks and enters with the intention of committing the offence or any other serious indictable offence): Act 27 of 2009 (commenced 19 May 2009).
- From 29 June 2015: s 66A(1) and s 66A(2) *Crimes Act 1900* were repealed and replaced with one offence of sexual intercourse with a child under 10 years (maximum penalty life imprisonment). Section 66A(1) and (2) were omitted from the Table and replaced with s 66A: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10A: Section 66B Crimes Act 1900 (attempt, or assault with intent, to have sexual intercourse with a child under 10)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10B: Section 66C(1) Crimes Act 1900 (sexual intercourse with a child 10–14)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10C: Section 66C(2) Crimes Act 1900 (aggravated sexual intercourse with a child 10–14)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10D: Section 66C(4) Crimes Act 1900 (aggravated sexual intercourse with a child 14–16)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10E: Section 66EB(2) Crimes Act 1900 (procure a child under 14 for unlawful sexual activity)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10F: Section 66EB(2) Crimes Act 1900 (procure a child 14–16 for unlawful sexual activity)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10G: Section 66EB(2A) Crimes Act 1900 (meet a child under 14 following grooming)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10H: Section 66EB(2A) Crimes Act 1900 (meet a child 14–16 following grooming)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10I: Section 66EB(3) Crimes Act 1900 (groom a child under 14 for unlawful sexual activity)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10J: Section 66EB(3) Crimes Act 1900 (groom a child 14–16 for unlawful sexual activity)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10K: Section 91D(1) Crimes Act 1900 (induce a child under 14 to participate in child prostitution)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10L: Section 91E(1) Crimes Act 1900 (obtain benefit from child prostitution, child under 14)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10M: Section 91G(1) Crimes Act 1900 (use a child under 14 for child abuse material purposes)

- Item inserted: Act 13 of 2015 (commenced 29 June 2015).

ITEM 10N: Section 93GA(1) Crimes Act 1900 (fire a firearm at a dwelling-house or other building with reckless disregard for the safety of any person)

- Item inserted: Act 17 of 2015 (commenced 21 August 2015).

ITEM 10O: Section 93GA(1A) Crimes Act 1900 (fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person)

- Item inserted: Act 17 of 2015 (commenced 21 August 2015).

ITEM 10P: Section 93GA(1B) Crimes Act 1900 (fire a firearm, in the course of an organised criminal activity, at a dwelling-house or other building with reckless disregard for the safety of any person)

- Item inserted: Act 17 of 2015 (commenced 21 August 2015).

ITEM 11: Section 98 Crimes Act 1900 (robbery with arms etc and wounding)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 12: Section 112(2) Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of aggravation)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 13: Section 112(3) Crimes Act 1900 (breaking etc into any house etc and committing serious indictable offence in circumstances of special aggravation)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Definition of "grievous bodily harm" in s 4(1) *Crimes Act 1900* amended to include the destruction of a foetus of a pregnant woman: Act 14 of 2005 (commenced 12 May 2005); and transmission of grievous bodily disease: Act 38 of 2007 (commenced 15 February 2008).

ITEM 14: Section 154C(1) Crimes Act 1900 (taking motor vehicle or vessel with assault or with occupant on board)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Offence under s 154C *Crimes Act 1900* extended to include vessels: Act 26 of 2006 (commenced 1 September 2006).
- "Car-jacking" omitted from Item and replaced with "taking motor vehicle or vessel with assault or with occupant on board": Act 50 of 2007 (commenced 1 January 2008).

ITEM 15: Section 154C(2) Crimes Act 1900 (taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation)

- Item included in original Table: Act 90 of 2002 (commenced 1 Feb 2003).
- Offence under s 154C *Crimes Act 1900* extended to include vessels: Act 26 of 2006 (commenced 1 September 2006).

- "Car-jacking" omitted from Item and replaced with "taking motor vehicle or vessel with assault or with occupant on board": Act 50 of 2007 (commenced 1 January 2008).
- Definition of "maliciously" repealed from the *Crimes Act 1900* and replaced with "intentionally or recklessly" for offences under s 154C(2): Act 38 of 2007 (commenced 15 February 2008).

ITEM 15A: Section 154G Crimes Act 1900 (organised car or boat rebirthing activities)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Offence of facilitating organised car or boat rebirthing activities created under s 154G *Crimes Act 1900*: Act 26 of 2006 (commenced 1 September 2006).

ITEM 15B: Section 203E Crimes Act 1900 (bushfires)

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).
- Renumbered from Item 15A: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

ITEM 15C: Section 23(2) Drug Misuse and Trafficking Act 1985 (cultivation, supply or possession of prohibited plants), being an offence that involves not less than the large commercial quantity (if any) specified for the prohibited plant concerned under that Act

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- The expression "cannabis plant" in Sch 1 *Drug Misuse and Trafficking Act 1985* was replaced by two new categories of prohibited drugs: "cannabis plant cultivated by enhanced indoor means" and "cannabis plant – other"; and a definition of "cultivation by enhanced indoor means" was inserted in s 3(1) *Drug Misuse and Trafficking Act*: Act 57 of 2006 (commenced 14 July 2006). Note: The commercial and large commercial quantities for indoor cannabis production are lower than for that occurring outdoors to reflect the higher yields produced by this method.

ITEM 16: Section 24(2) Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug:

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 17: Section 24(2) Drug Misuse and Trafficking Act 1985 (manufacture or production of commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 18: Section 25(2) Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves less than the large commercial quantity of that prohibited drug

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 19: Section 25(2) Drug Misuse and Trafficking Act 1985 (supplying commercial quantity of prohibited drug), being an offence that: (a) does not relate to cannabis leaf, and (b) if a large commercial quantity is specified for the prohibited drug concerned under that Act, involves not less than the large commercial quantity of that prohibited drug

- Item included in original Table: Act 90 of 2002 (commenced 1 February 2003).

ITEM 20: Section 7 Firearms Act 1996 (unauthorised possession or use of firearms)

- Section 7 *Firearms Act 1996* (unauthorised possession or use of firearms)
- Section 7A inserted into the *Firearms Act 1996* and s 7 amended to create two separate offences for the possession or use of an unauthorised firearm: Act 85 of 2003 (commenced 14 February 2004). Possession and use of a prohibited firearm or pistol under s 7(1) attracts a maximum penalty of 14 years. The lesser offence of possess and the use of firearms "generally" under s 7A attracts a maximum penalty of 5 years but is not subject to a standard non-parole period.
- Standard non-parole period increased from 3 to 4 years: Act 17 of 2015 (commenced 21 August 2015).

ITEM 21: Section 51(1A) or (2A) Firearms Act 1996 (unauthorised sale [supply] of prohibited firearm or pistol)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Note: s 51 *Firearms Act 1996* amended to broaden scope of offence by replacing "sale" with "supply": Act 74 of 2013 (commenced 1 November 2013) (not yet reflected in the Table).

ITEM 22: Section 51B Firearms Act 1996 (unauthorised sale [supply] of firearms on an ongoing basis)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Offence under s 51B *Firearms Act 1996* amended: Act 92 of 2003 (commenced 15 December 2003). "During any period of 30 consecutive days" replaced with "over any consecutive period of 12 months". A consecutive period of 12 months may include a period which occurs before the commencement of the amendment so long as that period does not exceed 30 days.
- Note: s 51B *Firearms Act* amended to broaden scope of offence by replacing "sale" with "supply": Act 74 of 2013 (commenced 1 November 2013) (not yet reflected in the Table).

ITEM 23: Section 51D(2) Firearms Act 1996 (unauthorised possession of more than 3 firearms any one of which is a prohibited firearm or pistol)

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).

ITEM 24: Section 7 Weapons Prohibition Act 1998 (unauthorised possession or use of prohibited weapon) — where the offence is prosecuted on indictment

- Item inserted: Act 50 of 2007 (commenced 1 January 2008 and applying retrospectively).
- Standard non-parole period increased from 3 to 5 years: Act 17 of 2015 (commenced 21 August 2015).

List of Acts that amended the Pt 4, Div 1A Table or the offences

- Act 90 of 2002: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*
- Act 85 of 2003: *Crimes Legislation Further Amendment Act 2003*
- Act 92 of 2003: *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003*
- Act 14 of 2005: *Crimes Amendment (Grievous Bodily Harm) Act 2005*
- Act 26 of 2006: *Crimes Amendment (Organised Car and Boat Theft) Act 2006*
- Act 27 of 2006: *Crimes (Sentencing Procedure) Amendment Act 2006*
- Act 57 of 2006: *Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Act 2006*
- Act 38 of 2007: *Crimes Amendment Act 2007*
- Act 50 of 2007: *Crimes (Sentencing Procedure) Amendment Act 2007*
- Act 74 of 2008: *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act 2008*
- Act 105 of 2008: *Crimes Amendment (Sexual Offences) Act 2008*
- Act 27 of 2009: *Crimes Legislation Amendment Act 2009*
- Act 28 of 2009: *Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officer) Act 2009*
- Act 99 of 2009: *Crimes Amendment (Fraud, Identity and Forgery Offences) Act 2009*
- Act 41 of 2012: *Crimes Amendment (Reckless Infliction of Harm) Act 2012*
- Act 74 of 2013: *Firearms and Criminal Groups Legislation Amendment Act 2013*
- Act 13 of 2015: *Crimes Legislation Amendment (Child Sex Offences) Act 2015*
- Act 17 of 2015: *Crimes (Sentencing Procedure) Amendment (Firearms Offences) Act 2015*
- Act 33 of 2018: *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018*.

[The next page is 4781]

Concurrent and consecutive sentences

Part 4, Div 2 *Crimes (Sentencing Procedure) Act 1999* (ss 55–60) contains provisions relating to the imposition of concurrent and consecutive sentences of imprisonment. It is convenient to explain here what DA Thomas first coined in his *Principles of Sentencing,* 2nd ed, 1979, Heinemann, London at p 56 as "the totality principle" (see A Ashworth, *Sentencing and Criminal Justice*, 4th ed, 2005, Cambridge University Press, New York at p 248).

[8-200] The principle of totality

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour. The High Court has quoted DA Thomas' exposition of the common law principle (below) on at least three occasions, the most recent being *Johnson v The Queen* (2004) 78 ALJR 616 at [18]:

> In *Mill* [*Mill v The Queen* (1988) 166 CLR 59 at 63] Wilson, Deane, Dawson, Toohey and Gaudron JJ adopted a statement from Thomas, *Principles of Sentencing* … at pp 56–57 [footnotes omitted]:
>
> > "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

The passage from Thomas was also quoted in *R H McL v The Queen* (2000) 203 CLR 452 at [15] and *R v Harris* [2007] NSWCCA 130 at [44]. Street CJ's description of the principle in *R v Holder* [1983] 3 NSWLR 245 is also commonly quoted, for example, in *R v MMK* [2006] NSWCCA 272 at [12]. Street CJ said at 260:

> The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.

Totality both constrains and sets a lower limit

The Court of Criminal Appeal in *R v MMK* [2006] NSWCCA 272 at [11] said the principle of totality was "not-unrelated" to the principle of proportionality.

The task of the court is to ensure that the overall sentence is neither too harsh nor too lenient. Just as totality is applied to avoid a crushing sentence "… it is not to be disregarded for the converse purpose of assessing whether the overall effect of the sentences is sufficient …": *R v KM* [2004] NSWCCA 65 at [55] cited with approval in *Vaovasa v R* [2007] NSWCCA 253 at [18]. The totality principle is routinely relied upon by the Crown in appeals against inadequacy of sentence. But mostly, the principle is invoked at first instance in the words of McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295 at 308, whereby:

> the Court … adjust[s] the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.

Totality and public confidence in sentencing

In *R v MAK* [2006] NSWCCA 381 at [18], the court said the principle must be applied without a suggestion that a discount is given for multiple offences:

> A sentencing court must, however, take care when applying the totality principle. Public confidence in the administration of justice requires the Court to avoid any suggestion that what is in effect being offered is some kind of a discount for multiple offending: *R v Knight* (2005) 155 A Crim R 252 at [112].

R v Harris [2007] NSWCCA 130 at [46] endorsed a statement of Sully J to similar effect in *R v Wheeler* [2000] NSWCCA 34 at [36].

[8-210] Applications of the totality principle

When a court is sentencing for multiple offences, and before it imposes the sentence for any one offence, it will have considered the outcome for all offences: *R v JRD* [2007] NSWCCA 55 at [33]. This approach ensures that the effective sentence reflects the overall criminality and that the individual sentences imposed conform to any statutory limitations that exist for specific sentencing options: *R v JRD* at [31], [33].

Where a sentence for an offence was reduced at first instance because of the totality principle on the basis of a premise, such as an existing sentence that no longer exists, a correction may be necessary so the sentence adequately reflects the criminality of the remaining offences, standing alone: *Johnson v R* [2017] NSWCCA 278 at [161]–[163]; *R v Tolmie* (1994) 72 A Crim R 416 at 418; see *R v JDX* [2017] NSWCCA 9 at [90]–[96]. See also **Power to vary commencement of sentence** at **[8-270]**.

Totality and non-custodial sentences

The totality principle applies where a court imposes more than one non-custodial sentence, or a mixture of different non-custodial sentences, or imprisonment is imposed with an additional penalty or order: *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 704; *R v Chelmsford Crown Court; ex parte Birchell* (1989) 11 Cr App R (S) 510 (fines); *Winkler v Cameron* (1981) 33 ALR 663 at 670 (fines and restitution orders); *Hunter v White* [2002] TASSC 72 at [9] (imprisonment and licence disqualification); and *EPA v Barnes* [2006] NSWCCA 246 at [50] (fines and an order for legal costs).

Totality and fines

Kirby P said in *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 704:

> The principle of totality is applicable where the penalty imposed is by way of fine: see *R v Sgroi* (1989) 40 A Crim R 197 at 203. However, it may be that the principle of

> totality may not have the same force in the case of the imposition of fines, as opposed to the imposition of imprisonment where it has a special operation: see *R v Brown* (1982) 5 A Crim R 404 at 407.

The passage was quoted with approval in *EPA v Barnes* [2006] NSWCCA 246 at [46]. Unlike terms of imprisonment, fines cannot be made "concurrent". Each fine which is imposed must be paid separately.

The court in *EPA v Barnes*, above, at [50] suggested that if the sentencer believes that the totality principle requires an adjustment to the fines which may otherwise be appropriate, the amount of each fine should be altered by the approach taken by the first instance judge in *Johnson v The Queen* (2004) 78 ALJR 616 (discussed below), of reducing individual sentences and then aggregating each to determine a total fine amount.

[8-220] Totality and sentences of imprisonment

As to the application of the totality principle where a court is considering imposing intensive correction orders see [3-630].

A court which sentences an offender to more than one sentence of full-time imprisonment can utilise s 53A *Crimes (Sentencing Procedure) Act 1999* and apply the principle of totality implicitly. See the discussion of the requirements for aggregate sentences at [7-505] and at [7-507] under the heading *Application of Pearce v The Queen and the totality principle (propositions 1, 4 and 6)*. Alternatively the court can impose individual sentences (including a fixed terms/non-parole period and terms of sentence) with specific dates and apply the principle of totality explicitly.

The severity of a sentence of imprisonment is not purely linear

The court in *R v MAK* [2006] NSWCCA 381 at [15]–[18] identified at least two matters that are considered under the totality principle. The first is that:

> The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence.

The court at [16] quoted *R v Clinch* (1994) 72 A Crim R 301 at 306–307 where Malcolm CJ said "a sentence of five years is more than five times as severe as a sentence of one year". *R v MAK* and *R v Clinch* were referred to in *Gore v R; Hunter v R* [2010] NSWCCA 330 at [42]; *Cavanagh v R* [2009] NSWCCA 174 at [16]ff. However, sometimes very long sentences are required and it is not possible to determine whether inadequate weight has been given to what was said in *Clinch* until the court also reflects on other factors: *Hampton v R* [2010] NSWCCA 278 at [36]. For example, the effective non-parole period of two years was not beyond the available range in *Einfeld v R* [2010] NSWCCA 87, Latham J (RS Hulme J agreeing) at [201], Basten JA at [185]–[189] dissenting.

Imposition of a crushing sentence

The second matter, referred to by the court in *R v MAK*, above, at [17], is that the totality principle is designed to avoid a court imposing a "crushing sentence" or, as put by King CJ in *R v Rossi* (1988) 142 LSJS 451 at 453: "… where the total effect

of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect." The court in *MAK* explained the notion of a crushing sentence at [17]:

> an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.

An assessment of whether a particular sentence is a "*crushing sentence*" must have regard to the offences committed, the maximum penalties, standard non-parole periods (if relevant) and all objective and subjective factors and principles concerning accumulation, concurrency and totality: *Paxton v R* [2011] NSWCCA 242 at [215]. The totality principle, including any necessity to avoid imposing a "crushing sentence", is not a basis to avoid imposing a sentence that is "just and appropriate". That a sentence may be "crushing" is but one matter taken into account in determining whether a particular sentence is beyond the range of sentences properly available: *Hraichie v R* [2022] NSWCCA 155 at [73]; *Atai v R* [2020] NSWCCA 302 at [132]; *GS v R* [2016] NSWCCA 266 at [50]–[51]. An extremely lengthy sentence would not necessarily be characterised as crushing if it reflects the total criminality of the offender's conduct and would not be disturbed on appeal because the offender may feel crushed by it: *Stanton v R* [2017] NSWCCA 250 at [153]; *ZA v R* [2017] NSWCCA 132 at [76]–[85]. For young offenders a crushing sentence is one that is so long that the offender cannot conceive of enjoying a useful life after its expiration: *Holliday v R* [2013] ACTCA 31 at [61].

For a discussion on totality in the context of Commonwealth offences see *Mohamed v The Queen* [2022] VSCA 136 at [5]–[6] and **Totality principle when previous sentence to be served: ss 16B, 19AD and 19AE** in **[16-050] Fixing non-parole periods and making recognizance release orders**.

Statutory provisions for concurrent and consecutive sentences of imprisonment

Several provisions in the Act are relevant to sentencing exercises where more than one sentence of imprisonment is imposed. The provisions are technical in nature. The common law, discussed below, largely governs this area of the law.

Commencement date of sentences

Section 47(2)(a) provides that a court may direct that a sentence of imprisonment commence on a day *prior to* the day on which it is imposed. Section 47(2)(b) also provides that a court may direct that a sentence of imprisonment commence on a day occurring *after* the day on which the sentence is imposed but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment. A direction "must not" be later than the day following the earliest day on which it appears to the court that the offender will become eligible to be released from custody, or will become eligible to be released on parole: s 47(4). On the issue of backdating and forward dating sentences, see **[12-500] Counting pre-sentence custody** and **[7-547] Forward dating sentences of imprisonment**, respectively.

Multiple sentences of imprisonment

Section 53 provides:

> (1) When a court imposes a sentence of imprisonment on an offender in relation to more than one offence, the court must (unless imposing an aggregate sentence of imprisonment in accordance with section 53A) comply with the requirements of this Division by imposing a separate sentence in relation to each offence.
>
> (2) The term, and any non-parole period, set under this Division in relation to a sentence of imprisonment is not revoked or varied by a later sentence of imprisonment that the same or some other court subsequently imposes in relation to another offence.

Section 55 provides that in the absence of a direction where more than one sentence of imprisonment is imposed, or where the offender is subject to another sentence of imprisonment that is yet to expire, the sentence "is to be served concurrently". Section 55 provides:

> (1) In the absence of a direction under this section, a sentence of imprisonment imposed on an offender:
>
> (a) who, when being sentenced, is subject to another sentence of imprisonment that is yet to expire, or
>
> (b) in respect of whom another sentence of imprisonment has been imposed in the same proceedings,
>
> is to be served concurrently with the other sentence of imprisonment and any further sentence of imprisonment that is yet to commence.
>
> (2) The court imposing the sentence of imprisonment may instead direct that the sentence is to be served consecutively (or partly concurrently and partly consecutively) with the other sentence of imprisonment or, if there is a further sentence of imprisonment that is yet to commence, with the further sentence of imprisonment.
>
> (3) A direction under this section has effect according to its terms.
>
> …

Rather than create a presumption in favour of concurrency, s 55 appears to be directed to ensuring that, if the judge does not specifically address the issue, the default position is that the sentences are to be served concurrently: *Yeung v R* [2018] NSWCCA 52 at [46]. Section 55(1) does not require a specific direction. A direction is implicit in fixing the relevant commencement date and any more formalistic approach is not required: *Yeung v R* at [48].

Section 55(5) provides that s 55 does not apply to a sentence of imprisonment imposed on an offender in relation to an offence involving an assault, or any other offence against the person, committed by the offender while a convicted inmate of a correctional centre, or against a juvenile justice officer committed by the offender while a person subject to control, or a sentence of imprisonment imposed on an offender in relation to an offence involving an escape from lawful custody committed by the offender while an inmate of a correctional centre (whether or not the escape was from a correctional centre).

Smart AJ identified some practical problems that arise from the language used in s 55 in *R v Killick* [2002] NSWCCA 1 at [68]–[79].

[8-230] Structuring sentences of imprisonment and totality

It has been said that express legislative provisions apart (such as s 57 escape, see below) questions of concurrence or accumulation are a discretionary matter for the sentencing judge (*R v Hammoud* [2000] NSWCCA 540 at [7]; *R v Scott* [2005] NSWCCA 152 at [31]; *LG v R* [2012] NSWCCA 249 at [24]) and that in determining appropriate sentences:

> Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected. *Johnson v The Queen* (2004) 78 ALJR 616 at [26].

However, the court in *R v MMK* [2006] NSWCCA 272 at [13] made clear that "the discretion is generally circumscribed by a proper application of the principle of totality". The court said at [11]:

> It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence in accordance with statements of the High Court as to the operation of the principle in *Mill v The Queen* (1988) 166 CLR 59; *Pearce v The Queen* (1998) 194 CLR 610 and *Johnson v The Queen* (2004) 78 ALJR 616.

Statements such as those in *R v Hammoud* [2000] NSWCCA 540 at [7] to the effect that questions of concurrence or accumulation are a discretionary matter for the sentencing judge "have to be read subject to what is required in a particular case to reflect the totality of the criminality before the Court": *R v Merrin* [2007] NSWCCA 255 per Howie J at [36].

The following discussion sets out the common law position before aggregate sentences were introduced, as to which see ss 44(2A), (2C) and 53A discussed at **[7-500]**ff.

The "orthodox method" of setting sentences for each offence *before* considering the issues of concurrency or cumulation

The discussion will return to the issue of whether a sentence of imprisonment in a particular case ought to be served concurrently or made consecutive. The High Court has suggested specific approaches to setting sentences of imprisonment for multiple offences *before* issues of concurrency or cumulation are considered. In *Mill v The Queen* (1988) 166 CLR 59 the High Court suggested two approaches at 63:

> Where the [totality] principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by *making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate* in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred [emphasis added].

The High Court in *Johnson v The Queen* (2004) 78 ALJR 616 [26] said that *Mill v The Queen*:

> expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of *fixing a sentence for each offence* and aggregating them before taking the next step of determining concurrency [emphasis added].

In *Pearce v The Queen* (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ said at [45]:

> A judge sentencing an offender for more than one offence must *fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence*, as well, of course, as questions of totality [emphasis added].

The court clarified in *Johnson v The Queen* at [26] that the approach suggested in *Pearce v The Queen* did not overrule the second method referred to in *Mill v The Queen* at 63 of "*lowering the individual sentences below what would otherwise be appropriate*" [emphasis added]:

> *Pearce* does not decree that a sentencing judge may never *lower each sentence and then aggregate* them for determining the time to be served. To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard *only* to the total effective sentence to be imposed on an offender [emphasis added].

Since *Pearce v The Queen*, the Court of Criminal Appeal has made clear that it is impermissible to impose a sentence for one offence and then increase it in order to encompass the criminality of other offences before the Court: *R v Merrin* [2007] NSWCCA 255 at [37]. Secondly, where an offender stands for sentence for multiple offences it is a clear error "… to have regard *only* to the total effective sentence to be imposed on an offender": *Johnson v The Queen* at [26].

Brownie JA said in *R v O'Connell* [2005] NSWCCA 265 at [30] that the strict application of the approach suggested in *Pearce* may present a practical problem where individual offences, if considered individually, do not warrant a prison sentence.

Should a sentence of imprisonment be served concurrently or consecutively?

A sentence should not be concurrent "simply because of the similarity of the conduct or because it may be seen as part of the one course of criminal conduct … [t]he question to be asked is, can the sentence for one offence encompass the criminality of all the offences?": *R v Jarrold* [2010] NSWCCA 69 per Howie J at [56], cited with approval in *Franklin v R* [2013] NSWCCA 122 at [44] and *MPB v R* [2013] NSWCCA 213 at [134].

In *R v XX* [2009] NSWCCA 115 at [52], Hall J derived the following 11 propositions from the case law, principally from *Cahyadi v R* [2007] NSWCCA 1 and *Nguyen v R* [2007] NSWCCA 14:

> There is no general rule that determines whether sentences ought to be imposed concurrently or consecutively: see *Cahyadi v R* (2007) 168 A Crim R 41 per Howie J at 47. However, a number of propositions relevant to the consideration of that issue may be derived from the case law. They include the following:
>
> (1) It is well established that questions of accumulation are, subject to the application of established principle, discretionary. What is important is that, firstly, an appropriate sentence is imposed in respect of each offence; and, secondly, that the total sentence imposed properly reflects the totality of the criminality: *R v Wilson* [2005] NSWCCA 219 at [38] per Simpson, Barr and Latham JJ agreeing.
>
> (2) In *R v Weldon* (2002) 136 A Crim R 55, Ipp JA at [48] stated that it is "*not infrequent that, where the offences arise out of one criminal enterprise, concurrent sentences*

will be imposed" but his Honour observed that "*this is not an inflexible rule*" and "*[t]he practice should not be followed where wholly concurrent sentences would fail to take account of differences in conduct*".

(3) The question as to whether sentences in respect of two or more offences committed in the course of a single episode or a criminal enterprise or on a particular day should be concurrent or at least partly accumulated is to be determined by the principle of totality and the relevant factors to be taken into account in the application of that principle. See observations in this respect of Howie J in *Nguyen v R* [2007] NSWCCA 14 at [12].

(4) In applying the principle of totality, the question to be posed is whether the sentence for one offence can comprehend and reflect the criminality of the other offence. See generally *R v MMK* (2006) 164 A Crim R 481 at [11] and [13], *Cahyadi* at [12] and [27] and *Vaovasa v R* (2007) 174 A Crim R 116.

(5) If the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent, otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences: *Cayhadi* per Howie J at [27].

(6) If not, the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality: *Cayhadi* per Howie J at [27].

(7) Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. These will include the nature and seriousness of each offence.

(8) In cases involving assault with violence where the offences involve two or more attacks of considerable violence and are distinct and separate (eg, see *R v Dunn* (2004) 144 A Crim R 180 at [50]) or in cases where there are separate victims of the attacks as in *Wilson*, the closeness in time and proximity of the two offences will often not be determinative factors. See also *R v KM* [2004] NSWCCA 65. In *Wilson*, having regard to the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act*, Simpson J observed at [38] that "*... to fail to accumulate, at least partially, may well be seen as a failure to acknowledge the harm done to those individual victims* …"

…

(9) Where two offences committed during the course of a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two: *Nguyen* per Howie J at [13] .

(10) Possession of two different kinds of drugs may not be regarded as one episode of criminality in a case of "*deemed*" supply: *Luu v R* [2008] NSWCCA 285 at [32].

(11) The fact that the evidence of two offences (eg, documentary evidence or the presence of drugs) are located by police at or in the one place is not a relevant factor in favour of concurrent sentences … (*Cahaydi* at [26]).

Iskov v R [2011] NSWCCA 241 at [87]–[91] is an example of an application of *Cahyadi v R*. It was held that even though three offences had been committed against the same victim within a period of a few hours, the judge was required to make each sentence partly cumulative on the preceding sentence or sentences because the criminality in each offence could not be comprehended within the other offences.

Multiple victims and discrete offending usually require partly consecutive sentences

The following cases for dangerous driving, sexual assault, assault and wounding, break, enter and robbery are cited as examples. The cases hold that the fact that there is more than one victim will generally require an increase in the otherwise appropriate sentence than where only one victim was involved: *Vaovasa v R* [2007] NSWCCA 253 at [16]. Similarly a prudent measure of cumulation is necessary where the criminal conduct is capable of being described as discrete offending.

Dangerous driving cases

In *R v Janceski* [2005] NSWCCA 288, Hunt AJA at [23] explained the approach of sentencing for a single action aggravated by multiple victims:

> separate sentences should usually be fixed which are made partly concurrent and partly cumulative, each such sentence being appropriate to the existence of only one victim and the aggregate of the sentences reflecting the fact that there are multiple victims resulting from the same action by the offender.

Further driving cases where the issue has been discussed include: *R v Skrill* [2002] NSWCCA 484 at [75]; *R v Plumb* [2003] NSWCCA 359 at [12] and cases listed at [19]; *Richards v R* [2006] NSWCCA 262. In the latter case it was said at [78]: "… failure to accumulate those sentences, at least partially, appears to have been a failure to acknowledge the harm done to the individual victims". See also **[18-400] Totality** in **Dangerous driving and navigation**.

Sexual assault

Generally, relevant considerations include the number of victims and whether the offences committed against each occurred on separate occasions: *Van der Baan v R* [2012] NSWCCA 5 at [117]. Where sexual offences arise out of one event a court is required to identify a sentence appropriate for each separate act and some degree of accumulation is sometimes necessary to address additional criminality: *Franklin v R* [2013] NSWCCA 122 at [44]–[45]. It is open for a court to make each victim's sentence wholly cumulative upon the non-parole period of another victim where the offences are committed on separate victims over an extended period: *Magnuson v R* [2013] NSWCCA 50 at [142]. It was an error in *Nguyen v R* [2007] NSWCCA 14 at [13] for the court to impose wholly concurrent sentences for the offences of armed robbery and sexual intercourse without consent in circumstances of aggravation which arose from the same incident. Similarly in *R v Gorman* [2002] NSWCCA 516 at [9], the judge erred by imposing wholly concurrent sentences for sexual offences arising from the same incident. Characterising the offences as "one episode of criminality" misapplied *Pearce v The Queen* and failed to have regard to the specific circumstances of each individual offence.

Further sexual assault cases where a judge has erred by imposing wholly concurrent sentences for discrete offending include *R v Smith* [2006] NSWCCA 353 at [17] and [23]; *R v TWP* [2006] NSWCCA 141 at [25]–[27]; *R v BWS* [2007] NSWCCA 59 at [16]–[17].

Where a court is required to sentence according to past (the late 1970s to early 1980s practices) it must be borne in mind that "the approach to questions of concurrence

and cumulation was more lax, before the handing down of *Pearce v The Queen*": *Magnuson v R* per Button J at [143]. This does not apply to child sexual offences. Section 25AA *Crimes (Sentencing Procedure) Act 1999*, which came into force on 31 August 2018, requires a court sentencing for such an offence to sentence the offender in accordance with sentencing patterns and practice at the time of sentencing, not at the time of the offence.

Assault and wounding offences

The judge in *R v Dunn* [2004] NSWCCA 41 erred by imposing concurrent sentences for two offences involving wounding committed in the course of a single extended criminal episode. Adams J expressed the view at [50]:

> There is a distinct difference between assaulting one victim and assaulting two. Each was intentionally injured with the knife. The learned sentencing judge did not articulate his reasons for making the sentences wholly concurrent.

The judge erred in *R v Nguyen* [2013] NSWCCA 195 by imposing wholly concurrent sentences for both a wounding with intent to cause grievous bodily harm offence under s 33(1)(a) *Crimes Act 1900* and manslaughter. Although there was short period of time between the offences, they were distinct offences caused by different bullets resulting in very different consequences: *R v Nguyen* at [81]. The nature and seriousness of the wounding offence was such that the sentence for manslaughter could not sufficiently comprehend and reflect the criminality involved in the wounding offence: *R v Nguyen* at [83].

Robbery

Where there are multiple counts it is incumbent on the court to consider the question of totality: *R v Kelly* [2010] NSWCCA 259. Imposing fixed terms for all but the most serious charge is "inappropriate in the context of serious offences such as robbery": *R v Kelly* at [55]. The judge's erroneous global approach caused her to underestimate the seriousness of the first (home invasion) offence: *R v Kelly* at [56]. In *Vaovasa v R* [2007] NSWCCA 253 at [19] the judge erred by imposing wholly concurrent sentences for three robbery in company offences upon the basis that the offences were committed against three victims and were part of one course of criminality of short duration.

Break, enter and steal

Totality will rarely, if ever, justify wholly concurrent sentences for a series of break enter offences: *R v Merrin* [2007] NSWCCA 255 at [38] citing *R v Harris* [2007] NSWCCA 130 at [38]–[42]. The judge in *Harris* erred by imposing wholly concurrent sentences for a "series of [break enter] offences". The court held at [45] that the limiting or constraining function of the principle of totality:

> will rarely if ever go so far as to justify wholly concurrent sentences for all of a series of offences such as those here. Subject to those limits, in general, sentences significantly cumulative should be imposed for separate serious offences of which those here are all examples.

Earlier at [40] the court said:

> Making sentences wholly concurrent means that the second and subsequent effectively constitute no punishment and sends a clear message to those members of the criminal

> community who chose to live by breaking and entering and stealing or the like that once they have committed one or a few offences, they can continue offending with virtual impunity so far as sentences are concerned.

The court acknowledged the circumstances where wholly concurrent sentences may be justified for break enter offences at [43]:

> Of course at times there will be good reason for complete concurrency. One is where some offences are little more than incidents of, or incidental to, others.

Fraud offences

In *R v Hawkins* [2013] NSWCCA 208 at [23]–[24], it was held that the individual sentences for the charges of defraud the Commonwealth and obtain financial advantage by deception may have been appropriate, however the concurrency of the sentences had the effect that the respondent received no punishment for six of the offences.

Offences in contravention of apprehended domestic violence orders

An offence committed in breach of an apprehended domestic violence order (ADVO), and an offence of breaching an ADVO, involves separate and distinct criminality. There is no duplicity in imposing distinct sentences for what are distinct offences: *Suksa-Ngacharoen v R* [2018] NSWCCA 142 at [131]. Conduct involving deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence occurring at the same time: *Suksa-Ngacharoen v R* at [132].

Totality and existing sentences of imprisonment

The totality principle has been applied where an offender is serving an existing sentence and is sentenced by the second court a period after the first offence: *Mill v The Queen* (1988) 166 CLR 59 at 66; *Choi v R* [2007] NSWCCA 150 at [157]. The court in *Mill* at 66 said that in a case where the offences were committed in a short period across State borders the proper approach:

> was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time.

The principle is applied not just to the non-parole period but to the head sentence: *Mill* at 67.

If the criminality of offences previously committed is great there will be very little room left for a further penalty to be imposed: *R v MMK* [2006] NSWCCA 272 at [14].

Offences committed under both state and federal law

Section 16B *Crimes Act 1914* (Cth) gives statutory expression to the principle where an offender is sentenced for Commonwealth offences: *Postiglione v The Queen* (1997) 189 CLR 295 at 308. Section 16B provides that the court is to have regard to:

> (a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
>
> (b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.

Separate indictments

There are no special rules in relation to totality which apply where a judge sentences an offender for charges on more than one indictment: *R v Finnie* [2002] NSWCCA 533 at [57]–[58]. Concurrent sentences should not have been imposed in *R v Finnie* because the separate indictments were referable to different and separate episodes of criminal activity and involved different modus operandi and different victims.

Totality and overlapping charges

An offender should not be punished twice for common elements between offences. In *Pearce v The Queen* (1998) 194 CLR 610, McHugh, Hayne and Callinan JJ said at [40]:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

The court said at [41] it "… need not decide whether this result is properly to be characterised as good sentencing practice or as a positive rule of law".

The principle was explained in *Nahlous v R* [2010] NSWCCA 58 at [17]:

> a person can by the one act commit two offences and, where the two offences address different aspects of the criminal conduct, there is nothing wrong with prosecuting the two offences or, subject to the principle of totality, with imposing separate sentences for the two offences.

In *Pearce v The Queen*, the overlapping charges were maliciously inflict grievous bodily harm with intent to do grievous bodily harm and break and enter a dwelling house and while therein inflict grievous bodily harm. The court concluded at [49]: " … the individual sentences imposed on counts 9 and 10 were flawed because they doubly punished the appellant for a single act, namely, the infliction of grievous bodily harm".

The double punishment principle referred to in *Pearce v The Queen* was applied in *R v Hilton* [2005] NSWCCA 317 where the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) *Crimes Act* and eight counts of using premises for child prostitution under s 91F(1). The court held that he was doubly punished for his conduct.

The practice or rule is obviously not applicable where there is a specific statutory provision which prevents the Crown charging a person with two offences with different ingredients for the same conduct or where it would be oppressive to charge for the second offence. Section 25A(5) *Drug Misuse and Trafficking Act 1985* provides that a person who has been convicted of an offence under s 25A (ongoing supply) is not liable to be convicted of an offence under s 25 (supply) on the same or substantially the same facts: *Tran v R* [2007] NSWCCA 140 at [12]. In *Nahlous v R* [2010] NSWCCA 58 at [17], the court held it was oppressive to charge for both the sale of the illegal decoders and also the receipt of the money as a result of the sale. The sale offence encompassed the criminality of possessing the proceeds of the sale. On the other hand, receiving

stolen property (even where the stolen property happens to be drugs) is quite different from the act of criminality in possessing a drug for the purpose of sale: *Hinchcliffe v R* [2010] NSWCCA 306 at [27].

[8-240] Sentences for offences involving assault by convicted inmate

Section 56 sets out specific provisions for sentences of imprisonment imposed on an offender in relation to "an offence involving an assault, or any other offence against the person, committed by the offender while a convicted inmate of a correctional centre" (s 56(1)(a)) or "an offence involving an assault, or any other offence against the person, against a juvenile justice officer committed by the offender while a person subject to control" (s 56(1)(b)). The sentence of imprisonment "is to be served consecutively" (s 56(2)) or the court "may instead direct that the sentence is to be served concurrently (or partly concurrently and partly consecutively) with the other sentence of imprisonment and any further sentence of imprisonment that is yet to commence": s 56(3). Such a direction may not be made for an offence involving an assault against a correctional officer or a juvenile justice officer unless the court is of the opinion that there are special circumstances justifying such a direction: s 56(3A).

If the court makes an order under s 56(3), that the second sentence is to be served concurrently or partly consecutively, the reasons for doing so have to be exposed: *R v Hoskins* [2004] NSWCCA 236 at [31]. In that case the effective sentence did not adequately reflect the seriousness of the crime and insufficient weight was given to general deterrence: *R v Hoskins* at [62]–[63] citing *R v Fyffe* [2002] NSWSC 751. See also *R v Windle* [2012] NSWCCA 222 at [56]. In *Banks v R* [2018] NSWCCA 41, the judge erred by wholly accumulating a sentence for recklessly wounding an inmate, on lengthy sentences already being served, resulting in an overall non-parole period of 14½ years that was 92% of the overall head sentence. It was in both the community and the applicant's interests that a longer period than 15 months of supervision on parole be available: at [32]–[34].

Section 56 does not apply when an offender has been released on parole but remains in custody and bail refused for subsequent offences — such an offender is not a "convicted inmate of a correctional centre": *Hraichie v R* [2022] NSWCCA 155 at [132]–[133], [136], [145] (note the offender was on parole by virtue of s 50 (rep) of the *Crimes (Sentencing Procedure) Act* which then required a court which had sentenced an offender to 3 years imprisonment or less to make a parole order directing their release at the end of the non-parole period).

Although s 56 only applies to "convicted inmates", the policy objectives behind it have been applied in *R v Jeremiah* [2016] NSWCCA 241 where an offender committed an assault whilst on remand; in *Tammer-Spence v R* [2021] NSWCCA 90 (see [42], [45]–[46]), where the offender poured boiling water on his cell mate while serving the balance of parole for a sentence for armed robbery; and in *Hraichie v R* [2022] NSWCCA 155 (see at [148]) where the offender committed offences of aggravated kidnapping and assaulting an inmate while bail refused for other offences.

[8-250] Sentences for offences involving escape by inmate

Section 57 sets out specific provisions for sentences of imprisonment imposed on an offender in relation to an offence involving an escape from lawful custody committed

by the offender while an inmate of a correctional centre. Part 6A *Crimes Act 1900* sets out offences relating to escape from lawful custody. Section 310D provides for an offence for an inmate who escapes or attempts to escape from lawful custody. Where the court is sentencing an offender for an offence involving escape from lawful custody, the court must set the sentence for "non-escape" offences first so that "escape" offences will be cumulative on them. Section 57(1A) provides:

> A sentence of imprisonment to which this section applies must be imposed after any other sentence of imprisonment that is imposed in the same proceedings.

Section 57(2) provides that where an offender is an "inmate of a correctional centre" and commits an offence "involving escape", the sentence is to be served consecutively. See for example *R v Mathieson* [2002] NSWCCA 97 at [30]. The statutory requirement in s 57 was not mentioned or put into effect in *Jinnette v R* [2012] NSWCCA 217 at [90]–[96].

In *R v Pham* [2005] NSWCCA 94, quoted with approved in *Jinnette v R*, Wood CJ at CL, with whom Hislop and Johnson JJ agreed, said at [16]–[19]:

> The offence of escape has been regarded by the courts as a serious offence, which potentially jeopardises the future of minimum security facilities and threatens the continued provision to prisoners of beneficial and humanitarian custodial arrangements and opportunities. It may lead to additional restrictions being placed upon their access to external medical treatment, and it may also impede the progress of rehabilitation for offenders with favourable prospects, if conditions of detention are strengthened, in order to prevent escapes.
>
> These considerations were noted, for example, in *R v Thomson* NSWCCA 21 May 1986 where, in a case decided before enactment of the *Sentencing Act 1989*, Street CJ observed that the ordinary sentence for an unremarkable escape "could be expected to approximate two years" (at a time when the maximum penalty for the offence was imprisonment for seven years); and also in *R v Mathieson* [2002] NSWCCA 97 at [27].
>
> Where the offender has remained at large for a very lengthy period or has used the opportunity of being at large to commit further offences, as was the case here, then the overall objective seriousness of his criminality is potentially increased: *R v Plummer* [2000] NSWCCA 363 at [34] and *R v Josef Regina* [2000] NSWCCA 100. The elements of both personal and general deterrence are also important, it being essential that prisoners understand that any offence of escape or attempted escape will result in a meaningful overall increase in their detention: *R v Butler* [2000] NSWCCA 525 at [18] and *R v Smith* [2004] NSWCCA 69. That this is so is also demonstrated by the fact that the maximum penalty prescribed for the offence has been increased from imprisonment for 7 years to imprisonment for 10 years.
>
> It is also for that reason that the legislature enacted, by way of s 57(2) of the *Crimes (Sentencing Procedure) Act 1999*, a requirement for sentences for escape to be served consecutively upon any existing sentence that has yet to expire, or upon any other sentence that is imposed in the same proceedings.

R v Pham was complicated in so far as it involved a consideration of s 57(3), as well as s 47. The respondent escaped during the parole period of an existing sentence and was at large for a considerable period of time. The court held that there were two distinct purposes apparent from these provisions: the first was to ensure that the offence of escape attracted an actual and meaningful accumulation of sentence; the second was to avoid the existence of a possible hiatus in custody, which would arise if the

offender was later released to parole for the existing sentence before the date fixed for commencement of the fresh sentence. It held that the commencement date of the new sentence was discretionary and governed by s 47 of the Act. The sentence was within the appropriate range but the starting date required adjustment in order to reflect an adequate period of additional punishment.

Section 254 *Crimes (Administration of Sentences) Act 1999* supplements the operation of Pt 6A *Crimes Act 1900*, in that the section allows for sentences to be extended where an offender is unlawfully absent from custody. However, the section does not operate to prevent a person from being proceeded against and convicted of any offence arising out of an escape: s 254(4).

[8-260] Limitation on consecutive sentences imposed by Local Courts

Sections 267(2) and 268(2) *Criminal Procedure Act 1986* provide that the maximum term of imprisonment that the Local Court may impose for an offence is, subject to the relevant section, 2 years or the maximum term of imprisonment provided by law for the offence, whichever is the shorter term. The former section applies to Table 1 offences and the latter to Table 2 offences.

Section 58 *Crimes (Sentencing Procedure) Act 1999* sets numerical limitations on consecutive sentences imposed by the Local Court. Section 58 is a very technical provision and close attention must be given to the language of the section. Its language is a consequence of the troubled history which plagued its predecessor (s 444 *Crimes Act 1900*): see *R v Clayton* (1997) 42 NSWLR 268. It provides:

> **58 Limitation on consecutive sentences imposed by Local Courts**
>
> (1) A Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.
>
> (2) Any period for which an existing sentence has been extended under this or any other Act is to be disregarded for the purposes of this section.
>
> (3) This section does not apply if:
>
> (a) the new sentence relates to:
>
> (i) an offence involving an escape from lawful custody, or
>
> (ii) an offence involving an assault or other offence against the person, being an offence committed (while the offender was a convicted inmate) against a correctional officer or (while the offender was a person subject to control) against a juvenile justice officer, and
>
> (b) either:
>
> (i) the existing sentence (or, if more than one, any of them) was imposed by a court other than a Local Court or the Children's Court, or
>
> (ii) the existing sentence (or, if more than one, each of them) was imposed by a Local Court or the Children's Court and the date on which the new sentence would end is not more than 5 years and 6 months after the date on which the existing sentence (or, if more than one, the first of them) began.

(4) In this section:

"existing sentence" means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).

"sentence of imprisonment" includes an order referred to in section 33(1)(g) of the *Children (Criminal Proceedings) Act 1987*.

Section 58 empowers the Local Court to accumulate sentences up to five years within the prescribed limits outlined above. The operation of s 58 was considered in *R v Perrin* [2022] NSWCCA 170 where Wright J (Ward P and Harrison J agreeing) held that:

1. If there is no existing sentence, s 58 is not engaged: [80], [81].
2. Whether a sentence is "existing" or "unexpired" for the purposes of s 58(1) and (4) is determined on the date the new sentence is imposed: [46], [66], [80]; *Stoneham v Director of Public Prosecutions (NSW)* [2021] NSWSC 735 at [33].
3. The prohibition or limitation in s 58(1) relates directly to imposing a new sentence to be served consecutively or partly concurrently and partly consecutively with an existing sentence only if the expiry date of the new sentence is more than 5 years after the existing sentence commenced: [46], [71].
4. The practical effect of s 58 is to constrain to a greater or lesser extent the length of the new sentence: [71]–[77].

Accordingly, when the new sentence is imposed, the Local Court must determine:

- whether there is an "existing sentence", being an "unexpired sentence" that also includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence "is being served" wholly or partly consecutively; and
- whether the date on which the new sentence would end is more than 5 years after the date on which that "existing sentence" began: *R v Perrin* at [46].

Section 58 and aggregate sentences

Section 58 only applies to the imposition of a sentence which is to be served consecutively. As for aggregate sentences: see **Aggregate sentences** at **[7-505]**.

Section 53B permits the Local Court to impose an aggregate sentence of up to five years. It does not alter the jurisdictional limit of two years for individual offences referred to above.

[8-270] Power to vary commencement of sentence

Section 59 provides:

59 Court may vary commencement of sentence on quashing or varying other sentence

(1) A court that quashes or varies a sentence of imprisonment imposed on a person (on appeal or otherwise) may vary the date of commencement of any other sentence that has been imposed on that person by that or any other court.

(2) If a person is subject to two or more sentences, this section applies to each of them.

(3) A court may vary a sentence under this section on its own initiative or on the application of a party to the proceedings on the quashing or variation of the other sentence.

(4) An appeal does not lie merely because the date of commencement of a sentence is varied under this section.

(5) The term of a sentence, or the non-parole period of a sentence, cannot be varied under this section.

The provision is designed to remedy a difficulty where the quashing of a sentence following a successful appeal, usually in the District Court or the Court of Criminal Appeal, leaves the appellant with a further sentence of imprisonment to commence on a specified date in the future. It was regarded as being both impractical and unjust to return a person to custody on a future date. Section 59 was amended by the *Crimes Legislation Amendment Act 2003* to remove a reference to "consecutive" and enable the section to be applied to concurrent sentences and partially consecutive sentences: *Allan v R (No 2)* [2011] NSWCCA 27 at [13]. The power in s 59 is not limited to the scenario where the quashing or varying of a sentence will result in a hiatus for a further sentence of imprisonment which commences on a date in the future: *Allan v R (No 2)* at [18]. A court may vary the date of commencement of any other sentence that has been imposed on that person by any other court if by quashing the sentence(s) there is no change in an offender's release date: *Allan v R (No 2)* at [19].

[8-280] Application of Division to interstate sentences of imprisonment

Part 4 Div 2 *Crimes (Sentencing Procedure) Act 1999* applies to unexpired sentences passed outside NSW, or to be served within NSW, in the same way as it applies to unexpired sentences passed within NSW: s 60.

[The next page is 4841]

Mandatory life sentences under s 61

For offences of murder and serious heroin or cocaine trafficking, s 61 *Crimes (Sentencing Procedure) Act 1999* provides that the court is to impose a sentence of life imprisonment if the court is satisfied of certain conditions.

The predecessor to s 61, s 431B *Crimes Act 1900*, was inserted into the *Crimes Act* by the *Crimes Amendment (Mandatory Life Sentences) Act 1996* (effective 30 June 1996), but repealed on 3 April 2000 as a consequence of the enactment the *Crimes (Sentencing Procedure) Act*.

Section 61 applies to all sentencing proceedings commenced after that date regardless of when the offence occurred: *Ngo v R* [2013] NSWCCA 142 at [61].

[8-600] Availability

Juveniles

Section 61 *Crimes (Sentencing Procedure) Act 1999* does not apply to a person who was less than 18 years of age at the date of the offence: s 61(6).

Murder

Under s 61(1) the court is to sentence an offender convicted of murder to life imprisonment if:

> … the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

The use of the phrase "can only be met" renders the section devoid of content because it effectively leaves the court no room to impose a sentence other than life: *Ngo v R* at [29]. It is difficult to reconcile the terms of s 61(1) with the preservation of s 21(1) *Crimes (Sentencing Procedure) Act* (general power to reduce penalties) in s 61(3): *Ngo v R* at [30].

Serious drug offences

Under s 61(2) the court is to sentence an offender convicted of "a serious heroin or cocaine trafficking offence" to life imprisonment if the court is satisfied of the same level of culpability as stated above for murder and that it is further satisfied that:

(a) the offence involved:

  (i) a high degree of planning and organisation, and

  (ii) the use of other people acting at the direction of the person convicted of the offence in the commission of the offence, and

(b) the person was solely or principally responsible for planning, organising and financing the offence, and

(c) the heroin or cocaine was of a high degree of purity, and

(d) the person committed the offence solely for financial reward.

A "serious heroin or cocaine trafficking offence" is defined by s 61(7) to mean an offence of supplying or knowingly taking part in the supply of not less than a commercial quantity of heroin or cocaine under s 25(2) *Drug Misuse and Trafficking Act 1985*, or an offence committed by an adult of supplying a commercial quantity of heroin or cocaine to a child aged under 16 years pursuant to s 25(2A), and in either case, the quantity of drug is a large commercial quantity.

[8-610] Application

Burden of proof

The burden of proving that a case falls within s 61 rests on the Crown, and the standard of proof is beyond reasonable doubt: *R v Merritt* (2004) 59 NSWLR 557 at [35].

Discretion — murder cases

There is a tension between the apparent mandatory requirement to impose a life sentence when a murder case falls within s 61(1), and s 61(3), which preserves the discretion under s 21(1) *Crimes (Sentencing Procedure) Act 1999* to impose a lesser sentence: *R v Harris* (2000) 50 NSWLR 409 at [93]; *Dean v R* [2015] NSWCCA 307 at [69]. This tension has been resolved in favour of recognising the continued existence of the discretion under s 21, even if the s 61(1) criteria are met, when the offender's subjective circumstances justify a lesser sentence than one of life imprisonment: *R v Merritt* (2004) at [36].

Discretion — drug cases

Section 61(5) states that nothing in the requirements under s 61(2):

> … limits or derogates from the discretion of a court to impose a sentence of imprisonment for life on a person who is convicted of a serious heroin or cocaine trafficking offence.

The effect of s 61(5) is that, even if all of the conditions in s 61(2) are not satisfied, a judge in the exercise of discretion may still impose a life sentence. A judge would be justified in imposing a life sentence, notwithstanding that all of the conditions in s 61(2) were not satisfied, only if the judge found that the offence for which the offender was being sentenced fell within the worst category of cases (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256) for that offence: *R v Attallah* [2005] NSWCCA 277 at [174].

Two-step process

A two-step process is involved in determining whether a life sentence is mandated. The court must first determine whether, on the objective facts, the level of culpability is so extreme that it warrants the maximum penalty; then the court must determine whether the subjective factors are capable of displacing the prima facie need for the maximum penalty: *R v Miles* [2002] NSWCCA 276 at [204]; *R v Merritt* at [37]; *Dean v R* at [73].

There must be an assessment that the level of culpability is such that a life sentence is required, having regard to the four indicia specified in s 61(1), before one can sensibly apply s 21(1): *Dean v R* at [95]. Neither *Muldrock v The Queen* (2011) 244 CLR 120 or *Markarian v The Queen* (2005) 228 CLR 357 render such an exercise impermissible:

Dean v R at [96]. Logically, a determination of the level of culpability for the purposes of s 61(1) must take place before consideration of whether a lesser sentence than life imprisonment should be imposed under s 21: *Dean v R* at [96].

Guilty plea

The fact that an offender pleads guilty does not automatically preclude the availability of a life sentence: *R v Penisini* [2004] NSWCCA 339 and cases cited therein at [13].

Subjective features

In some cases, the objective circumstances may be so appalling as to overwhelm the offender's subjective circumstances, including their prospects of rehabilitation: *R v Miles* at [203]. In *R v Ngo (No 3)* (2001) 125 A Crim R 495, Dunford J, in imposing a life sentence under s 61(1), said that he was satisfied that "the level of culpability in the commission of the offence [was] so extreme that the subjective features must be disregarded …": at [42].

Effective life sentence due to age

It is not correct to reason that, because a sentencing judge has declined to impose a life sentence pursuant to s 61(1), a term of imprisonment that would expire in the offender's old age cannot or should not be imposed: *Barton v R* [2009] NSWCCA 164 at [17]. In that case, the court rejected a submission that the sentence was a life sentence "in disguise": at [16]–[17].

[8-620] Extreme culpability

The court in *R v Merritt* (2004) 59 NSWLR 557 explored the question of whether a sentencing judge must be satisfied, before passing a life sentence, that the culpability was so extreme that the community interest in each of the four indicia referred to in s 61(1); namely: retribution, punishment, community protection, and deterrence, could only be met through the imposition of a life sentence. The court outlined four possible interpretations at [42] and chose the third "purposive" interpretation at [54]:

> … that such a [life] sentence is required if the culpability is so extreme that the community interest, in the *combined effect* of such of the four indicia as are applicable, could only be met by such a sentence (a construction which would embrace a circumstance where any one or more of those factors may be of itself insufficient, or inapplicable). [Emphasis in original.]

The absence of one or more of the indicia in s 61(1) will make it more difficult for a sentencing judge to be satisfied beyond reasonable doubt that the level of culpability is so extreme as to require the imposition of a life sentence: *R v Merritt* at [5]. However, the absence of the indicia of personal deterrence in a particular case (such as when an offender has a mental condition) is unlikely to affect the decision to a significant degree: *R v Merritt* at [6].

The absence of a finding of future dangerousness does not rule out the applicability of s 61(1): *R v Merritt* at [54].

In *Dean v R* [2015] NSWCCA 307, it was open to the sentencing judge to hold that the appellant's offending (of burning down a nursing home) came within the operation of s 61(1) notwithstanding that the murders were committed by way of reckless indifference to human life rather intention to kill: *Dean v R* at [56]. In assessing

the objective gravity of the offending as falling within the worst case category the judge took into account the number of victims, the applicant's motive and the mental element of recklessness: *Dean v R* at [42]. The sentencing judge was entitled to reject the submission that the applicant was less culpable because he did not intend to kill or harm anyone in the nursing home. His moral culpability was assessed by reference to his foresight that there was a real chance of several deaths as a result of his actions: *Dean v R* at [135].

The mental condition of the offender may temper the objective criminality, even for multiple killings. In *R v Merritt*, the court found that the sentencing judge gave insufficient weight to the applicant's state of mind (chronic adjustment disorder with depressed mood) when he killed his three children, and that the judge placed undue significance on the applicant's inability to explain his actions: at [73].

The offender's knowledge of the degree of harm that will be caused by the offence is relevant to their culpability: *R v Lewis* [2001] NSWCCA 448 at [67]. In that case, the court found it was relevant that the applicant knew the death of the victim would deprive five children of their mother.

[8-630] Comparison with common law cases that attract the maximum

Murder cases

The test of extreme culpability in s 61(1) "broadly accords with the common law approach" of the "worst case category" (as that term was used prior to *The Queen v Kilic* (2016) 259 CLR 256): *R v Merritt* (2004) 59 NSWLR 557 at [51]; *R v Harris* (2000) 50 NSWLR 409 at [87]–[90]. The use of the expression worst case "category" should no longer be used: see [10-005] **Cases that attract the maximum**.

Some guidance was given on "heinousness" in *R v Arthurell* (unrep, 3/10/97, NSWCCA), per Hunt CJ at CL:

> The adjective "heinous" which gives the noun "heinousness" its meaning has been variously defined as meaning atrocious, detestable, hateful, odious, gravely reprehensible and extremely wicked. The test to be satisfied is thus a substantial one.

Further examples of murder cases that attracted life sentences pursuant to the application of s 61(1), often in conjunction with a finding of "worst case", are:

- *Ngo v R* [2013] NSWCCA 142, where the victim was a politician — s 61(1) was applied to find an extreme level of culpability: at [79]
- *R v Hore* [2005] NSWCCA 3, which involved a brutal prison murder — the sentencing judge found extreme culpability under s 61(1) and that the murder was in the "worst category": at [333]
- *R v Coulter* [2005] NSWSC 101, where an 11 year old girl was murdered and mutilated by her mother's cousin — s 61(1) applied and "worst case" found: at [68]
- *R v Gonzales* [2004] NSWSC 822, in which the offender was sentenced to three life sentences for murdering his mother, father and sister — s 61(1) was applied and "worst case" found: at [110]–[111]
- *R v Sievers* (2004) 151 A Crim R 426, in which the offender murdered his girlfriend — the judge did not err in finding extreme culpability under s 61(1) despite

conceding that the murder on its own (without regard to the offender's murder of his previous wife and his future dangerousness) was not in the "worst category": at [49], [53]

- *R v Walsh* [2009] NSWSC 764, in which the offender murdered his wife and grandchildren — s 61(1) was applied and two of the three murders were found to be in the "worst category": at [40].
- *Dean v R* [2015] NSWCCA 307, in which the offender pleaded guilty to 11 counts of murder after he burnt down a nursing home where he was employed as a registered nurse.

For further guidance on the imposition of life sentences for murder see **Murder** at [30-030].

Drug cases

In drug cases, as explained above at [8-600], the court must be satisfied of an extreme level of culpability and the additional factors outlined in s 61(2) as to the degree of planning, role of the offender, purity of the drug, and motivation of financial reward. In *R v Attallah* [2005] NSWCCA 277, the court considered these requirements in relation to the common law standard of "worst case category". Justice James (Buddin and Rothman JJ agreeing) stated at [174]:

> A judge would be justified in imposing a life sentence, notwithstanding that all of the conditions in s 61(2) were not satisfied, only if the judge found that the offence for which the offender was being sentenced fell within the worst category of cases of that offence.

An example of a "worst case" in which a life sentence was imposed for the supply of a large commercial quantity of heroin was *R v Chung* [1999] NSWCCA 330.

Although the offence was committed before the commencement of the former s 431B *Crimes Act 1900* (the predecessor to s 61), the court found that the requirements of s 431B would have been met in this case, as the applicant was "a ruthless profiteer from the widespread distribution of high grade heroin, occupying a position towards the pinnacle of a well organised criminal network": at [30]. After comparison with *R v Chung*. However, the court in *R v Attallah* concluded that neither the terms of s 61(2) nor the "worst case category" threshold (as that term was used prior to *The Queen v Kilic*) under the common law had been satisfied, and consequently the court overturned the life sentence: *R v Attallah* at [222]–[223].

[8-640] Multiple offences

In *R v Harris* (2000) 50 NSWLR 409, a case involving three murders, it was stated that the existence of multiple offences can be taken into account when assessing the level of the offender's culpability: at [94]. However, prior convictions cannot be taken into account in a collective manner with the present offence for which the offender is being sentenced, in order to arrive at a finding of "extreme culpability". Rather, the present offence standing alone must be an offence of extreme culpability, justifying a life sentence: *Aslett v R* [2006] NSWCCA 360 at [26]–[27]. The difficulty identified in *Aslett v R* does not arise in the context of multiple murders committed as part of a single episode of criminality. In such a case, the objective criminality of one offence

is capable of informing the objective criminality of another, and the court may have regard to the whole of the conduct in determining the level of culpability involved in the commission of each offence: *Adanguidi v R* (2006) 167 A Crim R 295 at [32].

[The next page is 5401]

Sentencing procedures generally

Sentencing following a retrial

Parity

Section 21A factors "in addition to" any Act or rule of law

Guilty pleas

Power to reduce penalties for pre-trial disclosure

Power to reduce penalties for assistance to authorities

Court to take other matters into account (including pre-sentence custody)

Victims and victim impact statements

Taking further offences into account (Form 1 offences)

Sentencing guidelines

Correction and adjustment of sentences

[The next page is 5451]

Objective and subjective factors at common law

[9-700] The interaction between s 21A(1) and the common law

Section 21A(1) *Crimes (Sentencing Procedure) Act 1999* provides that in determining an appropriate sentence, the aggravating and mitigating factors referred to in s 21A(2) and (3) respectively are "in addition to" to any other matters required and/or permitted to be taken into account by the court under any Act or rule of law. In particular, s 21A(1)(c) provides the court is to take into account "any other objective or subjective factor that affects the relative seriousness of the offence".

The High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [18] found s 21A(1) "preserves the entire body of judicially developed sentencing principles, which constitute 'law' for the purposes of both s 21A(1) and s 21A(4)".

The High Court also made it clear in *Markarian v The Queen* (2005) 79 ALJR 1048 at [27]:

> what is required is that the sentencer must take into account all relevant considerations … in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.

For a discussion of some of these discrete components, see:

- **Standard Non-Parole Period Offences — Pt 4 Div 1A** at **[7-890]**
- **Factors relevant to assessing objective seriousness** at **[10-012]**
- **Subjective matters at common law** at **[10-400]**
- **Mental health or cognitive impairment** at **[10-460]**
- **Deprived background** at **[10-470]**
- **Section 21A — aggravating and mitigating factors** at **[11-000]**.

[9-710] The difficulty of compartmentalising sentencing considerations

The task of sentencing an offender involves making a complex discretionary decision: Gleeson CJ in *R v Gallagher* (1991) 23 NSWLR 220 at 230. Sentencing is not an area amenable to bright-line distinctions and "it is important to avoid introducing 'excessive subtlety and refinement' to the task of sentencing": *Weininger v The Queen* (2003) 212 CLR 629 at [24], citing *R v Storey* [1998] 1 VR 359 at 372 with approval.

A good illustration of the difficulties faced in compartmentalising concepts in sentencing are the separate but related assessments of the objective seriousness of an offence and the moral culpability of an offender which form part of the process of instinctive synthesis: see *Muldrock v The Queen* (2011) 244 CLR 120 at [58], *Bugmy v The Queen* [2013] HCA 37 at [44]–[46], *Munda v Western Australia* (2013) 249 CLR 600 at [57]. For example, some factors that are personal to an offender, such as a significant mental health impairment, may affect both the assessments of the objective seriousness of the offence and the moral culpability of the offender in some circumstances: *R v Way* (2004) 60 NSWLR 168 at [86]; *DS v R* [2022] NSWCCA 156

at [96]. Motive, provocation, non-exculpatory duress and an offender's mental state are also potentially relevant to both assessments: *Paterson v R* [2021] NSWCCA 273 at [29]; *Yun v R* [2017] NSWCCA 317 at [40]–[47]. See **Factors relevant to assessing objective seriousness** at **[10-012]**.

As Wilson J (dissenting) in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486 observed, there is an "… ease with which obscurity of meaning can infect this area of discourse". Over time other terms have developed to take on new meanings in response to changes in the sentencing regime and practice: *Stanton v R* [2021] NSWCCA 123 at [29]. For example, in the dangerous driving guideline judgment, *R v Whyte* (2002) 55 NSWLR 252, the "moral culpability" of an offender is a reference to the objective criminality of the offending and, in light of the current case law, using the expression "moral culpability" when dealing with objective seriousness, while consistent with *R v Whyte*, is apt to cause confusion: *R v Eaton* [2023] NSWCCA 125 at [56].

Regardless of the terms used and their categorisation, as the Court in *DS v R* [2022] NSWCCA 156 at [92] stated:

> The discussion of [objective seriousness and moral culpability] is not meant to burden sentencing judges but to assist them by inviting, and to an extent requiring, them to determine the seriousness of the offence and how much moral blame the offender bears, but only as part of a consideration of the weight to be attached to the various sentencing factors and for the purpose of undertaking the instinctive synthesis described in *Markarian*.

[9-720] The aggravating/mitigating binary fallacy

In *Weininger v The Queen* (2003) 212 CLR 629 the plurality said at [22]:

> The matters that must be taken into account in sentencing an offender include many matters of and concerning human behaviour. It is, therefore, to invite error to present every question for a sentencer who is assessing a matter which is to be taken into account as a choice between extremes, one classified as aggravating and the opposite extreme classified as mitigating. Neither human behaviour, nor fixing of sentences is so simple.

Therefore it is too simplistic and sometimes unhelpful to characterise a factor as either mitigating or aggravating.

The courts have also recognised what can be described as an aggravating/mitigating binary fallacy. It is a well established common law sentencing principle that the absence of a factor which would elevate the seriousness of offending in a particular case is not a matter of mitigation. What has been done by an offender is not less serious because it could have been worse: *Saddler v R* [2009] NSWCCA at [3]; *R v Woods* [2009] NSWCCA 55; *Faehringer v R* [2017] NSWCCA 248 at [49]–[50]; *Yaman v R* [2020] NSWCCA 239 at [120]; *Gibbons (a pseudonym) v R* [2019] NSWCCA 150 at [30]; *R v LS* [2020] NSWCCA 148 at [150].

The logical extension of proposing that the absence of aggravating features justifies a downward revision in the assessment of objective gravity is that the greater the number of aggravating features missing from the commission of an offence, the lower its objective criminality will be, which is problematic: *R v Woods* at [52]. In *R v Louizos* [2009] NSWCCA 71, the judge erred in his approach by finding "the absence of comprehensible motivation causes me to impose a lesser non-parole

period": at [93]–[94]. The very serious nature of the offence of soliciting to murder made it unlikely that the respondent's motive would significantly reduce the objective seriousness of the crime or her culpability, unless the judge concluded there was a motive that could truly be characterised as mitigating: at [90].

Section 21A uses an aggravating/mitigating binary outcome for various factors. It has been criticised by the courts. Grove J said *Van Can Ha v R* [2008] NSWCCA 141 at [4]:

> … the language of [s 21A] is that of command but I would stress that the scope of the mandate should not be misunderstood and any compliance is dependent upon the existence of relevant evidence of any particular factor.

The discussion of the common law begins with what can loosely be defined as objective factors. Some of the factors listed because of their complexity are also relevant to subjective considerations (see **[9-710] The difficulty of compartmentalising sentencing considerations** above).

[The next page is 5501]

Objective factors at common law

[10-000] Maximum penalty

Last reviewed: November 2023

The maximum penalty represents the legislature's assessment of the seriousness of the offence, and for this reason provides a sentencing yardstick: *Elias v The Queen* (2013) 248 CLR 483 at [27]; *Gilson v The Queen* (1991) 172 CLR 353 at 364. In *Markarian v The Queen* (2005) 228 CLR 357 at [31], Gleeson CJ, Gummow, Hayne and Callinan JJ set out three reasons why sentencers should have particular regard to the maximum penalties prescribed by statute. Their Honours said:

> careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

Giving careful attention to the maximum penalty does not mean that it "will necessarily play a decisive role in the final determination": *Elias v The Queen* at [27]. Where a maximum sentence was fixed at a very high level in the 19th century it may be of little relevance: *Elias v The Queen* at [27] with reference to *Markarian v The Queen* at [30].

A maximum penalty should not constrain a court's discretion with the result that it imposes an inappropriately severe sentence on an offender: *Elias v The Queen* at [27]. The court must arrive at a sentence that is just in all of the circumstances: *Elias v The Queen* at [27]. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion: *Elias v The Queen* at [27].

In *Markarian*, the High Court found error in the resentencing process because the Court of Criminal Appeal did not start with the maximum penalty for an offence involving the quantity of drug in question, but used another maximum penalty as its starting point: the maximum for an offence in the category of seriousness immediately below that of the principal offence. As indicated above, a maximum penalty serves as a yardstick or as a basis of comparison between the case before the court and the worst possible case. Their Honours also said at [31]:

> [I]t will rarely be, and was not appropriate for Hulme J here to look first to a [lower] maximum penalty, and to proceed by making a proportional deduction from it. [Citations omitted.]

A failure by a sentencing judge to consider the correct maximum penalty for an offence is an error: *R v Mason* [2000] NSWCCA 82. Other appeal decisions discussing reference to, or a statement of, the wrong maximum penalty and its impact on the sentence include: *Des Rosiers v R* [2006] NSWCCA 16 at [20], *R v O'Neill* [2005] NSWCCA 353, *R v Tadrosse* (2005) 65 NSWLR 740, *Smith v R* [2007] NSWCCA 138 at [34] and *R v Couch-Clarke* [2010] NSWCCA 288 at [39].

Increase in statutory maximum

An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased: *Muldrock v The Queen* (2011) 244 CLR 120 at [31].

For example, where the Legislature almost triples the maximum sentence for a particular type of offence it must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the Legislature that the existing sentencing patterns are to move in a sharply upward manner: *R v Slattery* (unrep, 19/12/96, NSWCCA).

Decrease in the maximum penalty

It is permissible to take into account the subsequent reduction in the maximum penalty as a reflection of the Legislature's policy in relation to fraud offences, and to reduce the impact of the maximum penalty for the repealed offence: *R v Ronen* [2006] NSWCCA 123 at [73]–[74].

Maximum penalties and the jurisdiction of the Local Court

For magistrates exercising summary jurisdiction, the maximum penalty for the offence, *not* the lower jurisdictional limit, is the starting point for determining the appropriate sentence: *Park v The Queen* (2021) 273 CLR 303 at [23]. The Local Court jurisdictional limit cannot regarded as some form of maximum penalty or a penalty reserved for the worst case: *R v El Masri* [2005] NSWCCA 167 at [30]. In *R v Doan* (2000) 50 NSWLR 115 at [35], Grove J (Spigelman CJ and Kirby J agreeing) stated that a jurisdictional maximum is:

> not a maximum penalty for any offence triable within that jurisdiction. In other words, where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit. The implication of the argument of the appellant that, in lieu of prescribed maximum penalties exceeding two years imprisonment, a maximum of two years imprisonment for all offences triable summarily in the Local Court has been substituted, must be rejected. As must also be rejected, the corollary that a sentence of two years imprisonment should be reserved for a "worst case".

In practical terms this means that a magistrate sentencing an offender for an indictable offence being dealt with summarily must identify and synthesise all the relevant factors to be weighed in determining the appropriate sentence, without regard to any jurisdictional limit: *Park v The Queen* at [2], [19]. This includes considering the appropriate discount to be applied for any plea of guilty (required by s 22 *Crimes (Sentencing Procedure) Act* 1999): *Park v The Queen* at [19]–[22]. The relevant jurisdictional limit is applied *after* the appropriate sentence for the offence has been determined: *Park v The Queen* at [2]; see also *Park v R* [2020] NSWCCA 90 at [22]–[35]; [182].

[10-005] Cases that attract the maximum

Last reviewed: August 2023

The maximum penalty for an offence is reserved for worst cases. Past High Court authorities, such as *Ibbs v The Queen* (1987) 163 CLR 447 at 451–452 and *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478, described cases that attract the maximum penalty as cases as falling into the "worst category". Courts should avoid using the

expression "worst category": *The Queen v Kilic* (2016) 259 CLR 256 at [19]–[20]. The expression may not be understood by lay people where a court finds that an offence is serious but does not fall into the "worst category".

The better approach is for the court to clearly record whether the offence is, or is not, so grave as to warrant the imposition of the maximum penalty: *The Queen v Kilic* at [20]. Both the nature of the crime and the circumstances of the criminal are considered in determining that issue: *The Queen v Kilic* at [18]. It is irrelevant whether it is possible to envisage, or conceive of, a worse instance of the offence: *The Queen v Kilic* at [18]. It is not the case that "a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness": *Veen v The Queen (No 2)* at 478.

Where the offence is not so grave as to warrant the imposition of the maximum penalty, a court is bound to consider where the facts of the particular offence and offender lie on the "spectrum" that extends from the least serious instance to the worst: *The Queen v Kilic* at [19]; *Elias v The Queen* (2013) 248 CLR 483 at [27].

As to s 61(1) *Crimes (Sentencing Procedure) Act 1999*, relating to the circumstances in which mandatory life imprisonment may be imposed (previously, s 413B *Crimes Act* 1900 (NSW)), see **Mandatory life sentences under s 61** at **[8-600]**ff.

[10-010] Objective seriousness and proportionality

Last reviewed: August 2023

Assessing the objective seriousness of an offence is a critical component of instinctive synthesis in the sentencing process: *R v Campbell* [2014] NSWCCA 102 at [27], [29]; *FL v R* [2020] NSWCCA 114 at [58]. It sets the parameters of an appropriate sentence, ensuring the sentence is proportionate to the offence: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v McNaughton* (2006) 66 NSWLR 566 at [15].

Assessing the objective seriousness of an offence is a separate but related task to assessing the moral culpability of an offender: *Muldrock v The Queen* (2011) 244 CLR 120 at [27], [54]; *Bugmy v The Queen* (2013) 249 CLR 571 at [44]; *Munda v Western Australia* (2013) 249 CLR 600 at [57]; *DS v R* (2022) 109 NSWLR 82 at [77]. See also **Subjective matters at common law** at **[10-400]**ff.

The principle of proportionality

In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, Mason CJ, Brennan, Dawson and Toohey JJ said:

> The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen* [No.1] that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender.

Assessing the objective seriousness of an offence, is required to observe the principle of proportionality, ensuring the offender is "adequately punished" in accordance with s 3A *Crimes (Sentencing Procedure) Act* 1999: *FL v R* [2020] NSWCCA 114 at [58]. The imposition of a proportionate sentence is a purpose of the process of instinctive synthesis: *R v Dodd* (1991) 57 A Crim R 349 at 354; *Khoury v R* [2011] NSWCCA 118 at [71]; *Zreika v R* [2012] NSWCCA 44 at [46].

The proportionality principle requires that a sentence should not exceed what is required to reflect the objective seriousness of the crime regardless of how poor the offender's subjective case: *Veen v The Queen (No 2)* at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158]; *DS v R* (2022) 109 NSWLR 82 at [68]. Nor should the sentence be less than the objective seriousness of the crime: *R v Whyte* at [156]; *R v McNaughton* (2006) 66 NSWLR 566 at [15].

To achieve proportionality, regard must be had to the "gravity of the offence viewed objectively" because "without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place": Jordan CJ in *R v Geddes* (1936) 36 SR (NSW) 554 at 556. Elaborating on this, the court in *R v Dodd* said at 354:

> Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472 … stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary: see, for example, the passage from the judgment of Street CJ in *Todd* [1982] 2 NSWLR 517 quoted in *Mill* (1988) 166 CLR 59 at 64 …

Following *The Queen v Kilic* (2016) 259 CLR 256, the quote above should be qualified to the extent that the description "most grave category" is now to be avoided (see the discussion at **[10-005]**, above).

[10-012] Factors relevant to assessing objective seriousness

Last reviewed: November 2012

The task of assessing the objective seriousness of an offence requires the court to identify factors relevant to the "nature of the offending" and consider where in the range of conduct covered by the offence the offending falls: *Muldrock v The Queen* (2011) 244 CLR 120 at [27]; *Baumer v The Queen* (1988) 166 CLR 51 at 57. The "nature of the offending" is assessed or "measured" against legislative guideposts, namely the maximum penalty and, where applicable, the standard non-parole period: *R v Moon* [2000] NSWCCA 534 at [70]. The court must also assess the "nature of the offending" in the case against other instances of such offending: *R v Campbell* [2014] NSWCCA 102 at [27]–[29]. See also **Maximum penalty** above at **[10-000]**, **Mandatory life sentences under s 61** at **[8-600]**ff, **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**ff and **Consistency** at **[10-020]**.

The following factors are to be considered, when known and present, when assessing objective seriousness:

- the offending conduct (for example, in relation to the offence of sexual intercourse without consent, the range of acts that can constitute "sexual intercourse" as defined)
- the offender's mental state (or fault element) at the time of the commission of the offence (ranging from intention to lesser mental states such as recklessness), and
- the consequences of the offending.

See, for example, *Muldrock v The Queen* at [27]; *R v Way* (2004) 60 NSWLR 168 at [86]; *Yun v R* [2017] NSWCCA 317 at [35]; *SKA v R* [2009] NSWCCA 186

at [129]–[137]. See also more detailed discussion about particular features of offending conduct and its consequences in **Premeditation and planning** at **[10-040]**; **Degree of participation** at **[10-050]**; **Breach of trust** at **[10-060]**; **Impact on the victim** at **[10-070]**; and **Co-offenders with joint criminal liability** at **[10-807]** in **Parity**.

Since *Muldrock v The Queen*, whether matters personal to an offender form part of the "nature of the offending" and should also be considered when assessing objective seriousness has been the subject of debate: *DS v R* (2022) 109 NSWLR 82 at [71]. The decisions of *DS v R* at [96]; *Paterson v R* [2021] NSWCCA 273 at [29]; *Yun v R* at [40]–[47]; *Tepania v R* [2018] NSWCCA 247 at [112], suggest that the following personal factors *may* in some circumstances be relevant to assessing both the objective seriousness of an offence and the moral culpability of an offender:

- motive
- provocation
- non-exculpatory duress
- the offender's mental illness, mental health impairment or cognitive impairment
- the offender's age.

In *R v Way* (2004) 60 NSWLR 168 at [85], a decision pre-*Muldrock v The Queen*, in the context of a standard non-parole period offence, the court held a personal factor would only impact on objective seriousness where it was "causally related to the commission of the offence, in so far as the offender's capacity to reason, or to appreciate fully the rightness or wrongness of a particular act, or to exercise appropriate powers of control has been affected". While in *DS v R* at [96], the court stated the "nature of the impairment, the nature and circumstances of the offence, and the degree of connection between the former and the latter" are determinative considerations.

Consistent with *Muldrock v The Queen* and *Bugmy v The Queen* (2013) 249 CLR 571, in *R v Eaton* [2023] NSWCCA 125 at [49], the Court held that, for a personal factor to impact on the assessment of objective seriousness, more than a simple or indirect causal connection is required between the relevant subjective feature of the case and the offending.

See also **Objective and subjective factors at common law** at **[9-700]**ff; **Subjective matters at common law** at **[10-400]**ff.

Mental health or cognitive impairment and objective seriousness

An offender's mental health or cognitive impairment *may* be relevant to the assessment of objective seriousness where it is causally related to an offence: *DS v R* (2022) 109 NSWLR 82 at [63]; *Paterson v R* [2021] NSWCCA 273 at [29]–[31]; *R v Way* (2004) 60 NSWLR 168 at [86]; cf *Subramaniam v R* [2013] NSWCCA 159 at [56]–[57]; *Badans v R* [2012] NSWCCA 97 at [53]. The circumstances in which a mental health or cognitive impairment will inform the objective seriousness of the offence in addition to be considered in assessing the offender's moral culpability are "few and confined": *Lawrence v R* [2023] NSWCCA 110 at [75].

In *DS v R* at [96] the Court stated:

> The most obvious such circumstance is where the mental impairment is effectively a constituent element of the crime, such as manslaughter involving a substantial impairment within the meaning of s 23A of the *Crimes Act*. Another example may be

> where an offender damaged property during a period of psychosis or while suffering delusions but in circumstance that fall short of that which might establish a mental illness defence. In such a case, it could be said that the objective seriousness of the offending was reduced perhaps substantially. Such an offence would not be premeditated or planned, and the offender would not have sought or derived any advantage from their offending or possessed any malice in doing do. On the other hand, where an offender suffered from depression that impaired their decision making, it is very difficult to accept that the objective seriousness of a sexual assault they committed is somehow reduced even though it might be said that their depression materially contributed to their inability to overcome their own impulse to commit the offence. Such circumstances might warrant a reduction in their moral culpability which would in turn warrant further consideration be given to the weight attached to various sentencing factors, although it would not necessarily result in a reduction in their sentence.

In *Camilleri v R* [2023] NSWCCA 106, a jury convicted an offender of manslaughter on the basis she was substantially impaired by a mental condition at the time of the offence (*Crimes Act*, s 23A), as an alternative to murder. The applicant had a longstanding, complex psychiatric history including intellectual disability, and autism spectrum and explosive disorders. Hamill J (Cavanagh J agreeing in large part) found the assessment of the extent to which the applicant was affected by her mental condition is to be made from the starting point that her mental responsibility was substantially impaired, and the role played by her cognitive or neurological impairment or mental illness on a proper assessment of objective criminality should not be diminished: at [138], [142]. Hamill J at [133] (Cavanagh J agreeing at [220]) also found the offender's mental condition and resultant loss of self-control impacted objective seriousness, because it meant the offence was truly spontaneous and unplanned. Adamson JA dissenting, found that while the offender's mental condition was *potentially* relevant to objective seriousness, it had been open to the sentencing judge to only take it into account when assessing moral culpability: at [26]–[28].

In *Lawrence v R*, the sentencing judge took the applicant's background and mental conditions into account to reduce his moral culpability for domestic violence offences committed against his former partner. The court observed while mental conditions "may" reduce the objective seriousness of an offence, there is no principle that a related impairment "must" do so: at [75]. The court found the offender's mental condition was not relevant to the objective seriousness of the offences which were "committed over a prolonged period that involved the assault, intimidation, and degradation of a former de facto spouse": at [79].

See also **Mental health or cognitive impairment** at **[10-460]**.

Provocation and objective seriousness

Where provocation is established such that it is a mitigating factor under s 21A(3)(c), it is a fundamental quality of the offending which may reduce its objective seriousness: *Williams v R* [2012] NSWCCA 172 at [42]. It may be that whether a factor such as provocation is categorised as an objective or subjective factor will have little practical impact on the ultimate sentence: *Williams v R* at [43] See also **Section 21A(3)(c) — the offender was provoked by the victim** at **[11-230]**.

Non-exculpatory duress and objective seriousness

The weight and characterisation of non-exculpatory duress as impacting on the assessment of objective seriousness will depend upon the form and duration of the

offender's criminal conduct, the nature of the threats made, and opportunities available to the offender to report the matters to the authorities: *Tiknius v R* [2011] NSWCCA 215 at [40]–[49]; see also *Giang v R* [2017] NSWCCA 25. See also **Section 21A(3)(d) — the offender was acting under duress** at **[11-240]**.

Age and objective seriousness

In *IE v R* [2008] NSWCCA 70 at [20], the court held an offender's youth is a subjective factor that could not bear upon the assessment of objective seriousness. However, in *R v AA* [2017] NSWCCA 84 at [55], the court found, in some circumstances, an offender's age may bear upon an assessment of objective seriousness, and can be relevant to an explanation of the context in which the offending occurred. For example, in respect of the age difference between a sexual offender and their victim: *DS v R* (2022) 109 NSWLR 82 at [129]. See also **[10-440] Youth**; **Section 21A(3)(j) — the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability** at **[11-300]**.

Standard non-parole period offences

The principles discussed in *DS v R* (2022) 109 NSWLR 82 at [63]–[96] also apply to the application of standard non-parole periods: *Tepania v R* [2018] NSWCCA 247; *Yun v R* [2017] NSWCCA 317; cf *Stewart v R* [2012] NSWCCA 183 at [37]. See also **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**ff.

Factors that cannot be taken into account

It is not permissible to take into account the absence of a circumstance which, if present, would render the offence a different offence. This is irrelevant to, and likely to distort, the assessment of objective seriousness: *Nguyen v The Queen* (2016) 256 CLR 656 at [30], [43], [60]. Similarly, a comparison of the gravity of the subject offence with a hypothesised offence is erroneous: *Nguyen v The Queen* at [59].

The following factors, which are personal to an offender, do not bear upon the assessment of the objective seriousness of an offence:

- prior criminal record: *R v McNaughton* (2006) 66 NSWLR 566 at [25]; *Lawrence v R* [2023] NSWCCA 110 at [57]–[58]
- a plea of guilty (and its timing): *Lovell v R* [2006] NSWCCA 222 at [61], [66]
- the liberty status of an offender at the time of the commission of the offence (for example, on bail or parole): *Simkhada v R* [2010] NSWCCA 284 at [25]; *Martin v R* [2011] NSWCCA 188 at [7], [17]; *Sharma v R* [2017] NSWCCA 85 at [65]–[67]
- the offender committed multiple offences: *R v Reyes* [2005] NSWCCA 218 at [43].

Regardless of whether the personal factors discussed above may be considered in the assessment of objective seriousness, they may be relevant to the assessment of moral culpability and for other sentencing purposes. See **Subjective matters at common law** at **[10-400]**ff.

[10-013] Objective seriousness findings

Last reviewed: August 2023

A sentencing judge must "identify fully the facts, matters and circumstances which the judge concludes bear upon the judgment that is reached about the appropriate sentence to be imposed": *Muldrock v The Queen* (2011) 244 CLR 120 at [29].

The judge's assessment of the objective seriousness of an offence must be clear upon a fair reading of the sentencing remarks and mere recitation of the facts of an offence is unlikely to be sufficient: *Kearsley v R* [2017] NSWCCA 28 at [64]–[66]; *R v Van Ryn* [2016] NSWCCA 1 at [133], [134]; *R v Cage* [2006] NSWCCA 304 at [17]. In *Kochai v R* [2023] NSWCCA 116, it was "tolerably clear" the sentencing judge was satisfied the offending was objectively serious because they had enumerated all of the relevant factors, and all of those factors elevated the seriousness of the offending: [46], [54].

Since the introduction of standard non-parole periods it has been increasingly common for sentencing judges to place their findings of objective seriousness in a range or on a scale: *R v Eaton* [2023] NSWCCA 125 at [57]; *Cargnello v Director of Public Prosecutions (Cth)* [2012] NSWCCA 162 at [88]. Even for offences carrying a standard non-parole period a failure to assess objective seriousness on a "hypothetical arithmetical or geometrical continuum of seriousness" does not indicate error: *R v Eaton* at [57]; *DH v R* [2022] NSWCCA 200 at [33]; [56]; [58]–[60]. Further, that the parties dispute where on a scale the offences fall will not necessarily place an obligation on a judge to place the offending on a scale: *Kochai v R* at [52].

The characterisation of objective seriousness on a scale from low range, through to mid and high ranges "is often unhelpful …" and "is likely to lead to confusion and misinterpretation" for offences not carrying a standard non-parole period: Basten JA in *Cargnello v Director of Public Prosecutions (Cth)* at [88]; Howie AJ in *Georgopolous v R* [2010] NSWCCA 246 at [30]. In *DH v R*, Yehia J at [60] stated the use of descriptors such as "lower end of the middle of the range", "upper end of the middle of the range" or, "just below or above the midpoint" add nothing of value to the process of instinctive synthesis and the determination of a proportionate sentence.

See also **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]** and **Sentencing guidelines** at **[13-630]**.

[10-015] Objective seriousness and post-offence conduct

Last reviewed: August 2023

Post offence events can be taken into account in assessing the objective seriousness of a crime but it must be done with particular care: *R v Wilkinson (No 5)* [2009] NSWSC 432 per Johnson J, at [61]. Events which precede and follow the technical limits of a crime may be considered in assessing its objective seriousness: *R v Wilkinson (No 5)* at [61] citing *DPP v England* [1999] 2 VR 258 at 263 at [18]; *R v Garforth* (unreported, 23/5/94, NSWCCA). A sentencing judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime, and are properly to be regarded as circumstances of aggravation or mitigation: *R v Austin* (1985) 121 LSJS 181 at 183; *R v Wilkinson (No 5)* at [61].

Poor treatment of a deceased person's body can be taken into account in homicide cases for the purpose of assessing the seriousness of the offence: *R v Yeo* [2003] NSWSC 315 at [36]; *Knight v R* [2006] NSWCCA 292 at [28]. Examples of aggravating post-offence conduct in murder and manslaughter cases include: infliction of further injury knowing the victim is already dead (*R v Hull* (1969) 90 WN (Pt 1) (NSW) 488 at 492); callous and disrespectful treatment of the body (*Colledge v State of Western Australia* [2007] WASCA 211 at [10] and [15], where the body was left for

weeks before being buried with lime to hasten its decomposition); concealing the body (*R v Lowe* [1997] 2 VR 465 at 490, where a deceased child was hidden in a storm-water drain); dumping the body in a remote spot (*R v Von Einem* (1985) 38 SASR 207 at 218); disposing of the deceased's possessions in different locations "to blur the trail" (*Bell v R* [2003] WASCA 216 at [16] and [25]); and incinerating the body (*R v Schultz* (1997) 68 SASR 377 at 384). In *DPP v England*, the sentencing judge erred by reasoning that acts after death could not amount to aggravating circumstances as the crime of murder was complete upon death: *DPP v England* at [14], [35]. It is not "double-counting" to have regard to post-offence conduct as adding an aggravating dimension to the crime, as well as indicating a lack of remorse: *DPP v England* at [37]; *Bell v R* at [25].

An offender's false statements to police and others concerning the whereabouts of the body, and his failure to reveal its true whereabouts, could not be taken into account in an assessment of the objective seriousness of the murder itself: *R v Wilkinson (No 5)* at [62]. To do so would be tantamount to treating the accused's conduct of his or her defence as an aggravating factor: *R v Cavkic (No 2)* [2009] VSCA 43 at [134].

As to post-crime ameliorative conduct of the offender as a matter in mitigation of sentence see **Ameliorative conduct or voluntary rectification** at **[10-560]**.

[10-020] Consistency

Last reviewed: August 2023

The High Court in *Hili v The Queen* (2010) 242 CLR 520 at [18], [49] examined what is meant by "consistency" and considered "the means by which consistency is achieved". The plurality said, at [18]: "... the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence". The principle was applied in *Barbaro v The Queen* (2014) 253 CLR 58 at [40]. The plurality in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [54] also quoted the passage with approval and added: "Consistency in that sense is maintained by the decisions of intermediate courts of appeal."

It is imperative for a court to have regard to previous cases and "[n]ot just to what has been done in other cases but *why* it was done": *Hili v The Queen* at [18] (emphasis in the original judgment). Like cases should be decided alike and different cases should be dealt with differently: *Hili v The Queen* at [49].

In considering patterns of sentencing it is well to also keep in mind that sentencing is a task involving the exercise of a discretion and that there is no single correct sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [27]. As to sentencing consistency for federal offences see **Achieving consistency in sentencing** at **[16-035] Relevance of decisions of other State and Territory courts**.

In striving to achieve consistency, courts have utilised previous cases on the one hand and statistics on the other. Many of the authorities cited below discuss both issues, however, for the purpose of this chapter, they have been dealt with separately. To some extent the utility of comparable cases and sentencing statistics depends on the offence. For example, courts have said sentencing statistics should be avoided when sentencing for manslaughter cases (discussed further in introduction to the **Manslaughter and infanticide** chapter at **[40-000]** under *Use of statistical data*). However, sentencing statistics are commonly utilised by the courts when sentencing for Commonwealth

drug offences (see **Achieving consistency** at **[65-150]**). The issue of consistency and the use of statistics is discussed further within the chapters dealing with particular offences from **[17-000]** and following.

[10-022] Use of information about sentences in other cases

Last reviewed: August 2023

In seeking consistency, while care must be taken, courts (including first instance judges) must have regard to what has been done in other cases: *Hili v The Queen* (2010) 242 CLR 520 at [53]; *Barbaro v The Queen* (2014) 253 CLR 58 at [40]–[41]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *R v Nguyen* [2010] NSWCCA 238 at [106]. In *Barbaro v The Queen*, the majority of the High Court said at [41]:

> other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect … the synthesis of the "raw material" which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel.

Although *Hili v The Queen* and *DPP (Cth) v De La Rosa* concern sentences imposed for Commonwealth offences, the principles enunciated therein, subject to what was said by the High Court in *The Queen v Pham* (2015) 256 CLR 550 set out below, remain applicable to NSW offences (see the approach taken by the court to manslaughter in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [54]).

In *The Queen v Pham*, the High Court examined the issue of using other cases during the sentencing process. The plurality (French CJ, Keane and Nettle JJ) set out at [28] the following non-exhaustive list of propositions concerning the way in which the assessment of sentences in other cases is to be approached [footnotes excluded]:

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.

(2) The consistency that is sought is consistency in the application of the relevant legal principles.

(3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.

(6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.

(7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

It is to be noted that no reference was made by the plurality to the statement in *Barbaro v The Queen* at [41] (quoted above) that a court can synthesise raw material like statistics.

The plurality observed that intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as "yardsticks" that may serve to illustrate (although not define) the possible range available: *The Queen v Pham* at [29]. Further, a court must have regard to such a decision unless the objective or subjective circumstances of the case make it distinguishable, or if the court thinks the outcome is manifestly inadequate or excessive: *The Queen v Pham* at [29].

Cases decided in the past do not define the permissible range for a court: *DPP (Cth) v De La Rosa* at [304]. The concept of an "available range", commonly referred to in sentencing appeals, emanates from a conclusion that a sentence is manifestly inadequate or manifestly excessive, and, therefore, falling outside the available range. Such a conclusion is derived from the last limb of *House v The King* (1936) 55 CLR 499 at 505 — that the result is "plainly unjust". However, it is wrong to suggest that a conclusion that a sentence is manifestly inadequate or manifestly excessive requires or permits setting the bounds of the range of available sentences: *Barbaro v The Queen* at [28]; see also *Robertson v R* [2015] NSWCCA 251 at [23]. Ordinarily, it should be assumed after *Barbaro v The Queen* that a court will only accept or reject a submission as to range after considering all the relevant facts and law which bear upon its merit: *Matthews v R* (2014) VR 280 at [17].

In *Munda v Western Australia* (2013) 249 CLR 600, Bell J held at [119] that the fact that the primary judge's sentence was consistent with sentences imposed in comparable cases, and that his Honour's reasons did not disclose patent error, invited careful consideration of the basis on which a conclusion of manifest inadequacy by the Court of Criminal Appeal was reached.

The Queen v Kilic (2016) 259 CLR 256 illustrates the perils of using comparative cases. The Court of Appeal of Victoria erred by attributing too much significance to the sentences imposed in other cases and by concluding that despite the "latitude" to be extended to a sentencing judge the disparity between the respondent's sentence and current sentencing practice meant there was a breach of the principle of equal justice: *The Queen v Kilic* at [23]. The Court of Appeal impermissibly treated the sentences imposed in the few cases mentioned as defining the sentencing range: *The Queen v Kilic* at [24]. The cases mentioned by the parties could not properly be regarded as providing a sentencing pattern: *The Queen v Kilic* at [25]. There were too few cases, one dealt with a different offence, another was more than 12 years old and the circumstances of the offending in each case were too disparate, including the fact that some were not committed in the context of domestic violence against a woman in abuse of a relationship of trust: *The Queen v Kilic* at [25], [27]–[31]. At best they were representative of particular aspects of the spectrum of seriousness: *The Queen v Kilic* at [25].

Strict limits apply as to the use that can be made of sentences imposed in other cases. The court must make its own independent assessment of the particular case: *R v F* [2002] NSWCCA 125 at [38]. The court must identify the limits of the discretion by reference to the facts of the case before it: *Robertson v R* at [23]. Ultimately, the

sentencing discretion is individual and must be exercised by the judge in respect of the individual offender and the particular offending: *Gavin v R* at [41]; *DPP (Cth) v De La Rosa* at [304], [305]; *Hili v The Queen* at [54].

Nevertheless, viewing comparable cases in an overall and broad way can provide some measure of the types of sentences passed in similar (although not identical) circumstances: *R v Smith* [2016] NSWCCA 75 at [73]. In *R v Smith*, the CCA referred to a first instance District Court decision and a decision of an intermediate appellate court as illustrations of how courts had approached the sentencing task in serious cases of dangerous driving causing death in the past: *R v Smith* at [70]–[71]. In *Hili v The Queen* at [64]–[65], the High Court also made reference to "one or two closely comparable cases" including the first instance decision of *R v Wheatley* (2007) 67 ATR 531.

It is not always helpful to trawl for comparisons with other decided cases and it would be futile to attempt to gauge the element of manifest seriousness from a single decision that forms part of a range of cases with widely differing objective and subjective circumstances: *R v Zhang* [2004] NSWCCA 358 at [26]; see also *R v Salameh* (unrep, 9/6/94, NSWCCA); *R v Trevenna* [2004] NSWCCA 43 at [98]–[100]; *R v Mungomery* [2004] NSWCCA 450 at [5]; *R v Araya* [2005] NSWCCA 283 at [67]–[71]. Thus, in *RCW v R (No 2)* [2014] NSWCCA 190, the court held at [48] that the judge erred in deriving a starting point for the sentence from a single comparable case on the basis of similarity in objective criminality without consideration of the offender's subjective features. However, there have been exceptions to this principle. In *Behman v R* [2014] NSWCCA 239, the court used the sentence imposed in an earlier case involving conduct "very similar" to that for which the offender stood to be sentenced, as a "strong guide as to the appropriate range": at [17]–[18], [22].

Singling out one subjective feature, such as age, in order to compare sentences is also an unproductive exercise: *Atai v R* [2014] NSWCCA 210 at [147], [161]. In *Atai v R*, a murder case, the Court of Criminal Appeal held that the range of criminality in the chosen cases, the bases upon which the offender was culpable and the subjective features were widely divergent. Similarly, in *Briouzguine v R* [2014] NSWCCA 264, a case involving the supply of significant quantities of drugs, the court held at [78] that reliance by the applicant on a number of other cases concerning drug supply offences involving large commercial quantities, wrongly assumed that the wide variety of facts and degree in which the offending can occur readily yielded a range.

At best, other cases do no more than become part of a range for sentencing, and in the case of manslaughter, this range is wider than for any other offence: *R v George* [2004] NSWCCA 247 at [48]; *Robertson v R* at [18], [20]. Therefore, in manslaughter cases, an examination of the results in other decided cases does not illuminate "in any decisive manner the decision to be reached in a particular case" and is "unhelpful and even dangerous": *BW v R* [2011] NSWCCA 176 at [61]; *R v Vongsouvanh* [2004] NSWCCA 158 at [38]; *CW v R* [2011] NSWCCA 45 at [131]. In *R v Hoerler* [2004] NSWCCA 184 at [41]; *Abbas v R* [2014] NSWCCA 188 at [38]–[42]; *R v Loveridge* [2014] NSWCCA 120 at [226]–[227]; and *R v Trevenna* at [98]–[100], it was held that it was not possible to extrapolate a sentencing pattern from past manslaughter cases.

In *Robertson v R*, the applicant was entitled to rely upon comparative manslaughter cases, however, their assistance in the circumstances was limited: *Robertson v R* at [24].

In *King v R* [2015] NSWCCA 99, a murder case, the court held that reliance on four other sentencing judgments as a means of establishing some kind of benchmark against which the reasonableness of the sentence at hand was to be measured, was not particularly helpful. Murder, like manslaughter, is a protean offence and each case depends upon its own facts. Axiomatically, differences in facts and circumstances will often lead to differences in the resulting sentence: *King v R* at [80].

[10-024] Use of sentencing statistics

Last reviewed: March 2024

It is has long been established that a court should have regard to the general pattern of sentences: *R v Visconti* [1982] 2 NSWLR 104 per Street CJ at 109, 111. In *Barbaro v The Queen* (2014) 253 CLR 58 at [41], the High Court said it is the role of the court to synthesise raw material like statistics.

In *Hili v The Queen* (2010) 253 CLR 58 at [18], the High Court stated that the sentencing consistency sought is "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence". Accordingly, the presentation of sentences which have been passed in "numerical tables, bar charts or graphs" which merely depict outcomes is not useful as it is not possible to ascertain from them why the sentence(s) were imposed. Further, useful statistical analysis is not possible where there is a very small number of offenders sentenced each year, as is the case for federal offenders. The High Court stated at [48]:

> Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.

The Queen v Pham (2015) 256 CLR 550

Both *Hili v The Queen* and *Barbaro v The Queen* must now be read in light of the High Court decision of *The Queen v Pham* (2015) 256 CLR 550. In *The Queen v Pham*, the court unanimously held that the Victorian Court of Appeal erred in law by adopting an impermissible statistical analysis of comparable cases to determine the objective seriousness of the subject offence: [3], [43]. In this case, Maxwell P attached to his judgment a table of 32 cases of intermediate appellate courts for offences involving a marketable quantity of border controlled drug where the offender was a "courier (or recipient) and no more", had pleaded guilty and had "no (or no relevant) prior convictions". A column in the table expressed the quantity imported as a percentage of the commercial quantity for each of the different drug types. The cases were ranked from the highest percentage to the lowest and a line of best fit was added.

The plurality (French CJ, Keane and Nettle JJ) said the case illustrated the inutility of the presentation of sentences imposed on federal offenders using the numerical tables, bar charts and graphs referred to in *Hili v The Queen* (at [48], see above): *The Queen v Pham* at [32], [33]. Presentations in these forms should be avoided: *The Queen v Pham*

at [28]. The statistical analysis was also flawed by treating the weight of drug imported as "the only variable factor affecting offence seriousness" and assuming that "courier" status was of uniform significance: *The Queen v Pham* at [37].

Bell and Gageler JJ did not agree with the plurality on this point and held that even if the Court of Appeal misused the table of 32 cases to determine the objective seriousness of the offence it does not demonstrate that presentation of this type of material is impermissible: *The Queen v Pham* at [45]. *Hili v The Queen* and *Barbaro v The Queen* are concerned not only with the consistent application of sentencing principles but also with reasonable consistency in sentencing outcomes: *The Queen v Pham* at [42], [46]. In *Hili v The Queen*, the court said it is not useful to use statistical material which only refers to the lengths of sentences passed because it says nothing about why sentences were fixed: *The Queen v Pham* at [46].

The joint justices further held that statistical material showing the pattern of past sentences for an offence may serve as a yardstick by which the sentencer assesses a proposed sentence and the appellate court assesses a challenge of manifest inadequacy or excess: *The Queen v Pham* at [47]. In *Barbaro v The Queen*, the court held that judges must have regard to past cases as they may establish a range. This history stands as a yardstick against which to examine a sentence but it does not define the outer boundary of the permissible discretion. It was accepted that comparable cases and sentencing statistics are aids and part of the material which the sentencer must take into account: *The Queen v Pham* at [48]. The Commonwealth Sentencing Database is a source of potentially relevant information about the pattern of sentencing for federal offences: *The Queen v Pham* at [49]. Bell and Gageler JJ said at [49] [footnote included]:

> Statistics have a role to play in fostering consistency in sentencing, and in appellate review, provided care is taken to understand the basis upon which they have been compiled [see *Knight v R* [2015] NSWCCA 222 at [3]–[13] per RA Hulme J] and provided the limitations explained in … *Barbaro* … are observed. The value of sentencing statistics will vary between offences. It is not meaningful to speak of a pattern of past sentences in the case of offences which are not frequently prosecuted and where a relatively small number of sentences make up the set.

CCA statements concerning the use of statistics

The previous accepted authority in NSW of *R v Bloomfield* (1998) 44 NSWLR 734 at 739, particularly the statements of Spigelman CJ (statistics "may be of assistance in ensuring consistency in sentencing" and "may indicate an appropriate range") must now be read in light of *Wong v The Queen* (2001) 207 CLR 584 at [59], *Barbaro v The Queen* at [41], *Hili v The Queen* at [48] and *The Queen v Pham* (2015) 256 CLR 550 at [49]. The court in *SS v R* [2016] NSWCCA 197 applied those cases. Bathurst CJ said at [63] that statistics in that case:

> … do not provide any real assistance in determining whether the sentence was manifestly excessive in the absence of any detail concerning the circumstances of the particular cases in question.

The limited use that should be made of Judicial Commission statistics has been recognised previously: *Ross v R* [2012] NSWCCA 161 at [19]. Statistics do no more than establish the range of sentences imposed, without establishing that the range is the correct range or that the upper or lower limits are the correct upper or lower limits: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]; *R v Boyd* [2022]

NSWCCA 120 at [139]; *Holohan v R* [2012] NSWCCA 105 at [51]. A failure by a court to consider Judicial Commission statistics does not in itself amount to error in the sentencing process: *Lawson v R* [2012] NSWCCA 56 at [13]. Sentencing statistics are a blunt instrument when seeking to establish manifest excess in a sentencing appeal: *Windle v R* [2011] NSWCCA 277 at [62] and an opaque tool for providing insight into a sentencing range in a sentencing appeal: *R v Nikolovska* [2010] NSWCCA 169 at [70]. For many offences, culpability varies over so wide a range that the statistics are of limited utility for a particular case and undue weight should not be given to them: *Fogg v R* [2011] NSWCCA 1 at [59].

In *R v Lao* [2003] NSWCCA 315 at [32]–[33], Spigelman CJ said:

> What is an available "range" is sometimes not accurately stated, when reference is made to Judicial Commission statistics. The statistics of the Judicial Commission do not show a range appropriate for a particular offence.
>
> This court is concerned to determine the appropriate range for the particular offence. The Judicial Commission statistics do not indicate that range. They reflect what was regarded as appropriate in the wide variety of circumstances in the cases reported in those statistics.

The court in *Skocic v R* [2014] NSWCCA 225 at [19]–[20] helpfully summarised the law in relation to the use that can be made of sentencing statistics following the decisions in *Hili v The Queen* and *Barbaro v The Queen*. In *Skocic v R* at [19], Bellew J said:

> In *MLP v R* [2014] NSWCCA 183, with the concurrence of Macfarlan JA and Adamson J, I had occasion to make a number of observations (commencing at [41]) regarding this issue. Those observations included the following:
>
> (i) consistency in sentencing is not demonstrated by, and does not require, numerical equivalence. What is sought is consistency in the application of the relevant legal principles: *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520 at [48]–[49][;]
>
> (ii) sentences imposed in other cases do not mark the outer bounds of the permissible sentencing discretion but stand as a yardstick against which to examine a proposed sentence. What is important are the unifying principles which such sentences reveal and reflect: *Barbaro v R; Zirilli v R* [2014] HCA 2; (2014) 305 ALR 323 at [41];
>
> (iii) the presentation of sentences passed in the form of numerical tables and graphs is of limited use: *Hili* (supra) at [48]. This is because reference to the lengths of sentences passed says nothing about why the sentences were fixed as they were;
>
> (iv) this Court has emphasised the need to adopt a careful approach when asked to have regard to statistics: *R v Nikolovska* [2010] NSWCCA 153 at [117] [see *Chan v R* [2010] NSWCCA 153] per Kirby J, Beazley JA (as her Honour then was) and Johnson J agreeing. A similarly careful approach is required when the Court is asked to compare a sentence imposed in one case with a sentence imposed in another: *RLS v R* [2012] NSWCCA 236 at [132] per Bellew J, McClellan CJ at CL and Johnson J agreeing. The need to take care in each instance arises, in part, from the fundamental fact that there will inevitably be differences, both in terms of the objective circumstances of offending and the subjective circumstances of the offender, between one case and another;
>
> (v) the fact that a particular sentence is, by reference to statistics, the highest imposed for a single instance of particular offending does not demonstrate that the sentence

> is unduly harsh. As a matter of common sense, there will always be one sentence which constitutes the longest sentence imposed for particular offending: *Jolly v R* [2013] NSWCCA 76 at [75].

The decisions of *Sharma v R* at [78]–[82], *R v Boyd* at [122], [139]–[143] and *Tatur v R* [2020] NSWCCA 255 at [46]–[47] reiterate some of these principles.

In *Tweedie v R* [2015] NSWCCA 71 at [45], the court held that the Judicial Commission sentencing statistics, which contained only five cases of the same fraud offence sentenced in the District Court, were of no use at all. Further, there was no utility in comparing the sentences imposed in that case with those imposed in the Local Court where the jurisdictional limit is 20% of the maximum penalty available in the District Court.

Generally, for offences involving the manufacture and supply of drugs, the utility of sentencing statistics are of limited weight because they do not record: the broad range of weight and purity of the drug involved; the role of the offender; and, whether there were aggravating features: *R v Chidiac* at [40]; see also *R v Boyd* at [169]; *Bao v R* [2016] NSWCCA 16 at [70]–[74]. The aggravating feature of being on conditional liberty at the time of the offending is not recorded in the statistics: *Sparkes v R* at [30].

It has been said that statistics can be used as broad support for a conclusion that a custodial sentence is appropriate: *Mitchell v R* [2013] NSWCCA 318 at [27]–[31]; *Peiris v R* [2014] NSWCCA 58 at [96]. However, the comparison of sentencing statistics becomes complicated where Form 1 offences have been taken into account: *R v Lenthall* [2004] NSWCCA 248; see also *Bao v R* at [70]–[74]; *Simpson v R* [2014] NSWCCA 23 at [39].

In *Peiris v R*, the court held that the sentencing judge's reliance on sentencing statistics was erroneous. If comparison is to be made for the purposes of establishing a yardstick in a case where the offence can be tried summarily and on indictment, then it should be made with all the data including that obtained from the Local and higher courts: *Peiris v R* at [90].

As with the use of comparable cases, the myriad circumstances of manslaughter offences means it is unhelpful to speak in terms of a range of sentences, or a tariff, for a particular form of manslaughter: *Leung v R* [2014] NSWCCA 336 at [120]; *R v Wood* [2014] NSWCCA 184 at [56]. Sentencing statistics for manslaughter cases are of such limited assistance to sentencing judges that they should be avoided: *R v Wood* at [59]. Although, in *Robertson v R* [2015] NSWCCA 251, Basten JA said such statistics (and comparable cases) should be approached cautiously: at [18]–[23].

In *Chandler v R* [2023] NSWCCA 59, a sentence appeal for an offence of manslaughter (using a motor vehicle), N Adams J (Hamill J agreeing; Beech-Jones CJ at CL dissenting), in determining a sentence manifestly excessive, had regard to such sentencing statistics as well as those for the offence of murder where the weapon was a motor vehicle (in addition to comparable cases): at [101]–[107], [112], [118], [124]–[126], [128]. In *Paterson v R* [2021] NSWCCA 273 at [42]–[49], the Court also had regard to sentencing statistics (and comparable cases) in the determination of a sentence appeal for manslaughter.

In *Simpson v R*, the court held that the sentencing statistics in relation to sexual assault offences under s 61I were also of little value as they did not disclose which

aggravating factors were present in those cases, nor what discounts were applied, nor the circumstances of each case: [39]–[41]. Similarly, in *Alenezi v R* [2023] NSWCCA 283, the court found the sentencing statistics relied upon by the offender, which were limited by the use of filters, and the "range" derived from them, excluded a number of cases which provided a reasonable basis of comparison: [45], [57].

Aggregate sentences and JIRS statistics

The applicant in *Knight v R* [2015] NSWCCA 222 was convicted of multiple counts of knowingly taking part in the supply of prohibited drugs contrary to s 25(1) *Drug Misuse and Trafficking Act* 1985. It was an inherent flaw to use the Judicial Commission sentencing statistics based on the principal offence to assert that an aggregate sentence was manifestly excessive: *Knight v R* at [13], [88]; *Tweedie v R* [2015] NSWCCA 71 at [47]. The Judicial Commission sentencing statistics (at the time) did not extend to aggregate sentences or to a number of different sentences that overlap: *R v Chidiac* [2015] NSWCCA 241at [41]; *Knight v R* at [8], [87], [88]; *Sparkes v R* [2015] NSWCCA 203 at [30]. But now see "Explaining the Statistics" in relation to aggregate sentences.

Additionally, in *Knight v R*, the applicant was seeking to compare his aggregate non-parole period (for four offences of supply) with the non-parole periods displayed in the statistics — which were non-parole periods referable either to a single s 25(1) offence or a s 25(1) offence which was the principal offence in a multiple offence sentencing exercise where all sentences were ordered to be concurrent: *Knight v R* at [11].

Selecting the statistical variable "multiple offences" was of no real utility where an offender is sentenced for multiple counts of the same offence because "multiple offences" does not limit the database to multiple instances of the same offence. It includes instances where there was one or more offences of *any type*: *Knight v R* at [7]. *Knight v R* was referred to by Bell and Gageler JJ in *The Queen v Pham* (2015) 256 CLR 550 at [49].

Further, an approach to a complaint of manifest excess involving consideration of the "undiscounted aggregate" sentence is contrary to principle as discounts are applied to indicative, not aggregate, sentences: *Sharma v R* [2022] NSWCCA 190 at [72].

[10-025] Necessity to refer to "Explaining the statistics" document

Last reviewed: August 2023

Where JIRS statistics are used by either party it is essential that reference is also made to the "Explaining the statistics" document (found at the top of the Statistics page on JIRS). This document explains how JIRS statistics are compiled. R A Hulme J in *Why v R* [2017] NSWCCA 101 at [60]–[61], [64] emphasised the need for the parties to refer to the "Explaining the statistics" document on JIRS:

> Quite a deal has been said in judgments of this Court in recent years about the care which needs to attend the use of sentencing statistics provided by the Judicial Commission of New South Wales. Walton J has referred to those which discuss statistics in the context of aggregate sentencing [Cross reference omitted.]

> In *Knight v R* [2015] NSWCCA 222 at [13] I wrote … "if [statistics] are to be relied upon, it is necessary that counsel ensure that the limits of their utility are properly understood". Earlier (at [8]) I said:
>
> > Available on the opening page of the statistics section of the Judicial Commission's website is a hyperlink to a document: 'Explaining the Statistics'. It contains an explanation of the counting methods employed and the variables that may be selected to refine the statistics.
>
> …
>
> The sentencing statistics can be a very valuable tool if properly understood and used appropriately. Once again, I can only implore practitioners to read the "Explaining the Statistics" document before relying upon statistics in any court, including this Court.

[10-026] Enhancements to JIRS statistics

Last reviewed: March 2024

JIRS statistics can be utilised to provide comparable cases that may be of assistance to the sentencing court. In response to the decision in *Hili v The Queen* (2010) 253 CLR 58, the higher courts' sentencing statistics on JIRS were enhanced by a new feature allowing users to access further information behind each sentencing graph and isolate offender and offence characteristics relevant to the offender currently being sentenced. The new feature provides sentencing information to explain why the sentence was passed or, as the High Court put it in *Hili v The Queen* at [18], to have "proper regard not just to what has been done in other cases but *why* it was done" [emphasis in original].

The enhancements also facilitate compliance by sentencing courts with proposition (7) in *The Queen v Pham* (2015) 256 CLR 550 at [28] and the principle outlined by the plurality of that case that "intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as 'yardsticks' that may serve to illustrate (although not define) the possible range of sentences available": *The Queen v Pham* at [29].

The JIRS statistics include the following information:

- registry file number
- a link to a summary of the CCA judgment, the judgment (whether it is a Crown appeal or severity appeal) and where there is a CCA judgment a link to the first instance remarks if they are available
- offence date
- sentence date (either at first instance or the re-sentencing date on appeal)
- the offender's characteristics listed in summary form including: the number of offences (one/any additional offences); whether a Form 1 was taken into account; the offender's prior record, plea, age and the penalty that was imposed
- the precise overall or effective sentence and the overall non-parole period.

R A Hulme J in *Why v R* [2017] NSWCCA 101 at [62]–[63] made reference to the enhancements:

> The Judicial Commission has provided enhancements to the statistics in recent times, partly in response to what the High Court has said in cases such as *Hili v The Queen;*

Jones v The Queen [2010] HCA 45; 244 CLR 520 and *The Queen v Pham* [2015] HCA 39; 256 CLR 550. They include the provision of statistics for "Aggregate/Effective" terms of sentence and non-parole periods. But there are limitations on the utility of these.

Another enhancement is the provision of further information about individual cases which make up the database. Sometimes it is limited but where published judgments are available there is a very helpful hyperlink to them (and sometimes to summaries of them). It is, unfortunately, rarely apparent in this Court that counsel who are relying upon the statistics have made use of this facility.

[10-027] Recent changes to JIRS statistics

Last reviewed: August 2023

The following changes have been made to JIRS sentencing statistics in light of recent Court of Criminal Appeal decisions referred to below. For the NSW higher courts, the menu option variable "Multiple offences" has been removed from the sentencing statistics viewer as the variable included offences of any type and any number and was considered to be too broad by the court in *Knight v R* [2015] NSWCCA 222 at [7]. In other cases the multiple offences variable was misunderstood, see *R v Wright* [2017] NSWCCA 102 at [52] where the parties assumed "multiple" referred only to multiple offences of the specific offence charged.

The "View" menu, which provided the "Median" and the "80% Range" options, has been removed from the sentencing statistics viewer for all NSW courts. Constructive feedback from users suggested that those features lacked utility and could be potentially open to misinterpretation. See also the statements concerning the use of medians in sentencing in *Wong v The Queen* (2001) 207 CLR 584 at [66] and *Harper v R* [2017] NSWCCA 159 at [34]. In the latter case, the applicant's submission relied upon an underlying premise that the median represents the sentences impose for the middle range offences. In the absence of providing anything about the facts of the cases, the premise was not accepted.

[10-030] Uncharged acts

Last reviewed: May 2024

Representative charges

Although uncharged criminal conduct cannot generally be taken into account on sentence (see **[1-500] De Simoni principle**), in some cases, the court is required to sentence for "representative charges", that is, charges which are representative of the total misconduct of the offender, including uncharged acts: *R v JCW* [2000] NSWCCA 209. This does not infringe the principle that a person should not be punished for a crime for which they have not been convicted: *R v JCW* per Spigelman CJ at [68], applying *Siganto v The Queen* (1998) 194 CLR 656.

Generally, uncharged acts cannot be taken into account as a circumstance of aggravation or to increase an otherwise proper sentence: *R v JCW* [2000] NSWCCA 209 per Spigelman CJ at [68]; *MJL v R* [2007] NSWCCA 261 at [15]; *Fisher v R* [2008] NSWCCA 129 at [19] (see below at **Increasing objective seriousness**). An exception to this is where the offender has made an admission to the uncharged conduct: *R v JCW*

[2000] NSWCCA 209 per Spigelman CJ at [55]–[56]. Further, the overall history of the conduct from which the representative charges have been selected may be considered to understand the relationships between the parties, to exclude any suggestion the offences charged were of an isolated nature, and to inform the degree of leniency to be extended to the offender.

In *R v JCW* there was an express admission by the offender that the particular counts with respect to daughter DW were "representative". That admission extended to an admission of the general nature of the relationship as set out in the uncontested evidence of DW, but this admission did not extend to any of the specific allegations contained in DW's evidence. Chief Justice Spigelman at [68] said:

> An admission of this general character is appropriate to be taken into account for purposes of rejecting any claim to mitigation and attendant reduction of an otherwise appropriate sentence. It is not, however, in my opinion, appropriate to be taken into account as a circumstance of aggravation, if that be permissible at all.

Where the offender has committed an offence of persistent child sexual abuse under s 66EA *Crimes Act*, they are sentenced in the same way for the representative counts as existed before the creation of the offence. Parliament did not intend to create a harsher sentencing regime for representative counts constituting a s 66EA offence: *R v Fitzgerald* (2004) 59 NSWLR 493.

See further **Sexual assault** at **[20-840]**.

Increasing objective seriousness

Notwithstanding the above, evidence of earlier uncharged acts may be relied upon in sentencing to demonstrate (and increase) the objective seriousness of the charged offence: *LN v R* [2020] NSWCCA 131 at [41] (per Basten JA; RA Hulme J agreeing; Hamill J dissenting).

The decision of *The Queen v De Simoni* (1981) 194 CLR 656 (see **[1-500] De Simoni principle**) was distinguished as the uncharged acts formed the context to a more serious offence: [40].

Basten JA stated at [40], [54]:

> [The principle in *De Simoni*] should not be applied without qualification to sentencing for the most serious offence, only because the surrounding circumstances and events, although capable of constituting separate offences, have not been the subject of separate charges. It would, of course, be an error to sentence the person for an uncharged offence, but it does not follow that conduct which might constitute an uncharged offence cannot be taken into account in sentencing for a more serious offence.
>
> …
>
> So long as it is legitimate to view an offence in context, which may include other activities of the offender, it is apparent that context may either render the objective seriousness of the offending greater than would otherwise have appeared or, depending on the extent to which different criteria are involved, may increase the moral culpability of the offender. In either case, the result may be to increase the sentence beyond that which might have been imposed had the surrounding events not been examined. There is no reason in principle to conclude that conduct which may involve criminality should be excluded, whereas conduct not itself criminal could be examined. On any view, conduct adverse to the offender's interests must be established beyond reasonable doubt.

The sentencing judge in *LN v R*, in dealing with the applicant's murder of his three-year-old son, took into account the applicant's sustained physical, psychological and verbal abuse over a seven-week period leading up to the assault resulting in the child's death. The majority in *LN v R* noted the victim was mentally and physically weakened by the prior acts of abuse which had a causal link to the death, as the actual violence required to cause death was lessened by the child being in a weakened state and, accordingly, the judge did not err by taking the uncharged earlier acts of violence into account: [59]–[60].

LN v R has been cited with approval in *Ragg v R* [2022] NSWCCA 150 at [39]–[46] (Beech-Jones CJ at CL; N Adams and Lonergan JJ agreeing); *DPP (NSW) v TH* [2023] NSWCCA 81 at [24] (Beech-Jones CJ at CL; Garling and Yehia JJ agreeing); *GL v R* [2022] NSWCCA 202 at [116] (Hamill J; Brereton JA and Garling J agreeing); *TL v R* [2020] NSWCCA 265 (Bellew J; Hoeben CJ at CL and Adamson J agreeing); and *Turner v R* [2021] NSWCCA 5 (Garling J; Payne JA and Davies J agreeing).

Other examples of where uncharged acts may be taken into account to inform some relevant feature of the charged offending conduct include to establish:

- the offender's state of mind in respect of the charged offences (*Giles v DPP (NSW)* [2009] NSWCCA 308; *Einfeld v R* [2010] NSWCCA 87; *Ross v R* [2016] NSWCCA 176);
- the offender's position within the hierarchy of a drug syndicate in respect of the charged drug offences (*Lago v R* [2015] NSWCCA 296; *Mezher v R* [2019] NSWCCA 76);
- the offender's awareness of a victim's vulnerability in respect of the charged offences (*LN v R* at [159]; see also *Ragg v R* at [44]); and
- an offence was not an isolated incident or aberration (see **Sexual assualt** at **[20-840]**); and
- the offending was part of a sustained course of criminality (*Turner v R* at [46]).

[10-040] Premeditation and planning

Last reviewed: August 2023

At common law the degree of premeditation or planning has long been recognised as a factor in weighing the seriousness of an offence: *R v Morabito* (unrep, 10/6/92, NSWCCA) at 86. It permits a court to treat the conduct as a more serious example of the offence charged than would otherwise be the case. Conversely, offences which are unplanned, impulsive, opportunistic and committed spontaneously are generally regarded as less serious than those that are planned: *R v Mobbs* [2005] NSWCCA 371 at [50]. A court is not entitled to make a finding that an offence was planned when such an adverse finding is not open: *BIP v R* [2011] NSWCCA 224 at [50].

Although intoxication is not a matter in mitigation, an offender's intoxication may be an indication that the offence was impulsive and unplanned: *Waters v R* [2007] NSWCCA 219 at [38] with reference to Wood CJ at CL in *R v Henry* (1999) 46 NSWLR 346 at [273]; see *LB v R* [2011] NSWCCA 220 at [42].

The armed robbery guideline in *R v Henry* at [162] refers to the circumstance of a "a limited degree of planning" (see **Robbery** at **[20-250]**). Planning is also referred

to as a factor in the break, enter and steal guideline (see **Break and enter offences** at **[17-020]** and cases at **[17-070]**). For fraud offences a distinction has been drawn between offences where there has been planning with a degree of sophistication and those committed on impulse: see *R v Araya* [2005] NSWCCA 283 at [96]; *R v Tadrosse* (2005) 65 NSWLR 740; *Golubovic v R* [2010] NSWCCA 39 at [23]. In such cases, general deterrence is an important factor in sentencing: *R v Pont* [2000] NSWCCA 419 at [43].

See discussion in **Fraud offences** at **[19-970]** and **[19-990]**.

Planning is referred to as an aggravating factor under s 21A(2)(n) (see **[11-190]**). The terms of s 21A(2)(n) conveys more than simply that the offence was planned: *Fahs v R* [2007] NSWCCA 26 at [21]. It is only when the particular offence is part of a more extensive criminal undertaking that [s 21A(2)(n)] is engaged": *Williams v R* [2010] NSWCCA 15, per McClellan CJ at CL at [20]. Where the offence was not planned it can be considered as a mitigating factor under s 21A(3)(b) (see **[11-220]**). This binary approach in s 21A to matters such as planning has been criticised on the basis that "[c]ategories of aggravating and mitigating factors are … not readily separable": *Einfeld v R* [2010] NSWCCA 87 at [72].

See further the application of s 21A(2)(n) and (3)(b) at **[11-190]** and **[11-220]** respectively.

[10-050] Degree of participation

Last reviewed: August 2023

Where more than one offender is involved in the commission of an offence, a consideration of sentencing is the degree of participation of the offender in the offence: *Lowe v The Queen* (1984) 154 CLR 606 per Gibbs CJ at 609; *R v Pastras* (unrep, 5/3/93, VSC). See also **Co-offenders with joint criminal liability** at **[10-807]**.

The application of this principle to robbery is discussed in **Robbery** at **[20-270]** and its application to drugs is discussed in **Drug Misuse and Trafficking Act 1985 (NSW) offences** at **[19-870]**.

An offender's criminal liability may be based on joint enterprise or extended joint enterprise or as an aider or abettor. For a discussion of the sentencing principles that are applied in the former category see A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", *Sentencing Trends and Issues*, No 38, Judicial Commission of NSW, 2009 and for a discussion of the latter category see "Sentencing in complicity cases — Abettors, accessories and other secondary participants (Part 2)", *Sentencing Trends and Issues*, No 39, Judicial Commission of NSW, 2010.

See also the discussion in **Robbery** at **[20-290]**.

[10-060] Breach of trust

Last reviewed: March 2024

Where an offence involves a breach of trust, the court regards it as a significant aggravating factor. For a breach of trust to exist there must be a special relationship

between the victim and offender at the time of offending: *Suleman v R* [2009] NSWCCA 70 at [26]. It is a common feature of many fraud and child sexual assault offences. In the most serious examples these offences are often associated with planning or premeditation and may also involve a course of criminality or periodic criminality that may extend over a lengthy period of time. Generally, persons who occupy a position of trust or authority can expect to be treated severely by the criminal law: *R v Overall* (unrep, 16/12/93, NSWCCA); *R v Hoerler* [2004] NSWCCA 184; *R v Martin* [2005] NSWCCA 190.

Breach of trust is an aggravating factor under s 21A(2)(k): see **Section 21A factors** at **[11-160]**.

The application of the principle to child sexual assault is discussed in **Sexual offences against children** at **[17-560]** and for fraud or dishonesty offences see "Breach of trust" in **Fraud offences** at **[19-970]**.

[10-070] Impact on the victim

Last reviewed: August 2023

At common law, the impact of an offence on the victim has always been taken into account. It is a matter relevant to assessing the objective seriousness of the offence. A sentencing judge is entitled to have regard to the harm done to the victim as a consequence of the commission of the crime: *Siganto v The Queen* (1998) 194 CLR 656 at [29]. The court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen, and the application of s 3A(g) ("harm done to the victim and community") and s 21A(2)(g) ("the injury, emotional harm, loss or damage caused by the offence is substantial") in a given case are limited by the common law rule: *Josefski v R* [2010] NSWCCA 41 at [38]. All other things being equal, the greater the harm, the more serious the circumstances of the offence. Care needs to be taken, however, that in giving consideration to the harmful consequences of an offence, the *De Simoni* principle is not infringed: *De Simoni v The Queen* (1981) 147 CLR 383.

Where there is sought to be established an impact more deleterious than generally anticipated from the circumstances of the offence (such as an aggravating circumstance) one would generally require evidence supporting that issue: *R v Solomon* [2005] NSWCCA 158 at [26]; *R v Youkhana* [2004] NSWCCA 412.

This common law factor is discussed further: **Victims and victim impact statements** at **[12-800]**; **Section 21A factors** at **[11-120]**, **[11-210]**; and **Robbery** at **[20-290]**.

Age of victim

Disparity in the offender and victim's ages may inform the assessment of the objective seriousness of the offence: *R v KNL* [2005] NSWCCA 260.

The younger the victim, the more serious the criminality: *R v BJW* [2000] NSWCCA 60 at [21]; *MLP v R* [2006] NSWCCA 271 at [22]; *R v PWH* (unrep, 20/2/92, NSWCCA). A child aged 13 years or under is virtually helpless in a family unit when abused by a step-parent, and all too often the child is afraid to inform on the step-parent: *R v BJW* per Sheller JA at [21].

[10-080] Possibility of summary disposal

Last reviewed: August 2023

In some circumstances the Supreme or District Court can take into account the fact that the offence or offences before the court could have been disposed of in the Local Court: *R v Palmer* [2005] NSWCCA 349 at [14]–[15]; *Bonwick v R* [2010] NSWCCA 177 at [43]–[45]; *Peiris v R* [2014] NSWCCA 58 at [85]. While it is a matter that may be relevant it is not always the case that a lost chance to be dealt with summarily will be a matter of mitigation: *R v Doan* (2000) 50 NSWLR 115 at [42].

In *Bonwick v R* at [45], the failure of the sentencing judge to refer to the Local Court limitation on sentence amounted to "an error justifying the intervention". The prescription of a standard non-parole period for an offence such as indecent assault does not displace the principle: *Bonwick v R* at [47].

In *Baines v R* [2016] NSWCCA 132 at [12], Basten JA expressed misgivings about the basis of the principle given that it only operates where the prosecutor has already elected to have the matter dealt with upon indictment, under s 260 *Criminal Procedure Act* 1986. Basten JA stated at [12]–[13]:

> [12] It is doubtful whether there is "a rule of law"; if there is, it should be applied, not "taken into account". However, what was meant was that there is a factor to be taken into account with varying significance in different contexts. Again, the particular nature of the significance is not articulated, except to suggest that it concerns the subjective circumstances of the offender.
>
> [13] To approach the matter on the basis of a presumptive fetter on the exercise of the court's sentencing discretion implies a power to review the exercise of prosecutorial discretion in the selection of jurisdiction. As noted in the joint reasons in *Magaming v The Queen* [(2013) 252 CLR 381 at [20]], "[i]t is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences." To which one might add, and in what court. The court should impose the appropriate sentence for the offence as proved, within the limits of the sentencing court's jurisdiction and discretion.

Other recent cases have narrowed or confined the application of the principle. A court can only take into account as a mitigating factor the possibility that an offence could have been disposed of summarily in "rare and exceptional" circumstances: *Zreika v R* [2012] NSWCCA 44 at [83]. It must be clear that the offence ought to, or would have, been prosecuted in the Local Court: *Zreika v R* at [83]. Johnson J said in *Zreika v R* at [109]:

> Unless [the Court of Criminal Appeal] is able to clearly determine that the offence in question, committed by the particular offender with his or her criminal history, ought to have remained in the Local Court, then the argument is theoretical at best. The bare theoretical possibility of the matter being dealt with in the Local Court does not suffice: *Wise v R* [2006] NSWCCA 264 at [31]; *R v Cage* [2006] NSWCCA 304 at [31]; *Edwards v R* at [47]; *McIntyre v R* [2009] NSWCCA 305 at [62]–[67].

An example is where the Crown withdraws an indictable offence following committal or where the offender is found not guilty of a purely indictable offence and the District Court is left with offences which — but for the serious offence — would have been dealt with in the Local Court: *Zreika v R* at [103]–[104] citing *McCullough v R* [2009] NSWCCA 94 at [22]–[23] and *R v El Masri* [2005] NSWCCA 167 at [30]; and see

Peiris v R at [4] where the offender was acquitted of an offence charged under s 61J *Crimes Act* 1900 but found guilty of two counts of indecent assault under s 61M *Crimes Act*.

The court should give consideration as to whether a reduced maximum penalty would apply in the Local Court: *McCullough v R* at [22]–[23]. See penalties set out for specific offences in s 268(2) *Criminal Procedure Act*. Section 268(1A) also provides for a general jurisdictional limit for the Local Court of two years imprisonment. The extent of the criminality is also an important consideration in having regard to the Local Court penalty: *Bonwick v R* at [43]. The principle does not apply if the offence is too serious to be dealt with in the Local Court even though the magistrate may technically have had jurisdiction: *R v Royal* [2003] NSWCCA 275 at [38]; *R v Hanslow* [2004] NSWCCA 163 at [21]. In *Peiris v R* at [84]–[85] after accepting that the principle applied, the judge had regard to the sentencing patterns and statistics of the Local Court for indecent assault. The court did not prohibit such an approach but held that the manner the statistics had been interpreted and used by the judge disclosed a material error: *Peiris v R* at [89].

Where the court takes the factor into account, the sentence to be imposed is not limited to the two-year jurisdictional limit of the Local Court and there is no obligation to indicate in any arithmetical sense how it affected the sentence imposed: *SM v R* [2016] NSWCCA 171 at [24], [27]; *R v Palmer* at [15(a)]. In *SM v R*, the court said at [26]:

> As explained in *Baines v R*, there has been little explanation in the caselaw as to precisely *how* the possibility that the matter could have been dealt with in the Local Court should be taken into account. If, as in the present case, the sentencing judge is satisfied that a term of imprisonment exceeding 2 years is required, the fact that the prosecutor might have taken a different view would not appear to be a relevant consideration.

However, in an appeal to the Court of Criminal Appeal against sentence, the court in *Zreika v R* held at [83] the fact that an offender's legal representative does not raise the issue in the District Court is "a very practical barometer as to whether such an argument was realistically available". In determining whether the factor was taken into account, although not explicitly mentioned, the experience of the judge is a relevant matter: *Hendra v R* [2013] NSWCCA 151 at [18].

In *Baines v R* [2016] NSWCCA 132, the court found the fact the charges could all have been dealt with in the Local Court was of no significance in circumstances where criminal liability was in issue. Liability in that case turned upon acceptance of the evidence of several female complainants and it was within the discretionary judgment of the Director of Public Prosecutions to elect that these issues be tried by jury: *Baines v R* at [133].

A failure of the sentencing judge to mention the matter does not constitute error: *R v Jammeh* [2004] NSWCCA 327 at [28] but see *Bonwick v R* at [45].

[10-085] Relevance of less punitive offences

Last reviewed: August 2023

There is no common law principle that a court is required to take into account, as a matter in mitigation, a lesser offence (with a lower maximum penalty) that the

prosecution could have proceeded upon: *Elias v The Queen* (2013) 248 CLR 483 at [5], [25]; *Pantazis v The Queen* [2012] VSCA 160 at [43] overruled. The so-called *Liang* principle (*R v Liang and Li* (unrep, 27/7/95, VCA), which permitted such a course, is said to be premised on the idea that the prosecution's selection of the charge should not constrain a court's sentencing discretion and require it to impose a heavier sentence than what is appropriate: *Elias v The Queen* at [26]. It is wrong to suggest that the court is constrained by the maximum penalty: *Elias v The Queen* at [27]. It is one of many factors that the sentencing court takes into account in the exercise of the sentencing discretion designed to attain individualised justice: *Elias v The Queen* at [27]. The *Liang* approach, of reducing a sentence for an offence to take account of a lesser maximum penalty for a different offence, "does not promote consistency" in sentencing for an offence and is inconsistent with the separation of the prosecutorial and judicial functions: *Elias v The Queen* at [29], [33], [34].

The holding in *Elias v The Queen* supports the view of the NSWCCA that a sentence imposed in the exercise of State judicial power on conviction for the State offence is not to be reduced to conform to a lesser maximum penalty applicable to a Commonwealth offence: *R v El Helou* [2010] NSWCCA 111 at [90]; *Standen v DPP (Cth)* [2011] NSWCCA 187 at [29].

[The next page is 5561]

Subjective matters

Subjective factors are personal to the offender and include the offender's age, health, background, and some post-offence conduct. They are relevant to sentencing purposes including punishment, personal deterrence, rehabilitation, and the protection of society: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; *Crimes (Sentencing Procedure) Act 1999*, s 3A. A range of subjective factors may also be relevant to the assessment of the offender's "moral culpability" for an offence.

[10-400] Assessing an offender's moral culpability

Last reviewed: August 2023

In *Muldrock v The Queen* (2011) 244 CLR 120 at [58], *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46], *Munda v Western Australia* (2013) 249 CLR 600 at [57] and *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477, the High Court separated the notion of an offender's moral culpability from the objective seriousness of the crime and, accordingly, in Court of Criminal Appeal cases decided after *Muldrock v The Queen*, an assessment of an offender's moral culpability has been treated as a distinct but important part of the sentencing exercise: *Tepania v R* [2018] NSWCCA 247 at [112]; *Paterson v R* [2021] NSWCCA 273 at [29]; *DS v R; DM v R* [2022] NSWCCA 156 at [77], [82]–[88].

In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477, *Muldrock v The Queen* (2011) 244 CLR 120 at [58] and *Bugmy v The Queen* (2013) 249 CLR 571 at [44]–[46], the High Court found that, in relation to the respective offender, their moral culpability was diminished, lessened or reduced by various subjective factors. In *DS v R; DM v R* [2022] NSWCCA 156 at [91], the court noted this raises the issue as to from what an offender's moral culpability is reduced, and "[t]he short answer is from a moral culpability that corresponds or substantially corresponds with the objective seriousness (or gravity) of the offence."

While an assessment of moral culpability is important, there is no requirement for a sentencing judge to use the phrase "moral culpability" provided it is clear they have considered all relevant matters going to sentence: *TA v R* [2023] NSWCCA 27 at [86]; see also *DS v R* [2022] NSWCCA 156 at [91]–[93].

The line between the assessment of the objective seriousness of the offence and the offender's moral culpability is not always straight-forward, with some subjective factors in some circumstances being relevant to both assessments: *DS v R* [2022] NSWCCA 156 at [94]–[96]. See also **The difficulty of compartmentalising sentencing considerations** at **[9-710]**; **Factors relevant to assessing objective seriousness** at **[10-012]**; and taking into account subjective features on sentence below, particularly, **Mental health or cognitive impairment** at **[10-460]**; **Deprived background** at **[10-470]**.

[10-405] Prior record

Last reviewed: August 2023

Section 21A(2)(d) Crimes (Sentencing Procedure) Act 1999 and the common law

Section 21A(2) (aggravating factors) *Crimes (Sentencing Procedure) Act 1999* provides:

> The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
>
> …
>
> (d) the offender has a record of previous convictions.

Section 21A(4) provides:

> The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

The Court of Criminal Appeal sat a bench of five in *R v McNaughton* (2006) 66 NSWLR 566 to settle how prior criminal record should be used against an offender in light of the common law and the terms of s 21A(2). The following sequential propositions can be extracted from the case with reference to the principle of proportionality:

1. The common law principle of proportionality requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *R v McNaughton* at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348 at 354.
2. Prior offending is *not* an "objective circumstance" for the purposes of the application of the proportionality principle: *R v McNaughton* at [25]; *Veen v The Queen (No 2)*; *Baumer v The Queen* (1988) 166 CLR 51. It is not open for a court to use prior convictions to determine the upper boundary of a proportionate sentence.
3. Prior convictions are pertinent to deciding where, within the boundary set by the objective circumstances, a sentence should lie: *R v McNaughton* at [26].
4. Prior record is not restricted only to an offender's claim for leniency: *R v McNaughton* at [20]; *Veen v The Queen (No 2)* at 477. As stated in *Veen v The Queen (No 2)* at 477, prior record is also relevant:

   > … to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

5. There is a difficulty with the reference in *Veen v The Queen (No 2)* to prior convictions "illuminating" the offender's "moral culpability": *R v McNaughton* at [26]. Taking into account in sentencing for an offence all aspects, both positive and negative, of an offender's known character and antecedents, is not to punish the offender again for those earlier matters: *R v McNaughton* at [28]. As Gleeson CJ, McHugh, Gummow and Hayne JJ explained in *Weininger v The Queen* (2003) 212 CLR 629 at [32]:

   > A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of

> which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

6. The aggravating factor of prior convictions under s 21A(2)(d) *Crimes (Sentencing Procedure) Act 1999* should be interpreted in a manner consistent with the proportionality principle in *Veen v The Queen (No 2)* at 477; *R v McNaughton* at [30]. Prior criminal record "cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence".

7. The reference to "aggravating factors" in s 21A(2) does not mean that s 21A(4) should be applied to deprive s 21A(2)(d) of any effect: *R v McNaughton* at [33]. The words "aggravating factors" in s 21A(2) should not be interpreted as if they were a reference only to "objective considerations". The aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law: *R v McNaughton* at [34]. Parliament has not used the word "aggravation" in its common law sense. The text of s 21A(1)(c) ("any other objective or subjective factor") and s 21A(2)(h) and (j) supports that interpretation. Thus, prior criminal record may be used in the manner set out in *Veen v The Queen (No 2)* at 477, as a subjective matter adverse to an offender via s 21A(2)(d). The statement by Howie J in *R v Wickham* [2004] NSWCCA 193 at [24], that "[o]n its face [s 21A(2)(d)] would indicate that a prior criminal record is a matter of aggravation by making the offence more serious", confines s 21A(2) to objective considerations and is therefore disapproved.

The court in *Hillier v DPP* (2009) 198 A Crim R 565 and *Van der Baan v R* [2012] NSWCCA 5 at [34] reiterated the above approach.

Requirement to state the precise manner prior record is taken into account under s 21A(2)(d)

It is incumbent upon the court to explain the manner in which the factor has been taken into account. A passing reference to s 21A(2)(d) is unsatisfactory: *R v Walker* [2005] NSWCCA 109 at [32]; *R v Tadrosse* (2005) 65 NSWLR 740 at [21]; *Doolan v R* (2006) 160 A Crim R 54 at [20]; *Adegoke v R* [2013] NSWCCA 193 at [35].

Undetected or ongoing criminal offending

If an offender has committed offences that had gone undetected and unpunished until current proceedings, or is being punished for a series of ongoing offences, the offender may have no record of prior convictions despite having committed numerous offences.

In *R v Smith* [2000] NSWCCA 140, a case which involved ongoing misappropriation of funds, the Court of Criminal Appeal said at [21]–[22]:

> [The offender] was not a first offender from the time he committed the second offence, only he had not been caught out. See also *R v Phelan* (1993) 66 A Crim R 446 at 448.

> In many respects the position may be compared with a sexual offender who commits a number of offences on young persons over a number of years where those offences go undetected for a long time. He cannot rely on the fact that he has no previous convictions when he comes to be sentenced for those offences. These offences are of a very different nature but, so far as relying on prior good character, it seems to me that similar considerations apply.

Gap in history of criminal offending

Where an offender's criminal record discloses a long "gap" in offending — a period in which no convictions have been recorded — this may provide a basis for inferring the offender has reasonable prospects of rehabilitation and may be unlikely to return to crime in the future: *Ryan v The Queen* (2001) 206 CLR 267 at 288. This assessment, however, still depends upon the circumstances of the individual case.

For example, in *R v Johnson* [2004] NSWCCA 76 at [29], the court held that, despite a gap in offending of over 10 years, the nature of the crimes committed both before and after the gap "could hardly inspire confidence concerning his rehabilitation or the unlikelihood of his returning to crime" and that leniency was plainly unwarranted.

There is also a distinction between taking into account in mitigation a period of no further convictions recorded from a certain point in time, and a positive finding there has not, as a matter of fact, been any offending since that time: *Richards v R* [2023] NSWCCA 107 at [83]. Noting *Richards v R* involved historical child sexual offending, if an offender seeks to be sentenced on the basis they have ceased offending from a particular time, this must be proved on the balance of probabilities and, if there is no evidence either way, the court may neither sentence on the basis offending has continued, nor ceased: *Richards v R* at [85].

Subsequent offending/later criminality

Offences in the offender's record which were committed after the date of the offence for which the offender stands for sentence may not be taken into account for the purposes of imposing a heavier sentence, but may be considered for the purposes of deciding whether the offender is deserving of leniency: *R v Hutchins* (1958) 75 WN (NSW) 75; *R v Kennedy* (unrep, 29/5/90, NSWCCA) at p 5, *R v Boney* (unrep, 22/7/91, NSWCCA); *Bingul v R* [2009] NSWCCA 239 at [69]. In *Charara v DPP* [2001] NSWCA 140 at [38], the court queried the logic of the reasoning in *R v Hutchins*:

> It is obvious that, even if taken into account only for the purpose of withholding leniency, offences committed after the offence for which sentence is imposed can result in increased punishment in the sense that the punishment is greater than it would have been in the absence of the later offences.

Charara v DPP was quoted with approval in *R v MAK* [2006] NSWCCA 381 at [58].

In *R v MAK*, the judge erred by treating as a mitigating factor the absence of any criminal record notwithstanding the commission of later sexual offences. The later offending illustrated that the conduct for which the offender stood for sentence was not an aberration but rather the start of a course of conduct: *R v MAK* at [60]. The later offending was relevant not by way of aggravating the offences but by depriving the offender of any leniency to which he might otherwise have been entitled by the fact that he had no criminal record at the time of the commission of the original offences:

R v MAK at [59]. The fact that the offender had no criminal record at the time was not considered to be a significant factor in the determination of the appropriate sentence. The court in *R v MAK* at [61] articulated the tension between the authorities as follows:

> We appreciate that less regard might be paid to later offending because at the time of the offence for which sentence is to be passed the offender has not been subject to the "formal condemnation of the law" or been given "the warning as to the future which the conviction experience implies"; see *[R v] McInerney* [(1986) 42 SASR 111] at 113 applied in *R v Bui* (2002) 137 A Crim R 220 at [27]. But in the circumstances of this case and given the seriousness of the conduct for which he was before Hidden J we do not think that the fact that MAK had not been convicted of sexual assault offences when he committed the offences against TW or TA was a basis for treating as a mitigating factor the absence of any criminal record.

Prior convictions subject of pending appeal

Prior convictions are to be taken into account even in circumstances where the convictions are the subject of a pending appeal on the basis that verdicts are not to be treated as provisional, pending their confirmation on appeal: *R v Sinanovic* [2000] NSWCCA 394 at [84].

Spent convictions

The *Criminal Records Act 1991* implements a "scheme to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history": s 3(1).

Where a conviction becomes spent (in most cases, after a period of 10 years without further convictions) the conviction ceases to form part of the offender's criminal record. For general purposes *other than in proceedings before a court*, an offender is not required to disclose spent convictions when questioned as to his or her criminal record: s 12.

Because s 12 does not apply to proceedings before courts (s 16), a court may have regard to a spent conviction, and the general rule that the conviction need not be disclosed does not apply.

A court must take reasonable steps to ensure an offender's privacy before admitting evidence of a spent conviction: s 16(2).

Section 10 bonds

The use of the phrase "record of previous convictions" in s 21A(2)(d) excludes s 10 orders under the Act: *R v Price* [2005] NSWCCA 285 at [36]. A s 10 order does not form part of an offender's record of previous convictions. If a s 10 order is to be taken into account it must be done by applying the specific common law principles in *Veen v The Queen (No 2)* in a limited way: *R v Price* at [38].

The absence of a prior record as a mitigating factor

Section 21A(3)(e) provides that a mitigating factor to be taken into account in determining the appropriate sentence for an offence includes the offender not having any record (or any significant record) of previous convictions. However, the provision or the common law on the subject does not apply where the special rule for child sexual assault offences in s 21A(5A) applies (see further below).

Proof of prior convictions

Prior convictions may be formally proved under the provisions of the *Evidence Act 1995*, s 178. It provides that a certificate may be issued by a judge, magistrate, registrar or other proper officer of the court detailing particular convictions and sentences. Such a certificate is proof not only of the conviction or sentence itself, but also evidence of "the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate": s 178(3).

Foreign convictions

Evidence of previous convictions in a foreign country may be taken into account in sentencing, even though the foreign procedures have not conformed to local trial methods: *R v Postiglione* (1991) 24 NSWLR 584 per Grove J at 590.

Federal offenders

A court sentencing a federal offender must take into account antecedents: s 16A(2)(m) *Crimes Act 1914* (Cth). See also *Weininger v The Queen* (2003) 212 CLR 629.

Child offenders

A distinction needs to be made between *recording* a conviction in respect of an offence committed by a juvenile and the *admission of evidence of prior offences,* where those offences were committed by a juvenile.

Recording a conviction

Section 14(1) *Children (Criminal Proceedings) Act 1987* deals with recording a conviction against a child. It provides that a court shall not, in respect of any offence, proceed to, or record, a conviction in relation to a child who is under the age of 16 years. However, in respect of an offence which is disposed of summarily, the court may either refuse to proceed or record a conviction in relation to a child who is of or above the age of 16 years.

Section 14(1) does not limit any power of a court to proceed to, or record, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily: s 14(2).

Admission of evidence of prior offences

Section 15 sets out the test for the admission of evidence of prior offences where those offences were committed when the offender was a child. It provides:

> (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:
>
> (a) a conviction was not recorded against the person in respect of the first mentioned offence, and
>
> (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
>
> (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.

(3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

In *R v Tapueluelu* [2006] NSWCCA 113 Simpson J (Grove and Howie JJ agreeing) said at [30]:

> s 15 is intended to protect a person who has remained crime free for a period of two years from suffering the admission of evidence of offences committed outside of that period, but once it is established that the crime-free period has not existed, then evidence of any other offences, whenever committed, does become admissible, or at least they are not subject to the prohibition otherwise contained in s 15. That is the only logical way of reading s 15.

Duty of Crown to furnish antecedents

The Crown has a duty to assist the court by furnishing appropriate and relevant material touching on sentence, including the offender's criminal antecedents report. This is a well recognised obligation and it is difficult to see how the sentencing process could be properly carried through without the Crown fulfilling it: *R v Gamble* [1983] 3 NSWLR 356 at 359.

[10-410] Good character

Last reviewed: March 2024

At common law, and now under s 21A(3)(f) *Crimes (Sentencing Procedure) Act 1999*, the good character of the offender is a matter that may be taken into account in mitigation of penalty.

Special rule for child sexual offences

An offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence: s 21A(5A). See **[17-570] Mitigating Factors**.

Circumstances where good character may carry less weight

There are also classes of offences where good character may carry less weight than others because they are frequently committed by persons of otherwise good character. For example, it has been held that less weight may be afforded to this factor in cases of:

- drug couriers: *R v Leroy* (1984) 2 NSWLR 441 at 446–447
- dangerous driving: *R v McIntyre* (1988) 38 A Crim R 135 at 139
- drink driving: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [118]–[119]

- child pornography offences: *R v Gent* [2005] NSWCCA 370 at [64]; and white-collar offences: *R v Gent* at [59]
- child sexual assault offences where s 21A(5A) does not apply on the facts. The common law position is set out in *R v PGM* [2008] NSWCCA 172 152 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

As to adding to the above list, it has been held that there is not a sufficient basis to add offences involving possession of prohibited firearms, but the court can consider the issue of weight in an individual case: *Athos v R* (2013) 83 NSWLR 224 at [44].

The category of offences in relation to which courts have said that less weight should be given on sentence to evidence of prior good character is not closed: *R v Gent* at [61].

Ryan v The Queen (2001) 206 CLR 267, a case involving a paedophile priest, is a leading case discussing good character. What was said there is now subject to the special rule in s 21A(5A) described above. McHugh J in *Ryan v The Queen* at [23] and [25] said that when considering the element of prior good character the court must distinguish two logically distinct stages:

1. It must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced.
2. If a prisoner is of otherwise good character, the sentencing judge is bound to take that fact into account.

The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case: *Ryan v The Queen* at [25].

The law on good character, including *Ryan v The Queen*, is comprehensively reviewed by Johnson J in *R v Gent* at [51]. The weight to be given to good character on sentence depends, to an extent, on the character of the offence committed: *R v Smith* (1982) 7 A Crim R 437 at 442; *Ryan v The Queen* at [143].

In *R v Kennedy* [2000] NSWCCA 527 at [21]–[22] and later *Jung v R* [2017] NSWCCA 24, it was held that little or no weight may be attributed to an offender's prior good character where:

- general deterrence is important and the particular offence before the court is serious and one frequently committed by persons of good character;
- the prior good character of the offender has enabled the offender to gain a position where the particular offence can be committed. In *Jung v R*, the offender's good character prior to the offences he committed against his clients was of no real assistance to him: *Jung v R* at [56]. Good character was a precondition to his registration as a physiotherapist. The offender's position provided him access to patients and gave him the opportunity to offend: *Jung v R* at [57]–[58];
- there is a pattern of repeat offending over a significant period of time.

The otherwise good character of the offender is only one of a number of matters the court must consider and the nature and circumstances of the offence is of utmost importance: *R v Gent* at [53].

Where a person has been convicted of an offence or offences to which he or she has expressly admitted being "representative", or where there is uncontested evidence supporting such a proposition, the offender should not be given credit for being of prior good character: *R v JCW* [2000] NSWCCA 209, considered in *R v Weininger* [2000] NSWCCA 501 at [51]–[56].

The good reputation of the offender sometimes occurs only because the offences are committed in secret and the offences themselves are seldom committed "out of character" because they are premeditated: *R v Levi* (unrep, 15/5/97, NSWCCA). Gleeson CJ, however, added the following observation:

> there is a certain ambiguity about the expression "good character" in a context such as the present. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.

This was referred to in the judgment of McHugh J in *Ryan v The Queen* at [27] and again in *R v Gent* at [49].

[10-420] Contrition

Last reviewed: May 2023

In *Alvares v R* [2011] NSWCCA 33 at [44], Buddin J said:

> Remorse in [a sentencing] context means regret for the wrongdoing which the offender's actions have caused because it can be safely assumed that an offender will always regret the fact that he or she has been apprehended. Remorse is but one feature of post-offence conduct upon which an offender may seek to rely as a matter which has the potential to mitigate penalty. The manner in which the issue of remorse is approached is not unique to either the sentencing process or to the courtroom. Indeed, it is a common feature of everyday existence. Ordinary human experience would suggest that it is only natural that a person who has committed some misdeed would wish to make the most favourable impression possible in seeking to make amends for it.

In *Roff v R* [2017] NSWCCA 208 at [25], the court held:

> An offender who is found to be remorseful, in the particular way required by s 21A(3)(i), is entitled to the benefit of that finding in mitigation, and if other things are equal, may anticipate a lesser sentence than a co-offender who has not been found to be remorseful. Thus the absence of remorse may *explain* why a heavier sentence was imposed upon the co-offender, insofar as it has the consequence that the offender has not been able to establish the mitigating factor of remorse. However, as was common ground on appeal, regard may not be had to the absence of remorse in *imposing* a heavier sentence.

The preferable course is not to quantify a discount for remorse, see **Section 21A(3)(i) — remorse shown by the offender** at **[11-290]**.

The extent to which leniency will be afforded on the ground of contrition will depend to a large degree upon whether or not the plea resulted from a recognition of the inevitable: *R v Winchester* (1992) 58 A Crim R 345. The strength of the Crown case is relevant to the question of remorse: *R v Sutton* [2004] NSWCCA 225 at [12].

The value of a plea of guilty as evidence of contrition is not reduced as a consequence of the Crown case being strengthened by the offender's assistance to authorities. An offender who takes the course of admitting guilt at an early stage should not, because of that, lose the benefit of a subsequent plea of guilty: *R v Hameed* [2001] NSWCCA 287 at [4]–[6].

In addition to remorse, a plea of guilty may indicate acceptance of responsibility and a willingness to facilitate the course of justice: *Cameron v The Queen* (2002) 209 CLR 339. A failure to show remorse is not a justification for increasing the sentence. An offender's reluctance to identify his co-offenders in a drug case was not an indication of an absence of remorse because of the well-known reasons why such offenders might be reluctant: *Pham v R* [2010] NSWCCA 208 at [27].

See further **Ameliorative conduct or voluntary rectification** at **[10-560]**; **Section 21A(3)(i) — remorse shown by offender** at **[11-290]**; principle 5 in relation to discount and remorse in **The R v Borkowski principles** at **[11-520]**; and **General sentencing principles applicable to** sentencing Commonwealth offenders at **[16-010]**.

[10-430] Advanced age

Last reviewed: November 2023

At common law an offender's age is a relevant subjective consideration at sentence: *R v Yates* (1984) 13 A Crim R 319 at 328; [1985] VR 41 at 50. There is also a statutory basis for taking age into account as a mitigating factor at sentence under s 21A(3)(j) *Crimes (Sentencing Procedure) Act 1999*, where "the offender was not fully aware of the consequences of his or her actions" because of the offender's age. Section 16A(2)(m) *Crimes Act 1914* (Cth) requires the court to take into account age for Commonwealth offenders. However, as in the case of other subjective considerations, the court must nevertheless impose a sentence which reflects the objective seriousness of the offence: *R v Gallagher* (unrep, 29/9/95, NSWCCA); *R v McLean* [2001] NSWCCA 58 at [44]; *R v Knight* [2004] NSWCCA 145 at [33]; *Des Rosiers v R* [2006] NSWCCA 16 at [32].

Advanced age may affect the type or length of penalty to be imposed, and may be relevant in combination with other factors at sentence such as health. Age and health are "relevant to the length of any sentence but usually of themselves would not lead to a gaol sentence not being imposed if it were otherwise warranted": *R v Sopher* (1993) 70 A Crim R 570 at 573. See further **Health** at **[10-450]**. Age is not a licence to commit an offence: *R v Holyoak* (1995) 82 A Crim R 502 at 507, following *R v DCM* (unrep, 26/10/93, NSWCCA).

The extent of any mitigation that results from advanced age will depend on the circumstances of the case, including the offender's life expectancy and any treatment needed: *R v Sopher* at 573. Where "serving a term of imprisonment will be more than usually onerous", age may entitle the offender to some discount on sentence: *R v Mammone* [2006] NSWCCA 138 at [45]; *R v Sopher* at 574.

The relevant principles to be applied were accurately summarised in *Gulyas v Western Australia* [2007] WASCA 263 at [54]: *Liu v R* [2023] NSWCCA 30 at [39]. They are nuanced and not capable of mechanical operation, and accordingly, age as a mitigating factor does not necessarily have a demonstrable effect upon each component

of the sentence imposed: *Liu v R* at [40], [47]. In that case, it was permissible for the sentencing judge to have regard to advanced age as a special circumstance which had a real and tangible effect upon the minimum time to be served and avoided double counting in the offender's favour: at [47]–[48].

Proportionality or balance remains a guiding principle. Undue emphasis cannot be placed "on the subjective factor of an offender's age, at the expense of other objective and subjective factors": *Des Rosiers v R* at [32]. The court in *R v Sopher* stated at 573:

> An appropriate balance has to be maintained between the criminality of the conduct in question and any damage to health or shortening of life.

A court cannot overlook that each year of a sentence of imprisonment may represent a substantial proportion of an offender's remaining life: *R v Hunter* (1984) 36 SASR 101 at 104. However, the sentence may unavoidably extend for all or most of the offender's life expectancy in order to reflect the objective seriousness of the offence: *Goebel-McGregor v R* [2006] NSWCCA 390 at [128]; see also *R v Walsh* [2009] NSWSC 764 at [43]. Adherence to the principle of proportionality may have the practical effect of imposing a "de facto" life sentence on a person of advanced age: *Barton v R* [2009] NSWCCA 164 at [22]. In *R v Holyoak*, Allen J stated at 507:

> It simply is not the law that it never can be appropriate to impose a minimum term which will have the effect, because of the advanced aged [sic] of the offender, that he well may spend the whole of his remaining life in custody.

A sentence should not be "crushing" in the sense that it "connotes the destruction of any reasonable expectation of useful life after release": *R v Yates* (1984) 13 A Crim R 319 at 326; [1985] VR 41 at 48; *R v MAK* [2006] NSWCCA 381; also see **Imposition of a crushing sentence** at **[8-220] Totality and sentences of imprisonment**. Notwithstanding, age is but one consideration and cannot justify the imposition of an erroneously lenient sentence: *Geraghty v R* [2023] NSWCCA 47 at [116].

[10-440] Youth

Last reviewed: November 2023

Specific provisions apply when sentencing a young offender (defined as a person under the age of 18): see **[15-000]**ff **Children (Criminal Proceedings) Act 1987** including **[15-010] Guiding Principles** and **[15-090] Sentencing principles applicable to children dealt with at law**.

An offender's youth is a recognised mitigating factor and, generally, the younger the offender, the greater the weight it should be given: *R v Hearne* [2001] NSWCCA 37 at [27]; *KT v R* [2008] NSWCCA 51 at [22]. However, the relevance of youth does not solely depend upon the offender's biological age: *MW v R* [2010] NSWCCA 324 at [51]; *R v Hearne*, above, at [28]. It may also concern a young adult offender's cognitive, emotional and/or psychological immaturity: *Miller v R* [2015] NSWCCA 86 at [97]–[98]. However, a 27-year-old offender is less likely to be regarded as a young person in the sense contemplated by the authorities: *R v Mastronardi* [2000] NSWCCA 12 at [20]. See also **Section 21A(3)(j) — the offender was not fully aware**

of the consequences of his or her actions because of the offender's age or any disability at **[11-300]** and **Section 21A(3)(h) — the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise** at **[11-280]**.

An offender's youth does not generally impact upon the assessment of the offence's objective seriousness but may impact upon the assessment of the offender's moral culpability: *IE v R* [2008] NSWCCA 70 at [19]–[21]; *TM v R* [2023] NSWCCA 185 at [66]; see also **Factors relevant to assessing objective seriousness** at **[10-012]**.

Sentencing principles for young offenders emphasise that rehabilitation is generally to take precedence over other sentencing factors: s 6 *Children (Criminal Proceedings) Act 1987*; *Miller v R*, above, at [96]; *Campbell v R* [2018] NSWCCA 87 at [23]. In *KT v R*, above, at [22]ff, McClellan CJ at CL collected the leading cases on the relevance of youth at sentence:

> The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation. These principles were considered in *R v GDP* (1991) 53 A Crim R 112 at 115–116 (NSWCCA), *R v E (a child)* (1993) 66 A Crim R 14 at 28 (WACCA) and *R v Adamson* [2002] NSWCCA 349 at [30].
>
> The law recognises the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law. Accordingly, allowance will be made for an offender's youth and not just their biological age (*R v Hearne* [2001] NSWCCA 37 at [25]). The weight to be given to the fact of the offender's youth does not vary depending upon the seriousness of the offence (*Hearne* at [24]). Where the immaturity of the offender is a significant factor in the commission of the offence, the criminality involved will be less than if the same offence was committed by an adult (*Hearne* at [25]; *MS2 v The Queen* … [2005] NSWCCA 397 at [61]).
>
> …
>
> The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity (*R v Bus* (unreported, Court of Criminal Appeal, NSW, No 60074 of 1995, 3 November 1995); *R v Tran* [1999] NSWCCA 109 at [9]–[10]; *R v TJP* [1999] NSWCCA 408 at [23]; *R v LC* [2001] NSWCCA 175 at [48]; *R v AEM* [2002] NSWCCA 58 at [96]–[98]; *R v Adamson* (2002) 132 A Crim R 511 at [31]; *R v Voss* [2003] NSWCCA 182 at [16]). In determining whether a young offender has engaged in "adult behaviour" (*Voss* at [14]), the court will look to various matters including the use of weapons, planning or pre-meditation, the existence of an extensive criminal history and the nature and circumstances of the offence (*Adamson* at [31]–[32]). Where some or all of these factors are present the need for rehabilitation of the offender may be diminished by the need to protect society.
>
> The weight to be given to considerations relevant to a person's youth diminishes the closer the offender approaches the age of maturity (*R v Hoang* [2003] NSWCCA 380 at [45]). A "child-offender" of almost eighteen years of age cannot expect to be treated substantially differently from an offender who is just over eighteen years of age (*R v Bus*; *R v Voss* at [15]). However, the younger the offender, the greater the weight to be afforded to the element of youth (*Hearne* at [27]).

As noted above, the emphasis given to rehabilitation rather than general deterrence may be moderated where the offender has engaged in "adult behaviour" and the offending was serious: *IS v R* [2017] NSWCCA 116 at [89]; *MJ v R* [2010] NSWCCA 52 at [37]–[39]; *KT v R* [2008] NSWCCA 51 at [25]. Further, in *IE v R* [2008] NSWCCA 70, the Court held the greater the objective gravity of an offence, the less likely it is that retribution and general deterrence will cede to the interests of rehabilitation: at [16]. The comments in *IE v R* have been cited with approval in *R v Sharrouf* [2023] NSWCCA 137 at [270] (Wilson J) and *IM v R* [2019] NSWCCA 107 at [55] (Meagher JA, RA Hulme and Button JJ agreeing).

In *TM v R* [2023] NSWCCA 185 at [49], Yehia J stated at [49]:

> The qualification to the principles concerning young persons where they conduct themselves in an "adult like manner" should be applied with some caution. While in some cases, significant planning, or other indicia of mature decision-making, may result in a diminution of the relevant principles, the gravity of an offence does not, by itself, demonstrate "adult like" behaviour. The assessment must be one of maturity and conduct, not only the degree of violence.

See also *YS v R* [2010] NSWCCA 98 at [22]; *MW v R* [2010] NSWCCA 324 at [51].

In *TM v R*, above, the offender, a 15-year-old child, with a group of 10 young men, punched and stomped on a 17-year-old victim, while stealing his hat and jacket, resulting in significant injuries to the victim. The Court found, while the conduct was serious, it had all the hallmarks of youth: immaturity, poor self-regulation, and a tendency to go along with a group: at [47]. In *Howard v R* [2019] NSWCCA 109, the offender, who had just turned 18, threw a Molotov cocktail during a street brawl and Fullerton J (with Macfarlan JA agreeing) found the decision to do so, "although extremely serious, was nonetheless eloquent of his limited emotional maturity and a less than fully developed capacity to control impulsive behaviour": at [11].

By contrast, in *JT v R* [2011] NSWCCA 128, where the child offender and another bashed a 14-year-old into insensibility during a prolonged attack, the Court found this did not reflect "impulsivity and immaturity on the part of the applicant … [and] … this is the very sort of offence that McClellan CJ at CL had in mind when qualifying his initial statement of principle in paras [24] and [25] of *KT v Regina*": at [34]. Similarly, youth was not a significant mitigatory factor for the 20-year-old offender in *R v Sharrouf* [2023] NSWCCA 137 because the Court considered that 24 serious domestic violence offences committed over a protracted period was adult-like behaviour: at [213] (Price J with Wilson J agreeing).

For a discussion of youth in respect of particular offences, see **Mitigating factors** at **[18-380] Dangerous driving and navigation**; **Subjective factors commonly relevant to robbery** at **[20-300] Robbery** and **Mitigating circumstances** at **[20-770] Sexual assault**. For a discussion of the application of the parity principle where co-offenders are different ages, see **Juvenile and adult co-offenders** at **[10-820] Parity**.

When imposing a term of imprisonment, youth may be factor in finding special circumstances to depart from the statutory non-parole period ratio: *Crimes (Sentencing Procedure) Act 1999*, s 44(2B); see also **What constitutes special circumstances?** at **[7-514] Setting terms of imprisonment**.

[10-450] Health

Last reviewed: May 2023

There are numerous ways in which the intellectual or physical condition of an offender may have an impact on the sentencing process. It has long been the practice of the courts to take into account circumstances which make imprisonment more burdensome for offenders, including considerations pertaining to an offender's health: *R v Bailey* (1988) 35 A Crim R 458 per Lee J, applying *R v Smith* (1987) 44 SASR 587, per King CJ; *Bailey v DPP* [1988] HCA 19. It is only in relatively rare cases that the *Smith* principle is applicable: *R v Badanjak* [2004] NSWCCA 395 at [11]. Relevant factors set out in *R v Vachalec* [1981] 1 NSWLR 351 at 353 include:

- the need for medical treatment
- hardship in prison
- the likelihood of an offender's reasonable needs being met while imprisoned.

Ill-health cannot be allowed to become a licence to commit crime, nor should offenders expect to escape punishment because of the condition of their health. It is the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners and the court will not interfere: *R v Vachalec* per Street CJ; cited with approval in *R v Achurch* [2011] NSWCCA 186 at [135].

Generally, ill-health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his or her state of health, or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health: *R v Smith*, per King CJ at 317; *Bailey v DPP*; *R v Badanjak* at [9]–[11]; *R v Achurch* at [118]; *Pfeiffer v R* [2009] NSWCCA 145; *R v L* (unrep, 17/6/96, NSWCCA).

Serious injuries suffered by an offender as a consequence of a motor vehicle accident, for which he or she is responsible are included: *R v Wright* [2013] NSWCCA 82 at [60]. An offender's condition need not be as serious as identified in *R v Smith* or even life threatening: *R v Miranda* [2002] NSWCCA 89. For example, in *R v Miranda* at [38], the offender had been suffering from bowel cancer. The court found that the inevitable rigidity of the prison system, the need to deal with bowel movements and the extreme embarrassment to the offender on a constant basis, would make the offender's life very difficult.

In *R v Higgins* [2002] NSWCCA 407, the applicant suffered from the HIV virus. The court held that the criminal system could not give priority to the applicant's health and must tailor the sentence with an eye to the overriding concern of the welfare and protection of the community generally, as far as common humanity will allow: per Howie J at [32].

Physical disability and chronic illness

As well as the risks associated with an offender's medical condition, the realities of prison life should not be overlooked: *R v Burrell* [2000] NSWCCA 26 at [27]. This does not necessarily mean that a prison sentence should not be imposed, or that the sentence should be less than the circumstances of the case would otherwise require: *R v L* (unrep, 17/6/96, NSWCCA).

Special circumstances

Serious physical disabilities or poor health rendering imprisonment more burdensome to the offender than for the average prisoner has been held to establish special circumstances warranting a longer period on parole: *R v Sellen* (1991) 57 A Crim R 313.

For commentary regarding foetal alcohol spectrum disorder, see **[10-460] Mental health or cognitive impairment** below.

[10-460] Mental health or cognitive impairment

Last reviewed: November 2023

Note: The language used in the common law to describe a mental health impairment, cognitive impairment or mental illness for the purposes of sentencing has, over time, developed. The *Crimes (Sentencing Procedure) Act 1999* does not provide or define terminology in this respect. Although not strictly relevant to sentencing, ss 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* contain definitions of "mental health impairment" and "cognitive impairment", respectively, and ss 4(1) and 14 of the *Mental Health Act 2007* contain definitions of "mental illness" and "mentally ill persons", respectively. These may provide some guidance in the use of appropriate terminology in the context of sentencing.

The fact that an offender has "a mental illness, intellectual handicap or other mental problems" may be taken into account at sentencing: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *R v Verdins* [2007] VSCA 102 at [32] cited.

An offender's mental condition can have the effect of reducing a person's moral culpability and matters such as general deterrence, retribution and denunciation have less weight: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]; *R v Israil* [2002] NSWCCA 255 at [23]; *R v Henry* (1999) 46 NSWLR 346 at 354. This is especially so where the mental condition contributes to the commission of the offence in a material way: *DPP (Cth) v De La Rosa* at [177]; *Skelton v R* [2015] NSWCCA 320 at [141].

The High Court explained the rationale for the principle in *Muldrock v The Queen* at [53]:

> One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, [in *R v Mooney* in a passage that has been frequently cited, said this [(unrep, 21/6/78, Vic CCA) at p 5]:
>
> > "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others."

The High Court continued at [54]:

> The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community. [Footnotes excluded.]

Sentencing an offender who suffers from a mental disorder commonly calls for a "sensitive discretionary decision": *R v Engert* (1995) 84 A Crim R 67 at 67. This involves the application of the particular facts and circumstances of the case to the purposes of criminal punishment set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 488. The purposes overlap and often point in different directions. It is therefore erroneous in principle to approach sentencing, as Gleeson CJ put it in *R v Engert* at 68:

> as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

See *Amante v R* [2020] NSWCCA 34 for a "classic example" of the scenario presented by Gleeson CJ in *R v Engert*: *Amante v R* at [85].

In some "few and confined" circumstances an offender's mental condition may also be relevant to assessing the objective seriousness of the offence: *Lawrence v R* [2023] NSWCCA 110 at [75]. In *DS v R* [2022] NSWCCA 156 at at [96]. See also "Mental health or cognitive impairment and objective seriousness" in **Factors relevant to assessing objective seriousness** at **[10-012]**.

Intermediate appellate court consideration

In *DPP (Cth) v De La Rosa*, McClellan CJ at CL summarised at [177] the principles developed by courts to be applied when sentencing an offender who is suffering from "a mental illness, intellectual handicap or other mental problems" (case references omitted):

- Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced with a reduction in the sentence.
- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed.
- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person, the length of the prison term or the conditions under which it is served may be reduced.
- It may reduce or eliminate the significance of specific deterrence.
- Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence… Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public.

McClellan CJ at CL further stated at [178]:

> … the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest severity it may nevertheless be appropriate to moderate the need for general or specific deterrence.

The principles in *DPP (Cth) v De La Rosa* have been "often-cited" and applied: *Wornes v R* [2022] NSWCCA 184 at [25]; see also *R v SS (a pseudonym)* [2022] NSWCCA

258; *Biddle v R* [2017] NSWCCA 128 at [89]–[90]; *Laspina v R* [2016] NSWCCA 181 at [39]; *Aslan v R* [2014] NSWCCA 114 at [33] and *Jeffree v R* [2017] NSWCCA 72 at [30]. However, the above principles are not absolute in their terms and there is no presumption as to their application. They merely direct attention to considerations that experience has shown commonly arise in such cases: *Choy v R* [2023] NSWCCA 23 at [74]; *Alkanaan v R* [2017] NSWCCA 56 at [108].

Where a principle does apply, it remains a matter for the judge to make a discretionary evaluation as to the extent of its significance: *Blake v R* [2021] NSWCCA 258 at [42]. In *Blake v R*, the court held it was open for the sentencing judge, in sentencing the offender for serious offences of violence against his ex-partner and her new partner including specially aggravated enter dwelling, to find that general deterrence remained important, albeit diminished "to some extent", and the offender's moral culpability "reduced somewhat", as a result of the offender's major depressive illness: [44]. The sentencing judge must examine the facts of the specific case to determine whether the mental condition has an impact on the sentencing process: *Aslan v R* at [34]; *Jeffree v R* at [31].

It should not be assumed that all the mental conditions recognised by the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington DC, attract the sentencing principle that less weight is given to general deterrence: *R v Lawrence* [2005] NSWCCA 91. Some conditions do not attract the principle. Spigelman CJ cited literature on the limitations of *DSM (IV)* at [23] and said at [24]:

> Weight will need to be given to the protection of the public in any such case. Indeed, one would have thought that element would be of particular weight in the case of a person who is said to have what a psychiatrist may classify as an Antisocial Personality Disorder.

Note: *Diagnostic and Statistical Manual of Mental Disorders DSM-5*, 5th edn, (Text Revision DSM-5-TR, 2022) is now available.

Heeding Spigelman CJ's point, in *Anderson v R* [2022] NSWCCA 187, the court held uncritical reliance should not be placed upon DSM-labelled conditions for any of the sentencing considerations that may be engaged in cases of mental disorder as identified in *DPP v De La Rosa*: at [35]. In *Anderson v R*, a psychologist reported the offender likely had borderline intellectual function, and the court held Spigelman CJ's caution is still more important as the DSM-5 refers to this as a subject of clinical focus and does not purport to recognise a mental disorder of that name: at [33]–[34].

However, in *Wornes v R*, the court held that the sentencing judge erred by failing to take the offender's personality disorder, with a history of hallucination and "schizoid" symptoms, into account: at [30], [32]–[33]. The judge's opinion a personality disorder ought not attract the principles in *DPP (Cth) v De La Rosa* as a matter of law constituted a significant departure from orthodoxy: *Wornes v R* at [26], [29]–[30], citing *Brown v R* [2020] VSCA 212 at [26].

A causal relationship between the mental disorder or abnormality and the commission of the offence will not always result in a reduced sentence. In *R v Engert* (1996) 84 A Crim R 67, Gleeson CJ said at 71:

> The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the

> absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case. For example, the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or of the need to protect the public.

See also *DS v R* [2022] NSWCCA 156 at [95]. Further, for such a causal connection to have a bearing on the sentence it need not be the direct or precipitating cause of offending: *Moiler v R* [2021] NSWCCA 73 at [59].

Another factor that may be relevant is whether there is a serious risk that imprisonment will have a significant adverse effect on the offender's mental health: *R v Verdins* [2007] VSCA 102 at [32]; *Courtney v R* [2007] NSWCCA 195 at [14]–[15].

It is often the case that childhood social deprivation causes mental disorders but not always and usually not wholly, so it is important not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [130]–[131]. In *Williams v R*, the combination of the offender's psychiatric disorders and his childhood exposure to trauma and violence caused him to normalise the violence used in the commission of the offence (robbery), such that each factor deserved consideration in the sentencing process: at [132]–[133]. See also **[10-470] Deprived background**, below.

Crimes (Sentencing Procedure) Act 1999

Section 21A(3)(j) also refers to an offender not being aware of the consequences of their actions because of a disability, as a mitigating factor. Whatever it may mean, the terms of s 21A(3)(j) are restricted to the common law on the subject. See discussion of **Section 21A factors "in addition to" any Act or rule of law** at **[11-300]**.

Offender acts with knowledge of what they are doing

The moderation of general deterrence when sentencing an offender with a mental disorder need not be great if they act with knowledge of what they are doing and with knowledge of the gravity of their actions. In *R v Wright* (1997) 93 A Crim R 48, the applicant's psychotic state was self-induced by a failure to take medication and a deliberate or reckless taking of drugs. Hunt CJ at CL stated at 52:

> by his recklessness in bringing on these psychotic episodes, [the applicant] is a continuing danger to the community, a matter which would in any event reduce — if not eradicate — the mitigation which would otherwise be given for the respondent's mental condition.

R v Wright was referred to in passing by the High Court in *Muldrock* (at fn 68). *Wright* has been applied in a number of cases including *R v SS* at [95]; *Wang v R* [2021] NSWCCA 282 at [98]; *Blake v R* at [43]–[44]; *R v Burnett* [2011] NSWCCA 276; *Cole v R* [2010] NSWCCA 227 at [71]–[73]; *Benitez v R* [2006] NSWCCA 21 at [41]–[42]; *Taylor v R* [2006] NSWCCA 7 at [30]; *R v Mitchell* [1999] NSWCCA 120 at [42]–[45]; *R v Hilder* (1997) 97 A Crim R 70 at 84.

In *Kapua v R* [2023] NSWCCA 14, the court held it was open for the sentencing judge to find the offender's post-traumatic stress disorder with psychotic features did not reduce her moral culpability because the offending, which involved significant fraud, required "planning, coordination and persistence" and was motivated (in part) to fund a drug habit: at [112]–[113].

However, in *Skelton v R* [2015] NSWCCA 320 at [138]–[139], the sentencing judge erred in concluding the extent of the reduction in the offender's moral culpability was "not as great as might have been available if [he] did not fully appreciate his actions were wrong" following the jury's rejection of the defence of mental illness. The court found the jury's verdict left open the possibility the offender was impaired to some degree and the judge's conclusion that the impairment was "not great at all, or even significant" was contrary to the expert evidence: *Skelton v R* at [138]ff.

Relevance to rehabilitation

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ said at 71:

> there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system.

In *Benitez v R* [2006] NSWCCA 21 the judge erred by finding that, although the applicant had good prospects of rehabilitation, his mental condition was not a mitigating factor because it was not the cause of the commission of the offence. It is not necessary to show that it was the cause, or even a cause, of the commission of the crime: *Benitez v R* at [36], referred to in *R v Smart* [2013] NSWCCA 37 at [26], [30].

Protection of society and dangerousness

In *Veen v The Queen (No 2)* (1988) 164 CLR 465, the majority said at 476:

> a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ explained the problem that confronted the High Court in *Veen v The Queen (No 2)*. His Honour stated at 68:

> in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

R v Whitehead (unrep, 15/6/93, NSWCCA) is an example of an application of the principle. Gleeson CJ stated that it would be incongruous to treat sexual sadism as a mitigating factor in sentencing for malicious wounding, explaining:

> One reason for this is that the very condition that diminishes the offender's capacity for self-control at the same time increases the need for protection of the public referred to by the High Court in the case of *Veen v The Queen (No 2)* …

Similarly, in *R v Adams* [2002] NSWCCA 448, a case where the offender had a fascination with knives and suffered from a severe personality disorder of an antisocial type, the court held that there was a "compelling need to have regard to the protection of the community". See *Cole v R* [2010] NSWCCA 227 at [73]–[75].

However, a consideration of the danger to society cannot lead to a heavier sentence than would be appropriate if the offender had not been suffering from a mental abnormality: *Veen v The Queen (No 2)* at 477; *R v Scognamiglio* (1991) 56 A Crim R 81 at 85. In *Veen v The Queen (No 2)*, the High Court put the principle in these terms at 473:

> It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible.

Fact finding for dangerousness and risk of re-offending

It is accepted that an assessment of an offender's risk of re-offending where a lengthy sentence is imposed is necessarily imprecise: *Beldon v R* [2012] NSWCCA 194 at [53]. In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [12]:

> No doubt, predictions of future danger may be unreliable, but, as the case of *Veen* shows, they may also be right. Common law sentencing principles … permit or require such predictions at the time of sentencing, which will often be many years before possible release.

Kirby J discussed the issue in *Fardon v Attorney General for the State of Queensland* at [124]–[125].

Findings as to future dangerousness and likelihood of re-offending do not need to be established beyond reasonable doubt: *R v SLD* (2003) 58 NSWLR 589. The court stated at [40]:

> A sentencing judge is not bound to disregard the risk that a prisoner would pose for society in the future if he was at liberty merely because he or she cannot find on the criminal onus that the prisoner would re-offend. The view that the risk of future criminality can only be determined on the criminal standard is contrary to all the High Court decisions since *Veen (No 1)*.

R v SLD was approved in *R v McNamara* [2004] NSWCCA 42 at [23]–[30] and earlier, in *R v Harrison* (1997) 93 A Crim R 314 at 319, the court held that a sentencing judge is not required to be satisfied beyond reasonable doubt that an offender will in fact re-offend in the future. It is sufficient, for the purpose of considering the protection of the community, if a risk of re-offending is established by the Crown: *Beldon v R* at [53].

Provisional sentencing for murder is now available for an offender aged 16 years or less at the time of the offence as was the case in *R v SLD* and also *Elliott v The Queen* (2007) 234 CLR 38 at [1]. See further at **[30-025]**.

For a discussion of limiting terms see **Limiting terms** at **[90-040]**.

Foetal alcohol spectrum disorder

In *LCM v State of Western Australia* [2016] WASCA 164, the Western Australian Court of Appeal considered the medical condition of foetal alcohol spectrum disorder

(FASD) and how its relevance in sentencing proceedings. FASD is a mental impairment and as such engaged sentencing principles relating to an offender's mental condition: *LCM v State of Western Australia* at [121]. The case contains a comprehensive discussion of Australian and overseas cases and literature. Mazza JA and Beech J at [123] (Martin CJ agreeing at [1] with additional observations at [2]–[25]) cautioned against the use of generalisations about FASD:

> By its nature, and as its name indicates, FASD involves a spectrum of disorders. The particular disorder of an individual with FASD may be severe, it may be minor. FASD may lead to a varying number of deficits of varying intensity. Thus blanket propositions about how a diagnosis of FASD bears on the sentencing process should be avoided. Rather, attention must be directed to the details of the particular diagnosis of FASD, including the nature and extent of the specific disabilities and deficits, and how they bear upon the considerations relevant to sentence.

See also *R v MBQ; ex parte Attorney-General (Qld)* [2012] QCA 202.

In *Eden v R* [2023] NSWCCA 31, evidence of the offender's FASD was sought to be relied upon on the sentence appeal when such evidence was not before the sentencing judge. The report was not admitted on appeal and the court held the offender's FASD was one factor, amongst others, that affected the offender's decision making, and that affixing a label to an offender's condition does not automatically find expression in sentence: *Eden v R* at [37] citing *Anderson v R* at [33]–[35]. If there was a causal connection between the impairment as a result of the offender's FASD and the offence, the nature of the impairment, the nature and circumstances of the offence, and the degree of connection between them, must be considered in the assessment of the offence's objective gravity: *Eden v R* at [38] citing *DS v R* [2022] NSWCCA 156 at [96]. Further, such evidence had the capacity to impact the offender's moral culpability as well as inform the weight to be given to the need for specific deterrence: *Eden v R* at [39], [41]. Also see **Intermediate appellate court consideration** above.

In *Hiemstra v Western Australia* [2021] WASCA 96, an offender's FASD was considered in the context of their traumatic childhood and the principle in *Bugmy v The Queen* (2013) 249 CLR 571. See **Specific applications of the principle of Bugmy v The Queen** below.

Relevance to other proceedings

See **[90-000] Mental Health and Cognitive Impairment Forensic Provisions Act 2020** for commentary regarding penalty options available under Pts 4 and 5 of that Act.

See **[30-000] Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act** in the *Local Court Bench Book* for commentary regarding diversion in summary proceedings.

See **[4-300] Procedure for fitness to be tried (including special hearings)** in the *Criminal Trial Courts Bench Book* for commentary regarding unfitness and special hearings in the District and Supreme Courts.

See **[6-200] Defence of mental health impairment or cognitive impairment** in the *Criminal Trial Courts Bench Book* regarding the defence of mental health and/or cognitive impairment and the special verdict of act proven but not criminally responsible.

See **[6-550] Substantial impairment because of mental health impairment or cognitive impairment** in the *Criminal Trial Courts Bench Book* regarding the partial defence to murder in s 23A *Crimes Act 1990*.

[10-470] Deprived background

Last reviewed: March 2024

Bugmy v The Queen (2013) 249 CLR 571

In *Bugmy v The Queen* at [40] the High Court said:

> … 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.

Simpson J (as her Honour then was) in *R v Millwood* [2012] NSWCCA 2 at [69] (Bathurst CJ and Adamson J agreeing), which was decided before *Bugmy v The Queen*, put it this way:

> I am not prepared to accept that an offender who has the start in life that the respondent had bears equal moral responsibility with one who has had what might be termed a 'normal' or 'advantaged' upbringing. Common sense and common humanity dictate that such a person will have fewer emotional resources to guide his (or her) behavioural decisions...

The effects of profound deprivation do not diminish over time and should be given "full weight" in determining the sentence in every case: *Bugmy v The Queen* at [42]–[43]. A background of that kind may leave a mark on a person throughout life and compromise the person's capacity to mature and learn from experience. It remains relevant even where there has been a long history of offending: at [43]. Attributing "full weight" in every case is not to suggest that it has the same (mitigatory) relevance for all the purposes of punishment: *Bugmy v The Queen* at [43]. Social deprivation may impact on those purposes in different ways. The court in *Bugmy v The Queen* explained at [44]–[45]:

> 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.
>
> The point was made by Gleeson CJ in [*R v*] *Engert* [(1995) 84 A Crim R 67 at [68]] in the context of explaining the significance of an offender's mental condition in sentencing …

An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence: *Bugmy v The Queen* at [37]. Not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence: *Bugmy v The Queen* at [40].

In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background: *Bugmy v The Queen* at [41].

The above principles have been applied in a number of Court of Criminal Appeal decisions including *Baines v R* [2023] NSWCCA 302 at [76], [107]; *DR v R* [2022] NSWCCA 151 at [37], [40]; *Hoskins v R* [2021] NSWCCA 169 at [54]; *Ohanian v R* [2017] NSWCCA 268 at [24]–[26]; *Kiernan v R* [2016] NSWCCA 12 at [63].

The Court of Criminal Appeal's approach to Bugmy v The Queen

While the High Court in *Bugmy v The Queen* referred to "profound" childhood deprivation, there is no "magic" in the word "profound" or any requirement to characterise an offender's childhood as one of "profound deprivation" before the principle that social disadvantage may reduce an offender's moral culpability is engaged: *Hoskins v R* [2021] NSWCCA 169 at [57].

In *Nasrallah v R* [2021] NSWCCA 207, the majority held it was open to the sentencing judge to find the offender, who had as a child been the victim of attempted sexual assault by an uncle, and of kidnapping and physical assault by a person she met online, did not disclose a history of profound deprivation in accordance with *Bugmy v The Queen*: Bell P (as his Honour then was) at [6], [18]–[19], [25]; Price J at [48], [50]–[52]; Hamill J dissenting at [86]–[87], [97]. Notwithstanding, Bell P at [21]–[22] and Price J at [46] found the judge had regard to the applicant's background and adolescence in mitigation.

In *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the court held that the use of the word "may" by the plurality in *Bugmy v The Queen* at [40] did not mean that consideration of this factor is optional; it was a recognition that there may be countervailing factors, such as the protection of the community, which might reduce or eliminate its effect. A deprived background is not confined to an immediate family context or early childhood. The principle has been applied in other cases including where an offender had a supportive immediate family background but he had an association with peers and extended family who were part of the criminal milieu: *Ingrey v R* at [38]–[39]. The principle was also applied where an offender had a stable and secure upbringing with his extended family until the age of 13 when he discovered his biological mother's identity, after which, he was exposed to an environment where violence and substance abuse were normalised: *Hoskins v R* at [62]–[63].

In *Tsiakas v R* [2015] NSWCCA 187, the court held that the offender's solicitor should have given consideration to obtaining a psychiatric or psychological report, which could have addressed the applicant's background. The sentence proceedings were, however, conducted on the premise of a background of disadvantage: *Tsiakas v R* at [74]. The failure to obtain a report did not occasion a miscarriage of justice in the circumstances of the case because "something of real significance was required to be presented … to be capable of materially affecting the outcome of the sentencing hearing": *Tsiakas v R* per Beech-Jones J at [67].

However, in *Kliendienst v R* [2020] NSWCCA 98, there was uncontested evidence before the sentencing judge of the applicant's deprived upbringing and exposure to violence, trauma and drug abuse, including associated expert evidence. Although no submission was put to the sentencing judge that the applicant's moral culpability could

be substantially reduced because of his background, the principles in *Bugmy v The Queen* were applicable as there was uncontested evidence of the factual basis for raising them: *Kliendienst v R* at [67]–[68].

When childhood social deprivation causes mental disorders, it may not do so wholly, so it is important not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [130]–[131]. In *Williams v R*, the combination of the offender's psychiatric disorders and his childhood exposure to trauma and violence caused him to normalise the violence used in the commission of the offence (robbery), such that each factor deserved consideration in the sentencing process: at [132]–[133]. See also **[10-460] Mental health or cognitive impairment**.

Causal link between deprived background and offending

The plurality in *Bugmy v The Queen* did not determine one way or the other whether a causal link between an offender's deprived background and the offending is required for it to be taken into account on sentence: at 579, 581. However, there has been some tension in the approaches taken since, and it is a question in respect of which differing views have been expressed: *Noonan v R* [2020] NSWCCA 346 at [49].

A line of authority from the Court of Criminal Appeal has held a causal link between an offender's deprived background and the offending is not required for it to be taken into account in mitigation on sentence. N Adams J (Bell P (as his Honour then was) and Davies J agreeing) in *Dungay v R* [2020] NSWCCA 209 at [153] held, after reviewing the authorities:

> …the absence of such a link does not mean that the Court does not give full weight to a childhood of profound deprivation if that is established on the evidence.

McCallum J (as her Honour then was) (Hamill and Cavanagh JJ agreeing) in *Lloyd v R* [2022] NSWCCA 18 at [27] agreed, stating:

> The prevailing view appears to be that it is not necessary to establish the existence of a causal connection with the offending before having regard to *Bugmy* factors.

The decisions of *R v Hoskins* at [57], *R v Irwin* [2019] NSWCCA 133 at [116] and *Judge v R* [2018] NSWCCA 203 at [29]–[32] also support this view. In *Perkins v R* [2018] NSWCCA 62, White JA at [82]–[88]; Fullerton J at [95]–[111]; Hoeben CJ at CL dissenting at [42], left the possibility open that such a causal relationship was not required for deprived background to be taken into account, and it was a matter for individual assessment.

For a full discussion of the issue, see Beckett J, "The Bugmy Bar Book: Presenting evidence of disadvantage and evidence concerning the significance of culture on sentence" at pp 11–15 at https://bugmybarbook.org.au/wp-content/uploads/2023/07/JudgeBeckett-TheBarBookPaper2021.pdf, accessed 31 October 2023.

Specific applications of the principle of Bugmy v The Queen

In *Ingrey v R*, the offender's particular disadvantage was not the circumstances of his immediate upbringing by his mother and father, but his association with peers and extended family who were part of the criminal milieu. They regularly exposed the offender from a young age to criminal activity: *Ingrey v R* at [27]. Such circumstances

would have compromised the offender's capacity to mature and learn from experience and amounted to social disadvantage of the kind envisaged in *Bugmy v The Queen*: *Ingrey v R* at [35]–[39].

In *Kentwell v R (No 2)* [2015] NSWCCA 96, the offender succeeded in establishing that he had a deprived background. He was removed from his Aboriginal parents at 12 months of age and adopted out to a non-Aboriginal family, where he grew up deprived of knowledge about his family and culture. The court applied *Bugmy v The Queen* and held that the offender's moral culpability was reduced, as the social exclusion he experienced was capable of constituting a background of deprivation explaining recourse to violence: *Kentwell v R (No 2)* at [90]–[93]. This was supported by a body of evidence demonstrating that social exclusion could cause high levels of aggression and anti-social behaviours.

In *IS v R* [2017] NSWCCA 116, evidence established that the offender had been exposed to parental substance abuse and familial violence before being placed under the care of the Minister at the age of seven, after which time he moved around considerably. The sentencing judge accepted that the principle in *Bugmy v The Queen* was engaged and also found that the offender had favourable rehabilitation prospects. However, it was implicit in the conclusions of the judge, concerning general deterrence and the need for community protection, that the judge failed to give any weight to the reduction in moral culpability made explicit in the earlier findings: *IS v R* at [58]. Campbell J said "… the weight that would ordinarily be given in offending of this serious nature to personal and general deterrence and the protection of society 'to be moderated in favour of other purposes of punishment' and, in particular, his 'rehabilitation': *Bugmy* at 596 [46]": *IS v R* at [65].

In *Donovan v R* [2021] NSWCCA 323, despite accepting the offender's profound childhood deprivation, the sentencing judge rejected the application of *Bugmy v The Queen* due to the offender's prosocial behaviour and positive social achievements at the time of offending, as he was able to "rise above it": at [84]. The judge's reasoning was held to overlook the essence of the evidence, particularly regarding the link between the offender's childhood exposure to abuse and the offending: at [85]–[89].

However, in *Hiemstra v Western Australia* [2021] WASCA 96, the offender had experienced significant childhood trauma and disadvantage, and had been diagnosed with foetal alcohol spectrum disorder (FASD). The court held the sentencing judge erred in the application of the principle in *Bugmy v The Queen* by failing to give full weight to the offender's traumatic childhood including his FASD as it decreased his moral blameworthiness for the offending: [111]–[112], [118]–[119]. For further commentary concerning the consideration of FASD on sentence, see **Foetal alcohol spectrum disorder** at **[10-460] Mental health or cognitive impairment**.

The court in *Kiernan v R* [2016] NSWCCA 12 held that the sentencing judge did not err in dealing with the offender's criminal history and subjective case notwithstanding the deprived and depraved circumstances of the latter's upbringing. Hoeben CJ at CL said at [60]: "the applicant's criminal history, together with the effect on him of his deprived and abusive childhood, meant that his Honour had to take into account the protection of the community …"

The plurality in *Bugmy v The Queen* did not talk in terms of general deterrence having no effect, but referred to that factor being "moderated in favour of other

purposes of punishment" depending upon the particular facts of the case: *Kiernan v R* at [63]. The CCA in *Kiernan v R* concluded (at [64]) the judge understood and applied *Bugmy v The Queen*.

In *Drew v R* [2016] NSWCCA 310, it was accepted that the offender suffered economic and social deprivation during childhood, both while residing with his family on an Aboriginal reserve until the age of 14 and then after being placed in a boys' home to learn a trade. However, limited weight could only be given to any allowance for the offender's deprived background under the principles in *Bugmy v The Queen* per Fagan J at [18] (Gleeson JA agreeing at [1]). Even having regard to his background of social disadvantage, the fact remained that the offender was a recidivist violent offender with convictions for matters of violence stretching over 35 years, committed against 13 separate victims, including domestic partners and the offender's son. The needs of specific deterrence and community protection loomed large: *Drew v R* at [1], [17], [125].

Related principles

The same sentencing principles are to be applied to every case, irrespective of the offender's identity or membership of an ethnic or other group. However, sentencing courts should take into account all material facts, including those facts which exist only by reason of the offender's membership of such a group: *Neal v The Queen* (1982) 149 CLR 305, per Brennan J at 326.

The High Court in *Munda v Western Australia* (2013) 249 CLR 600 at [53] reiterated the principle in *Neal v The Queen* in the context of a manslaughter committed by an Aboriginal offender who perpetrated domestic violence against his partner:

> It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide. [Footnotes omitted.]

For the purposes of applying the statutory principle of imprisonment as the last resort in s 5(1) *Crimes (Sentencing Procedure) Act 1999*, courts in NSW should not apply a different method of analysis for Aboriginal offenders as a group: *Bugmy v The Queen* (2013) 249 CLR 571 at [36]. Nor should courts in NSW take into account the "unique circumstances of all Aboriginal offenders" as relevant to the moral culpability of an individual Aboriginal offender and the high rate of incarceration of Aboriginal Australians: at [28].

R v Fernando (1992) 76 A Crim R 58

The High Court in *Bugmy v The Queen* (2013) 249 CLR 571 carefully considered the first instance case of *R v Fernando* (1992) 76 A Crim R 58. Principle (E) in *R*

v Fernando (also approved by the High Court in *Bugmy v The Queen*) should be considered in light of s 21A(5AA) *Crimes (Sentencing Procedure) Act 1999* (see below). In *R v Fernando*, Wood J set out the following propositions:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but, rather, to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence, which to a very significant degree go hand in hand within Aboriginal communities, are very real ones and require more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless realistically assess the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) In sentencing an Aboriginal person who has come from a deprived background, or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him or her and which is dominated by inmates and prison officers of European background, who posses little understanding of Aboriginal culture and society or of the offender's own personality.

R v Fernando gives recognition to social disadvantage at sentence and is not about sentencing Aboriginal offenders: *Bugmy v The Queen* at [37].

The High Court observed in *Bugmy v The Queen* that many of the propositions in *R v Fernando* address the significance of intoxication at the time of the offence and that the decision correctly recognises that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor: *Bugmy v The Queen* at [37]. However, since *Bugmy v The Queen*, s 21A(5AA) *Crimes (Sentencing Procedure) Act* was enacted and it provides that self-induced intoxication at the time of the offence is not to be taken into account as a mitigating factor on sentence (see below at **[10-480] Self-induced intoxication**).

The High Court in *Bugmy v The Queen* at [38] affirmed the proposition in *R v Fernando* that a lengthy term of imprisonment might be particularly burdensome for an Aboriginal offender because of his or her background or "lack of experience of European ways". These observations reflect the statement by Brennan J in *Neal v The Queen* at 326 that the same sentencing principles are to be applied irrespective of the offender's ethnic or other group. However, a court can take into account facts which exist only by reason of the offender's membership of such a group. Wood J was right to recognise in *R v Fernando* the problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them: *Bugmy v The Queen* at [40].

[10-480] Self-induced intoxication

Last reviewed: May 2024

Section 21A(5AA) *Crimes (Sentencing Procedure) Act 1999* provides:

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

Section 21A(6) provides that self-induced intoxication has the same meaning as it has in Pt 11A *Crimes Act*. In s 428A *Crimes Act* (in Pt 11A), self-induced intoxication is defined as any intoxication except intoxication that—

(a) is involuntary, or

(b) results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or

(c) results from the administration of a drug [in accordance with a prescription where required]… or of a drug for which no prescription is required [in accordance with the recommended dosage and manufacturer's instructions].

Section 21A(5AA) and (6) commenced on 31 January 2014: *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014*.

Before the introduction of s 21A(5AA), an offender's intoxication, whether by alcohol or drugs, could explain an offence but ordinarily did not mitigate the penalty. Section 21A(5AA) confirms and extends the common law approach to intoxication.

Whether intoxication self-induced and the development of the common law

In *Bugmy v The Queen* (2013) 249 CLR 571 (which preceded the introduction of s 21A(5AA)), *R v Fernando* (1992) 76 A Crim R 58 was approved, where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ at [38] said:

> The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J

> explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised that there are Aboriginal communities in which alcohol abuse and alcohol-related violence go hand in hand. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor. … [Footnotes excluded.]

In *Bourke v R* [2010] NSWCCA 22, which also preceded the introduction of s 21A(5AA), McClellan CJ at CL (Price and RA Hulme JJ agreeing) stated at [26]:

> …intoxication… will ordinarily not mitigate the penalty save where the intoxication is the result of an addiction and the original addiction did not involve a free choice.

The Court of Criminal Appeal has since dealt with s 21A(5AA) and a discussion of some of these decisions, in chronological order, follows.

In *Kelly v R* [2016] NSWCCA 246, Rothman J (Hoeben CJ at CL and RA Hulme J agreeing) at [46]–[50] approved the above comment in *Bourke v R*, finding s 21A(5AA) did not abolish that part of *R v Fernando* approved in Bugmy v The Queen. His Honour stated at [50]:

> The effect of *Fernando* and *Bugmy* is to recognise that, in certain communities to which the circumstances in *Fernando* and *Bugmy* applied, the abuse of alcohol and drugs is so prevalent and accompanied by violence that the intoxication no longer fits the description of being "self-induced".

In *Kelly v R*, it was accepted the offender had used drugs of various kinds since he was 13 and, at that age, "was not at an age of "rational choice" that would give rise to the full responsibility for the moral culpability and the predictable consequences of a choice to become addicted": [54]. However, Rothman J found the use of drugs (benzodiazepine in this case) was still self-induced, even though the drug's effect on the offender was out of the ordinary: [65]. His Honour was unable to find that "the violent impulses and aggressive behaviour, caused by the benzodiazepine, and the disinhibiting effect of it, was a 'predictable consequence of his choice as to the use of drugs'" (referring to *Bourke v R*): [64].

In *Tepania v R* [2018] NSWCCA 247, Johnson J (Payne JA and Simpson AJA agreeing) considered at [122]–[128] the application of s 21A(5AA) in the context of an offender who had a socially disadvantaged upbringing, finding that s 21A(5AA) operates to prevent self-induced intoxication operating as a mitigating factor because of its impact upon the degree of deliberation by an offender: [127]. His Honour held the sentencing judge did not fail to have regard to the offender's profound deprivation, and that the offender's self-induced intoxication was not a mitigating factor pursuant to s 21A(5AA): [123]–[124], [127]–[128].

In *Fisher v R* [2021] NSWCCA 92, Adamson J (Fullerton J agreeing) held s 21A(5AA) precludes a sentencing court from taking into account self-induced intoxication to explain an offender's conduct, where such explanation reduces the offender's moral culpability and/or the objective seriousness of the offending: [225].

Fisher v R was a sentence appeal relating to an offence of sexual intercourse without consent and Adamson J (Fullerton J agreeing; Brereton JA dissenting) held the

sentencing judge erred by taking into account the offender's self-induced intoxication in determining whether he deliberately deceived the complainant and actually knew she was not consenting: [73]; [225], [231]. The judge's statement he had not taken the offender's self-induced intoxication into account in mitigation did not cure the error of using it to "explain" the offender's conduct: [76]; [225], [229]. Fullerton J, in additional reasons, held the judge was obliged to disregard the respondent's intoxication entirely when enquiring into his state of mind, awareness or perception at the time of the offending, where that enquiry was undertaken to assess the objective seriousness of the offending and the offender's moral culpability: [74], [77].

In *Pender v R* [2023] NSWCCA 291, Simpson AJA (Rothman and Cavanagh JJ agreeing) at [50]–[51] approved of Fullerton and Adamson's JJ's construction of s 21A(5AA) in *Fisher v R* (above) and said it stood as the construction of the Court of Criminal Appeal. Although *Fisher v R* and *Pender v R* concerned sexual offending and consent (including the application of repealed ss 61HA and 61HE), these decisions potentially apply more broadly.

In *Pender v R*, the offender argued on appeal (but not in the sentence proceedings) that s 21A(5AA) did not apply as his intoxication was not self-induced as it was the result of an addiction, and the original addiction did not involve a free choice (citing *Bourke v R* at [26] and *Kelly v R* at [47]). Simpson AJA (Rothman and Cavanagh JJ agreeing) did not accept, on the evidence, the offender's intoxication was not self-induced: [61]. Her Honour remarked that the proposition called for a considerable depth of examination, including as to whether the offender suffered an "addiction", notwithstanding that it was accepted his drug use was largely, if not entirely, a consequence of significant adversities of his early life: [60]–[61].

As an aggravating factor

Where intoxication involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence, it may also be an aggravating factor: *R v Fletcher-Jones* at 387; *Mendes v R* [2012] NSWCCA 103 at [73]–[75], [83]. In *R v Mitchell* [2007] NSWCCA 296 at [29], the court said that:

> violence on the streets especially by young men in company and under the influence of alcohol or drugs is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence.

The court in *GWM v R* [2012] NSWCCA 240 at [75] held that voluntary or self induced intoxication by an offender where he committed an aggravated child sexual assault was not relevant to assessing the gravity of the offence except as a possible aggravating factor.

See also **Assault, wounding and related offences** at **[50-150]**.

Where the offender becomes intoxicated voluntarily and embarks on a course that is criminal conduct, such as dangerous driving, the reason that the offender was intoxicated is generally irrelevant: *Stanford v R* [2007] NSWCCA 73 at [53]. This is due to the fact that "the offence is not concerned with punishing the drinking of alcohol but with the driving thereafter": *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the*

Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002) (2004) 61 NSWLR 305 at [142]; see also *R v Doyle* [2006] NSWCCA 118 at [30]. Subsequent offences will be treated more seriously: *Stanford v R* at [54].

Where intoxication is the basis upon which an aggravated version of dangerous driving is charged, it should not be double-counted as an aggravating factor: *R v Doyle* at [25]. The same double counting problem would arise if a court took into account an offender's intoxication as an aggravating factor where it is an ingredient of the crime such as the offence of assault causing death while intoxicated under s 25A(2) *Crimes Act*. For intoxication and dangerous driving, see also **[18-340]** in **Dangerous driving and navigation**.

The approach of having regard to intoxication when applying the standard non-parole statutory scheme needs to be considered in light of the recently re-enacted s 54A(2) *Crimes (Sentencing Procedure) Act*. See further the discussion at **What is the standard non-parole period?** at **[7-890]**.

[10-485] Drug addiction

Last reviewed: May 2023

Drug addiction is not a mitigating factor: *R v Valentini* (1989) 46 A Crim R 23 at 25. The observations in the armed robbery guideline case of *R v Henry* (1999) 46 NSWLR 346 at [273] as to the relevance of an offender's drug addiction in assessing the objective criminality of an offence and as being a relevant subjective circumstance (explained further below) do not appear to be directly affected by the enactment of s 21A(5AA): *R v Boyd* [2022] NSWCCA 120 at [181].

Spigelman CJ made clear in *R v Henry* at [206] that an offender's drug addiction is not a matter in mitigation:

> I attach particular significance to the impact that acknowledgment of drug addiction as a mitigating factor would have on drug use in the community. Thesentencing practices of the courts are part of the anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate that message. The concept that committing crimes in order to obtain moneys to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of monies for some other, but legal, purpose is perverse.

Addiction is "not an excuse" but a choice

Very many offences of armed robbery are committed because of an addiction to drugs. However, drug addiction is not an excuse: *R v Henry* per Wood CJ at CL at [236]; see also principle (a) at [273].

Self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice: *R v Henry* at [185]. Per Spigelman CJ at [197]:

> drug addicts who commit crime should not be added to the list of victims. Their degree of moral culpability will vary, just as it varies for individuals who are not affected by addiction.

Persons who choose a course of addiction must be treated as choosing its consequences: *R v Henry* per Spigelman CJ at [198]. Not all persons who suffer from addiction commit crime, therefore to do so involves a choice: per Spigelman CJ at [200]; per Wood CJ at CL at [250]. There is no warrant in assessing a crime that was induced by the need for funds to feed a drug addiction, as being at the lower end of the scale of moral culpability or lower than other perceived requirements for money (such as gambling): *R v Henry* per Spigelman CJ at [202]. The proposition has been followed and applied repeatedly: *Toole v R* [2014] NSWCCA 318 at [4]; *R v SY* [2003] NSWCCA 291; *Jodeh v R* [2011] NSWCCA 194.

Further, the decision to persist with an addiction, rather than to seek assistance, is also a matter of choice: *R v Henry* per Spigelman CJ at [201]. Those who make such choices must accept the consequences: *R v Henry* per Wood CJ at CL at [257], with which Spigelman CJ agreed.

In *R v Henry*, Wood CJ at CL set down a number of general principles in relation to the sentencing of offenders with drug addictions: at [273].

To the extent that an offence is motivated by a need to acquire funds to support a drug habit, such a factor may be taken into account as a factor relevant to objective criminality. This may be done in so far as it assists the court to determine:

- the extent of any planning involved in the offence, and its impulsivity
- the existence (or otherwise) of an alternative reason in aggravation of the offence (for example whether it was motivated to fund some other serious criminal venture), and
- the state of mind (or capacity) of the offender to exercise judgment: *R v Henry* per Wood CJ at CL, principle (b) at [273].

The use of alcohol or drugs by an offender may be relevant in sentencing for one or more of a number of reasons. For example, it may be that a crime such as armed robbery has been committed in order to provide money for a drug addiction. The origin or extent of a drug addiction (or any attempts to overcome it) may be relevant subjective considerations where such an addiction might:

- impact upon the prospects of recidivism
- impact upon the prospects of rehabilitation
- suggest that the addiction was attributable to some other event for which the offender was not primarily responsible — thereby removing personal choice (for example, where it arose as the result of a medical prescription or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete); or
- justify special consideration in the case of offenders at the "cross-roads" (*R v Osenkowski* (1982) 30 SASR 212; (1982) 5 A Crim R 394): *R v Henry* per Wood CJ at CL, principle (c) at [273].

While it can be said that the objective of rehabilitation needs to be taken into account along with the other objectives of retribution and deterrence, it is but one aspect of sentencing. Such offenders should not be placed in a special category for sentencing: *R v Henry* per Wood CJ at CL at [268], [269] and [270].

Addiction attributable to some other event

Since *R v Henry* there have been instances where offenders have sought to bring their addiction within the third bullet point above.

Drug addiction at a very young age

Drug addiction may be a relevant as a subjective circumstance where the origin of the addiction might suggest that it was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example, where it occurred at a very young age or the person's mental or intellectual capacity was impaired: *R v Henry* per Wood CJ at CL at [273] with whom Spigelman CJ agreed at [201].

There is, however, no principle of law that a drug addiction that commenced when an offender was young will always operate as a mitigating factor: *Hayek v R* [2016] NSWCCA 126 at [75]. It may be a mitigating factor in the particular circumstances of an individual case: *Hayek v R* at [80].

In *Brown v R* [2014] NSWCCA 335, the offender became addicted to a number of drugs from the age of 9 or 10. The court held that this was an age at which his drug addiction could not be classified as a personal choice and the offender was entitled to some leniency. The court adopted the remarks of Simpson J in *R v Henry* at [336] and [344]. If the drug addiction has its origins in circumstances such as social disadvantage; poverty; emotional, financial or social deprivation; poor educational achievement; or, sexual assault, it is appropriate for rehabilitative aspects of sentencing to assume a more significant role than might otherwise be the case: see *Brown v R* at [26]–[29].

Similarly, in *SS v R* [2009] NSWCCA 114, the court held that the applicant's addiction to cannabis from 11 years of age could be regarded as a matter of mitigation: *SS v R* at [35], [103]. However, in *R v Gagalowicz* [2005] NSWCCA 452 at [33], the judge erred by treating the 16-year-old offender's drug addiction as a matter in mitigation. The offender's history did not suggest he became involved in drugs other than as a result of a choice he made as a teenager and he persisted with the addiction thereafter: *R v Gagalowicz* at [38] citing *R v Henry* at [201]. In *Fitzpatrick v R* [2010] NSWCCA 26 at [23], the sentencing judge acknowledged that the offender used drugs at a very young age. The CCA held that the factor was attributed sufficient weight in the sentencing exercise: *Fitzpatrick v R* at [25].

An addiction which commenced when the offender was 14 years of age because of peer pressure and in an attempt to "'look cool' to impress a girl" but which continued for three decades, did "nothing to mitigate the applicant's crime": *Hayek v R* per Wilson J at [83] and see [80]–[81], [41]. To the contrary, the "long term unaddressed addiction to prohibited drugs could have legitimately increased the sentence": *Hayek v R* at [84].

See also **[10-480] Self-induced intoxication** above.

Self-medication

In some circumstances, an addiction to drugs used to overcome psychological or physical trauma may be a factor in mitigation. In *Turner v R* [2011] NSWCCA 189, the court held that an addiction to prescription opioid medication following an

accident was a matter that mitigated the offence. The case fell squarely within the exception to the principle that drug dependence is not a mitigating factor: *Turner v R* at [58]. However, in many instances self-medication will not fall within the exception: *Bichar v R* [2006] NSWCCA 1 at [25]; *R v SY* [2003] NSWCCA 291 at [62]; *R v CJP* [2004] NSWCCA 188. In *Jodeh v R* [2011] NSWCCA 194, the court held that the offender's illicit drug use to manage pain caused by a motorbike accident did not fall into the "rare category" of circumstances in which an addiction to drugs will be a mitigating factor: *Jodeh v R* at [28]–[29]. Similarly, in *Bichar v R*, the court observed at [23]–[24]:

> It is very often the case that there will be some life experience or some psychological or psychiatric state that causes, or at least contributes to, the use of drugs. One will almost always be able to assume that without that experience or without the disturbed psychological or psychiatric state the person would have been unlikely to have resorted to illegal drugs.
>
> … the fact that some traumatic or injurious event results in a person using drugs does not mean that drug addiction is a matter of mitigation …

Compulsory Drug Treatment Correctional Centre Act 2004

The *Compulsory Drug Treatment Correctional Centre Act 2004* amended the *Drug Court Act 1998*, the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* to provide for imprisonment by way of compulsory treatment detention for drug-dependent recidivist offenders. The courts listed under the *Drug Court Regulation* have a duty to ascertain whether an offender sentenced to imprisonment might be eligible and, if so, to refer the offender to the Drug Court: s 18B *Drug Court Act 1998*. See R Dive, "Compulsory drug treatment in gaol — a new sentencing issue" (2006) 18(7) *JOB* 51.

The Drug Court determines eligibility, makes compulsory drug treatment orders and supervises participants.

[10-490] Hardship to family/dependants

Last reviewed: November 2023

Although the general principle is that hardship to family and dependants needs to be exceptional before it justifies a discrete and substantial component of leniency, if it is not exceptional it may still be taken into account as part of the offender's subjective case: *Matthews v R* [2018] NSWCCA 186 at [33] and the authorities cited there. Simpson J (with Macfarlan and Gleeson JJA agreeing) at [33] said great caution is required in applying this qualification lest it undermine the principle.

In *R v Edwards* (1996) 90 A Crim R 510, Gleeson CJ said at 515:

> There is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, as senior counsel for the respondent acknowledged in argument, it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship, and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be breadwinners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who

> are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment.

The passage was quoted with approval in *Hoskins v R* [2016] NSWCCA 157 at [63].

It is not uncommon for hardship to be caused to third parties by sentencing a person to prison. Judges and magistrates are required in the course of their duty to sentence offenders to imprisonment where incarceration will cause hardship to third parties: *R v Scott* (unrep, 27/11/96, NSWCCA).

It is only where circumstances are "highly exceptional" — and where it would be inhumane to refuse to do so — that hardship to others in sentencing can be taken into account: *R v Edwards*. This was accepted in *O'Brien v R* [2022] NSWCCA 234 and *R v Hall* [2017] NSWCCA 313 at [65], although consideration should be given to the qualification in *Matthews v R* discussed above. Further, in *R v Girard* [2004] NSWCCA 170, Hodgson JA at [21] said the imprisonment of a child's parents, although not exceptional (in this case), can be taken into account as one subjective circumstance, but not as a matter resulting in a substantial reduction or elimination of a term of imprisonment. This was applied in *Doyle v R* [2022] NSWCCA 81 at [35], [40]. In *R v Cornell* [2015] NSWCCA 258, Beech-Jones J at [139]–[141] discusses some of the other authorities impacting upon the principle.

Hardship to employees did not justify the suspension of a sentence in *R v MacLeod* [2013] NSWCCA 108 at [49] where full-time imprisonment should have been imposed. The evidence neither established "extreme hardship" nor extraordinary circumstances: *R v MacLeod* at [50]–[52], [55].

As a matter of logic or even mercy, hardship to a member of an offender's family does not have a lesser claim upon a court's attention than hardship to a person for whom the offender was a paid carer. A case does not become "wholly exceptional" simply because the person affected by the hardship was not a member of the offender's family: *R v Edwards* (1996) 90 A Crim R 510 at 516 per Gleeson CJ; *R v Chan* [1999] NSWCCA 103 at [39].

If a custodial sentence is required but there is evidence of extreme hardship, a court may take into account the extraordinary features of the case by suspending the sentence of imprisonment, shortening the term of sentence and/or reducing the non-parole period: *Dipangkear v R* [2010] NSWCCA 156 at [34]; *R v MacLeod* at [49]. Each case will depend on the seriousness of the crime, whether there is a need for deterrence and the nature and degree of the impact of the sentence upon the third person: *Dipangkear v R* at [34].

Pregnancy, young babies

The fact that a person to be sentenced is pregnant or the mother of young baby is a relevant factor to be taken into account: *R v Togias* (2001) 127 A Crim R 23; *R v SLR* [2000] NSWCCA 436; *HJ v R* [2014] NSWCCA 21 at [67], [73].

R v Togias involved the application of s 16A(2)(p) *Crimes Act 1914* (Cth), which requires a court to have regard to "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants": *HJ v R* at [69].

In NSW, there are no facilities for mothers and babies to live together whilst an offender is in any juvenile detention facility. However, in the adult correctional system,

there is a facility at Jacaranda House where mothers in custody can have their baby with them: *HJ v R* at [63]. Accordingly, in an appropriate case where a juvenile offender is pregnant at the time of sentence, a court may make an order with the effect that the offender be transferred to an adult correctional facility: *R v SLR*.

A court is required to have regard to the fact that an offender is the mother of a young baby, the effect of separation on her and the degree to which it may impact upon the hardship of her custody: *HJ v R* at [76]. If exceptional circumstances can be shown, it is relevant to have regard to any effect of full time custody on the offender's child: *HJ v R* at [76]. Evidence of hardship and/or increased risk to the offender should she be imprisoned was lacking: *R v Togias* at [11]–[13], [57]–[58].

Where an offender has a young baby a court may consider declining to make an order that the offender serve her term of imprisonment in juvenile detention: *HJ v R* at [76].

[10-500] Hardship of custody

Last reviewed: May 2023

Protective custody

The hardship that will be suffered by a prisoner in gaol because he or she will be in protective custody, is a matter to be taken into account in sentencing. Protective custody can only be taken into account in mitigation in the determination of the sentence or in the finding of special circumstances where there is evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21]. See further discussion in **Mitigating factors** at **[17-570]**.

It was well recognised in Australia that every year in protective custody is equivalent to a longer loss of liberty under the ordinary conditions of imprisonment: *AB v The Queen* (1999) 198 CLR 111 per Kirby J at [105]; *R v Howard* [2001] NSWCCA 309; *R v Rose* [2004] NSWCCA 326; *R v Patison* [2003] NSWCCA 171 at 136–137. However, these authorities must give way to the evidence based approach of the more recent authorities beginning with *R v Durocher-Yvon* (2003) 58 NSWLR 581. It was held in *Clinton v R* [2009] NSWCCA 276 per Howie J at [25] that it is not:

> appropriate for a court to adopt a mathematical formula to convert time spent in protection to an equivalent period spent in the general prison population. There are too many variables and there is not always a significant difference between being on protection and being part of the normal prison population. There may well be benefits derived from being on protection that offset some of the deprivations.

It was held in *R v Chishimba* [2011] NSWCCA 212 at [13]–[14] that it was erroneous for the sentencing judge to take a mathematical approach to the issue of protective custody and to accept that every year in protective custody should be regarded as equivalent to 18 months in general custody.

Safety of prisoners

In *York v The Queen* (2005) 225 CLR 466, the High Court set aside a partially suspended sentence of imprisonment that had been substituted by the Court of Appeal of the Supreme Court of Queensland and reinstated a wholly suspended sentence that had been imposed by the sentencing judge. The majority of the court had held that

it would be bowing to pressure from criminals if the offender were able to avoid a custodial sentence because of the risk to her safety while in prison. However, the High Court made it clear that the safety of a prisoner is a relevant consideration in determining an appropriate sentence. In the particular circumstances of this case, there was persuasive evidence before the sentencing judge that the prisoner could not be protected in the Queensland prison system. McHugh J said at [31] that:

> the duty of sentencing judges is to ensure, so far as they can, that they do not impose sentences that will bring about the death of or injury to the person sentenced.

At [32] McHugh J further said:

> Where a threat exists — as it often does in the case of informers and sex offenders — recommendations that the sentence be served in protective custody will usually discharge the judge's duty. Here the learned sentencing judge concluded on persuasive evidence that no part of the Queensland prison system could be made safe for Mrs York. That created a dilemma for the sentencing judge. She had to balance the safety of Mrs York against the powerful indicators that her crimes required a custodial sentence. In wholly suspending Mrs York's sentence, Atkinson J appropriately balanced the relevant, even if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side. In suspending the sentence, the learned judge made no error of principle. Nor was the suspended sentence manifestly inadequate.

It is the responsibility of the authorities, not the courts, to ensure the safety of prisoners in custody. The fact that prisoners will have to serve their sentences in protection is a very important consideration to be taken into account in fixing the length of the sentence but it should not usually be permitted to dictate that the custody should not be full time: *R v Burchell* (1987) 34 A Crim R 148 at 151; *R v King* (unrep, 20/8/91, NSWCCA).

Former police

In *R v Jones* (1985) 20 A Crim R 142, Street CJ said at 153:

> In view of his past work in the Police Force, it is also to be recognised that the time that he must necessarily spend in custody will involve a greater degree of hardship than might otherwise be the case. It is well-known that a period of imprisonment for a former member of the Police Force can at times be fraught with a considerable degree of harassment being directed against the prisoner by his fellow prisoners. This can lead, as it has in this case, to the need for the prisoner being held in protection in conditions inferior to those affecting the general prison population.

See also *R v Patison* [2003] NSWCCA 171 at [38].

It cannot be assumed that an offender who is a police officer will serve his or her imprisonment in protective custody: *Hughes v R* [2014] NSWCCA 15 at [54]. It is necessary to point to evidence to that effect: *Hughes v R* at [54].

Foreign nationals

Any person who comes to Australia specifically to commit a serious crime has no justifiable cause for complaint when he or she is incarcerated in this country where the language is foreign to him or her and he or she is isolated from outside contact:

R v Chu (unrep, 16/10/98, NSWCCA) per Spigelman CJ. See also *R v Faneite* (unrep, 1/5/98, NSWCCA) per Studdert J and *R v Sugahara* (unrep, 16/10/98, NSWCCA) per McInerney J.

The fact that the prisoner is a foreigner with limited English and has no friends or family who are able to visit will make their imprisonment harsher than would be the case for the ordinary prisoner. This requires some, though not much recognition: *R v Huang* [2000] NSWCCA 238 per Adams J at [19]. A failure to have regard to this factor does not mean the sentence(s) exhibit error: *Yang v R* [2007] NSWCCA 37. However, if there is no evidence before the sentencing judge as to the offender's experience as a prisoner, it is not a consideration that requires substantial recognition but it is relevant to the question whether a sentence is manifestly excessive: *Nguyen v R* [2009] NSWCCA 181 at [27].

[10-510] Entrapment

Last reviewed: May 2023

Many of the commonly quoted cases in this area of the law occurred prior to the High Court judgment of *Ridgeway v The Queen* (1995) 184 CLR 19. Legislation that permits and regulates controlled operations by the police has been enacted at both the State and federal levels.

Entrapment is not a defence in Australia. At sentence it involves the idea that an accused person has been induced to commit a crime which he or she would not have committed, or would have been unlikely to commit: *R v Sloane* (1990) 49 A Crim R 270 per Gleeson CJ at 272–273.

In *R v Taouk* (1992) 65 A Crim R 387 at 404, Badgery-Parker J, Clarke JA and Abadee J agreeing, said that, when it comes to sentence, the question is not whether the accused can show that but for the involvement, encouragement or incitement by police, he or she would not have committed the crime; but, rather, whether, in all circumstances of the case, the involvement of the police was such as to diminish the culpability of the accused.

Similarly, in *R v Leung* (unrep, 21/7/94, NSWCCA) per Hunt CJ at CL, the court echoed the principle that entrapment is relevant to mitigation of penalty, but each case must be judged on its own facts. The prisoner's culpability will be regarded as diminished if the offence may not have been committed had the police not facilitated it. There is no entrapment if the prisoner was prepared to sell drugs to whomever asked for them.

It is legitimate to discount a sentence by reason of the circumstances in which the offender was led to commit the offence, including dealings with an undercover police officer acting as agent provocateur. This may be a ground for mitigation, but each case must be judged on its own facts: *R v Scott* (unrep, 30/6/83, NSWCCA) per Lee J; *R v Rahme* (1991) 53 A Crim R 8 at 13; *R v Reppucci* (1994) 74 A Crim R 353.

It is permissible for a sentencing judge to regard, as a mitigating factor, the fact that an offender engaged in criminal acts to a greater extent than would have happened if no assistance was provided by the authorities. This principle applies to a case where it is likely that, without assistance, the offender would have made little progress in carrying out the enterprise: *R v Thomson* [2000] NSWCCA 294 per James J at [80].

On the other hand, the fact that authorities have allowed criminal conduct to continue is not a circumstance of mitigation: *R v Thomson* per James J at [84].

Role of undercover police officers

Similarly, in *R v Anderson* (1987) 32 A Crim R 146, Kirby P was of the view that in assessing the culpability of an offender, the role played by undercover police may be relevant to the sentence to be imposed. His Honour observed that there is a fine line between the passive yet properly inquisitive conduct of an undercover police agent approached by a drug dealer to become involved in an illegal drug offence and a positive inducement by that agent to such an offence or an encouragement which lifts the offence from a minor category to a major one.

[10-520] Extra-curial punishment

Last reviewed: May 2023

A court can take into account "extra-curial punishment", that is, "loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his [or her] offence or at least by reason of the offender having committed the offence": *Silvano v R* [2008] NSWCCA 118 at [29]. It is "punishment that is inflicted upon an offender otherwise than by a court of law": *R v Wilhelm* [2010] NSWSC 378 per Howie J at [21]. The court in *Silvano v R* at [26]–[33] collected several authorities on the subject. The weight to be given to any extra-curial punishment will depend on all the circumstances of the case and in some cases, extra-judicial punishment attracts little or no weight: *R v Daetz* [2003] NSWCCA 216 at [62].

A court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property, or persons extracting retribution or revenge for the commission of an offence: *R v Daetz* at [62]; *R v Allpass* (1993) 72 A Crim R 561 at 566–567.

A failure by the judge to take into account the injury suffered by the offender when the injuries did not result in "a serious loss or detriment" was held not to be erroneous in *Mackey v R* [2006] NSWCCA 254 at [23]. Where injuries inflicted on an offender in prison by other prisoners were not inflicted for the purpose of punishing the offender for having committed the offence(s), they could not be considered extra-curial punishment: *Silvano v R* at [34]. A sufficient nexus is not established by simply asserting that the injuries inflicted in prison would not have been suffered had the offender not been arrested and remanded in custody as a result of having committed the offences: *Silvano v R* at [35].

See further **Dangerous Driving** at **[18-380]**. Registration on the Child Protection Offender Register is not extra-curial punishment: see **Sexual Offences Against Children** at **[17-570]**.

Self-inflicted injuries

The sentencing principles concerning extra-curial punishment extend to unintentional self-inflicted injuries received in the course of the offence but not if an offender deliberately self-inflicts injuries: *Christodoulou v R* [2008] NSWCCA 102 at [41]–[42]. In *Cvetkovic v R* [2013] NSWCCA 66, the court held the sentencing judge

did not err by following *Christodoulou v R* and in not placing much weight on the harm the offender had done to himself. In dismissing an application for special leave to the High Court, Bell and Gageler JJ stated that leave to appeal was not warranted on the basis that *Christodoulou v R* was wrongly decided. The ground had "insufficient prospects of success" in the circumstances of the case: *Cvetkovic v The Queen* [2013] HCASL 131 at [5]. Note, however, that reasons for refusing an application for special leave create no precedent and are not binding on other courts: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [112], [119].

Similarly, in *Betts v R* [2015] NSWCCA 39 at [35], the court held the injuries suffered by the offender were either deliberately self-inflicted, or inflicted by the victim at the offender's instigation and intimately bound up with his criminal conduct. Therefore, the injuries could not be considered extra-curial punishment for the purposes of sentencing.

Public humiliation

The High Court, in *Ryan v The Queen* (2001) 206 CLR 267, expressed conflicting views on the question of whether public humiliation may be considered as a mitigating factor on sentence. Kirby and Callinan JJ were each of the view that adverse publicity and public opprobrium suffered by a paedophile priest could properly be taken into account: *Ryan v The Queen* at [123] and [177] respectively. Hayne J disagreed with Kirby and Callinan JJ: *Ryan v The Queen* at [157]. McHugh J expressed the view that public opprobrium and stigma did not entitle a convicted person to leniency, as such an approach would be "an impossible exercise" and appear to favour the powerful: *Ryan v The Queen* at [52]–[53]. McHugh J also considered it incongruous that the worse the crime, and the greater the public opprobrium, the greater the reduction might have to be: *Ryan v The Queen* at [55].

It is accepted in NSW that where public opprobrium reaches such a proportion that it has a physical or psychological effect on the person, it may properly be considered by the sentencing court: *R v Allpass* (1993) 72 A Crim R 561; *Kenny v R* [2010] NSWCCA 6; *Duncan v R* [2012] NSWCCA 78 at [28]; *BJS v R* [2013] NSWCCA 123 at [228]–[231].

In *R v Obeid (No 12)* [2016] NSWSC 1815, no such physical or psychological effect was shown: at [102].

In upholding a Crown appeal, the court in *R v King* [2009] NSWCCA 117 took into account a degree of extra-curial punishment the offender suffered as a result of the manifestly inadequate sentence (at [71]), acknowledging that "[p]ublic outrage at the sentence was turned upon the offender … Had a sentence that appropriately denounced his conduct been imposed on him, he would have been spared further public humiliation and anger": at [69].

Media coverage

The proceedings in *R v Wran* [2016] NSWSC 1015, according to the sentencing judge, attracted significant public attention and inaccurate reporting. Harrison J said "the publication of [the] egregious articles warrants the imposition of a sentence that takes account of Ms Wran's continuing exposure to the risk of custodial retribution, the unavoidable spectre of enduring damage to her reputation and an impeded recovery from her ongoing mental health and drug related problems": *R v Wran* at [79].

Very limited weight was nonetheless attributed to extensive media coverage as a form of extra-curial punishment in *R v Obeid (No 12)* at [103]. This was because the offending involved the abuse of a public position; the media reports did not sensationalise facts; and, the case concerned an issue of public importance (political corruption). Therefore, it seemed "incongruous that the consequential public humiliation should mitigate the sentence": *R v Obeid (No 12)* at [101]. *R v Obeid (No 12)* can be contrasted with *R v Wilhelm* [2010] NSWSC 378 per Howie J at [16], where the offender's reputation was "destroyed by the allegations made against him and the reporting of those allegations in the media".

Professional ramifications

There is a divergence of authority on the question of whether the professional ramifications experienced by an offender as a result of their offending can be taken into account as extra-curial punishment.

Wood J (as he then was) said in *R v Hilder* (unrep, 13/5/93, NSWCCA) that a court could "take into account the loss of reputation, and employment and also where appropriate, the loss of a pension or superannuation benefits". This statement cannot apply to Members of Parliament to the extent that s 24C applies: see **Section 24C — disqualification of parliamentary pension** at **[11-355]**. In *Ryan v The Queen* (2001) 206 CLR 267 at [54], McHugh J expressed the view that "[i]t is legitimate … to take into account that the conviction will result in the offender losing his or her employment or profession or that he or she will forfeit benefits such as superannuation". None of the other Justices directly addressed the issue.

In *Einfeld v R* [2010] NSWCCA 87, the court noted there was an element of uncertainty as to whether the concept of extra-curial punishment "includes legal consequences of a kind which flow directly from the conviction or the sentence, such as disqualification from holding an office, remaining in an occupation or holding a licence": *Einfeld v R* at [86]. However, their Honours found that the fact the offender would lose his practising certificate and be struck off the roll of solicitors could be taken into account: *Einfeld v R* at [95]. Such a conclusion was consistent with earlier authority: *Oudomvilay v R* [2006] NSWCCA 275 at [19]; *R (Cth) v Poynder* [2007] NSWCCA 157 at [86].

In *R v Zerafa* [2013] NSWCCA 222, the court accepted the professional ramifications of the offending were a mitigating factor, but found them to be of limited effect because the respondent "must have … anticipated … that an inevitable consequence, if his offending [defrauding the Commonwealth] were discovered … would be that he would be struck off the role of chartered accountants": *R v Zerafa* at [92]. See also *Kenny v R* [2010] NSWCCA 6 at [48]–[50]. This was similar to the approach taken in *FB v R* [2011] NSWCCA 217, which concerned a high school teacher convicted of aggravated sexual assault of a student. The court noted at [156] that the "respondent must have known that his sexual pursuit of pupils in his care would sooner or later bring his professional career to an end". In *DPP v Klep* [2006] VSCA 98 at [18], the Victorian Court of Appeal accepted that the loss of either a profession, office or trade as a direct result of the offending was a factor to be borne in mind but it was not a substitute for the punishment required by law.

Other authorities have declined to find professional ramifications were sufficient to constitute extra-curial punishment. In *Greenwood v R* [2014] NSWCCA 64 at [35],

Hoeben CJ at CL (Bathurst CJ and Adams J agreeing) held that "[l]oss of employment, no matter what the employment, would be an inevitable consequence in almost every circumstance where a person was convicted of an offence of this kind [sexual and indecent assault]". In *Kearsley v R* [2017] NSWCCA 28 at [76], the court held that extra-curial punishment cannot arise when the loss of employment is a natural consequence of a conviction. The applicant's irrevocable loss of his medical career and good standing in the community were not "the superadded or unexpected result of something that is not reasonably associated with the fact of his conviction and sentence": *Kearsley v R* at [77].

The relevance and/or weight to be given to professional ramifications as extra-curial punishment may be influenced by whether the offence was connected to, or committed in the course of, the offender's occupation. The Victorian Court of Appeal has endorsed such an approach, observing in *R v Talia* [2009] VSCA 260, that "[t]here seems … to be a distinct difference between a disqualification resulting from criminal conduct in the course of the employment … and criminal conduct remote from that employment but having that consequence … [i]n the latter class of case there might be a considerably stronger argument in favour of the incidental loss of employment being treated as a circumstance of mitigation": *R v Talia* at [28].

[10-530] Delay

Last reviewed: May 2023

Delay by itself is not mitigatory but it may be in combination with other relevant sentencing factors favourable to the offender: *R v Donald* [2013] NSWCCA 238 at [49] citing *Scook v R* [2008] WASCA 114. Each case depends on its own circumstances: *R v V* (1998) 99 A Crim R 297. Street CJ's statement, in *R v Todd* [1982] 2 NSWLR 517 at 519, is the starting point:

> Moreover, where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course he comes up for sentence on subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

R v Todd was endorsed in *Mill v The Queen* (1988) 166 CLR 59 (at 66) as being a just and principled approach.

For a discussion of delay as a mitigating factor in the specific context of child sexual assault offences, see **Mitigating factors** at **[17-570]**.

Rehabilitation during a period of delay

Rehabilitation undertaken by an offender during a period of delay may effect the sentencing exercise by lessening the significance of general deterrence: *PH v R* [2009] NSWCCA 161 per Howie J at [32]. For example, in *Thorn v R* [2009] NSWCCA 294

at [57], the court found that during the delay of 7 years between the commission of 55 fraud offences and the sentence "the applicant has not only completely reformed but he has also matured from a misguided youth with a compulsion to gamble into a well-respected citizen with honest and steady employment on the threshold of marriage". Similarly, in *R v Ware* (unrep, 9/7/97, NSWCCA), Gleeson CJ said evidence of substantial rehabilitation might be regarded as mitigating. See also the discussion in *R v Pickard* [2011] SASCFC 134 at [95].

The cause of delay is relevant to determining the weight to be given to rehabilitation. Genuine rehabilitation undertaken during a period of delay caused by the offender absconding is not to be entirely ignored, but cannot be given the same significance as in a case where the delay was due to circumstances outside the offender's control: *R v Shore* (1992) 66 A Crim R 37 at 47. In comparison, in *Thorn v R*, the offender had admitted the offences in 2003 and prosecution was not commenced until late 2008, with no explanation for the period of delay, which was in no way the fault of the offender.

Rehabilitation undertaken by an offender during a period of delay may also be a factor weighing in favour of the exercise of an appellate court's residual discretion to dismiss a Crown appeal: see also **The residual discretion to intervene** at **[70-100]**.

Delay — state of uncertain suspense

The "state of uncertain suspense" (Street CJ in *R v Todd* at 519) — where an offender experiences a delay following the initial intervention of the authorities — is a matter which can entitle an offender to an added element of leniency: *R v Blanco* [1999] NSWCCA 121 at [11], [16] and *Mill v The Queen* at 64–66). Where an offender relies on such a mitigating factor, they must establish it on the balance of probabilities: *Sabra v R* [2015] NSWCCA 38 at [47], applying *The Queen v Olbrich* (1999) 199 CLR 270. In *Sabra v R*, the court held that the sentencing judge had erred in tending to the view that although the offender had evidently suffered anxiety and concern over the delay, greater consequences needed to be established before the delay could be taken into account: *Sabra v R* at [44]–[46].

An additional consideration is the desirability for prosecuting authorities to act promptly where there is evidence of serious criminality. It is in the public interest that those who are suspected of serious crime be brought to justice quickly, particularly where there is a strong case against them: *R v Blanco* at [17]. However, it is not permissible to reduce a sentence merely as a means of expressing disapproval at neglectful or dilatory conduct by the State. The focus is overwhelmingly on the consequences of the delay on the offender, no matter what the explanation for it: *R v Donald* at [49].

However, the principle does *not* apply to a state of suspense or uncertainty experienced by an offender who remains silent and hopes that his or her offending will remain undetected: *R v Spiers* [2008] NSWCCA 107 at [37]–[38] (applying *R v Hathaway* [2005] NSWCCA 368 at [43]; *R v Shorten* [2005] NSWCCA 106 at [19]). An offender should not be rewarded for his successful concealment of his offending: *R v Kay* [2004] NSWCCA 130 at [33].

Relevance of onerous bail conditions during delay

Lapse of time on bail brought about as a consequence of the proceedings, such as a delay of three years during which time the offender had been subject to restrictions on

liberty, may properly be regarded as a penal consequence that can be taken into account in sentencing: *R v Keyte* (unrep, 26/3/86, NSWCCA) per Street CJ. What weight is to be given to such a matter will vary from case to case, depending upon what other factors need to be considered and what sentence is required in the particular case to address the purpose of punishment: *R v Fowler* [2003] NSWCCA 321 at [242]. See also *R v Khamas* [1999] NSWCCA 436 and *R v Jajou* [2009] NSWCCA 167 concerning delay and the relevance of onerous reporting requirements while on bail.

Circumstances in which delay may not entitle an offender to leniency

Delay will not usually be a mitigating factor where it is caused by the problems associated with detecting, investigating or proving the offences and the period of the delay is reasonable in the circumstances: *Scook v R* per Buss JA quoted with approval in *R v Donald* [2013] NSWCCA 238 at [49].

Delay will not operate to the benefit of an offender where advantage is taken of the opportunity afforded by his/her liberty during that period to reoffend: *R v DKL* [2013] NSWCCA 233 at [46]. Nor does it apply to the sentencing for murder where there was no uncertainty as to the sentence the prisoner would receive if found guilty because of the provisions of s 19 *Crimes Act 1900*, as it then stood: *R v King* (1998) 99 A Crim R 288. It is the fact of imprisonment, rather than the length of the sentence, which will be of greatest significance in punishing the offender and denouncing his conduct: *R v Moon* [2000] NSWCCA 534 per Howie J at [81].

Sentencing practice after long delay

Section 21B *Crimes (Sentencing Procedure) Act 1999* provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied *at the time the offence was committed*, not at the time of sentencing: s 21B(2). These provisions apply to proceedings commenced on or after 18 October 2022: see *Crimes (Sentencing Procedure) Amendment Act 2022*. Prior to the insertion of s 21B, unless the offence was a child sexual offence (see s 25AA(1) (rep)), the court was required to sentence in accordance with the sentencing patterns and practices existing *at the time of the offence*: *R v MJR* (2002) 54 NSWLR 368. Section 25AA(1) continues to apply to proceedings commenced from 31 August 2018 to 17 October 2022.

However, s 21B(3) provides that a court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the *time the offence was committed* if:

(a) the offence is not a child sexual offence; and

(b) the offender establishes that there are exceptional circumstances.

Section 21B(3) has not yet been judicially considered however, where it applies, reference to the common law that had developed prior to the insertion of s 21B may provide some guidance. Where an offender is exposed to a harsher punishment and sentencing regime than that which existed at the time of the offence, and if an authentic and credible body of statistical material exists that is capable of reconstructing what would have been done previously, then the approach outlined in *R v Shore* (1992)

66 A Crim R 37 should be adopted: *R v MJR* (2002) 54 NSWLR 368. In *R v Shore* Badgery-Parker J (with whom Mahoney JA and Hunt CJ at CL agreed) at [42] approved the trial judge's statement of his approach as follows:

> In my opinion I should, so far as I am able to do so, seek to impose upon the offender, a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so.

In the absence of such statistical material, the court is constrained to take the non-statistical approach, as described by Howie J in *R v Moon* [2000] NSWCCA 534 at [70], and approved by Sully J in *R v MJR* at [107]:

> The nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence are crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed. Even after taking into account the subjective features of the offender and all the other matters relevant to sentencing, such as individual and general deterrence, the sentence imposed should reflect the objective seriousness of the offence … and be proportional to the criminality involved in the offence committed … Whether the sentence to be imposed meets these criteria will be determined principally by a consideration of the nature of the criminal conduct as viewed against the maximum penalty prescribed for the offence.
>
> When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the Court will by approaching the sentencing task in this way effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time.

This view was endorsed by Spigelman CJ, who held that the sentencing practice at the time of the commission of the offences should be applied, rather than the higher severity that had been adopted since that time. According to Spigelman CJ, the propositions he put forward in *R v PLV* (2001) 51 NSWLR 736 at [94], concerning the difficulty in determining what the court would have done many years before, and in making such an artificial and inappropriate distinction, were incorrect. Instead, he found at [31]:

> it is "out of keeping" with the provisions of s 19 of the *Crimes (Sentencing Procedure) Act 1999*, for this court to refuse to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender.

For a discussion of sentencing practices following delay in the context of sexual offences against children see **Sentencing for historical child sexual offences** at **[17-410]**.

[10-540] Restitution

Last reviewed: May 2023

It is usual for the court to have regard to whether, and the extent to which, there has been restitution to those affected by the crime, but this will not carry much weight in

the way of mitigation if the prospects of adequate compensation for loss is remote: see, for example, *R v Kilpatrick* [2005] NSWCCA 351 at [37]. There is an extensive discussion of the authorities in *Job v R* [2011] NSWCCA 267 at [32]–[49]. See further, in the context of fraud offences, in **Mitigating factors** at **[20-000]**.

There should be evidence of any claims that restitution has been effected if such a consideration is to be taken into account as a mitigating factor. In *R v Johnstone* [2004] NSWCCA 307 at [37]–[38].

The principal restitution power is found in s 43 *Criminal Procedure Act 1986*, and relates to all offences and all courts: s 3 Sch 2 *Crimes Act 1900*. Section 43 provides:

> **43 Restitution of property**
>
> (1) In any criminal proceedings in which it is alleged that the accused person has unlawfully acquired or disposed of property, the court may order that the property be restored to such person as appears to the court to be lawfully entitled to its possession.
>
> (2) Such an order may be made whether or not the court finds the person guilty of any offence with respect to the acquisition or disposal of the property.
>
> (3) Such an order may not be made in respect of:
>
> (a) any valuable security given by the accused person in payment of a liability to which the person was subject when the payment was made, or
>
> (b) any negotiable instrument accepted by the accused person as valuable consideration in circumstances in which the person had no notice, or cause to suspect, that the instrument had been dishonestly come by.

Availability

Pursuant to s 43, a court may order property to be restored to the person lawfully entitled to possession, where a person is accused under the *Crimes Act* of unlawfully acquiring or disposing of property: s 43(1) *Criminal Procedure Act 1986*.

Restitution orders may not be made in respect of certain valuable securities or negotiable instruments: s 43(3).

Any order under s 10 *Crimes (Sentencing Procedure) Act 1999* has the effect of a conviction for a restitution order: s 10(4) *Crimes (Sentencing Procedure) Act 1999*.

As to restitution in respect of an offence taken into account, see below.

Effect of acquittal

Restitution orders may be made irrespective of whether or not the person is found guilty of an offence with respect to the acquisition or disposal of the property in question: s 43(2) *Criminal Procedure Act 1986*.

Subject matter

The section does not expressly deal with the proceeds of the original property where those proceeds are in the hands of the defendant. However, it has been held, in *R v Justices of the Central Criminal Court* (1860) 18 QBD, that when examining similar legislation, proceeds are capable of being the subject of orders for restitution. The court in that case also said that a restitution order could be made against an agent,

where the agent holds the proceeds on behalf of the defendant. It has been held that a court can make an order for restitution against the property or proceeds, but it cannot do both: *R v London County Justices* (1908) 72 JP 513.

Where an offender is charged with offences in relation to certain goods, and all those goods have been recovered, it is an incorrect exercise of judicial discretion to order the offender to make restitution out of money taken from him or her at the time of apprehension that relates to other offences with which the offender is not charged.

Restitution for offences taken into account

Where a person is found guilty of an offence, the sentencer may, with the consent of the person, take into account other offences to which guilt is admitted under s 33 *Crimes (Sentencing Procedure) Act 1999*: see **Taking Further Offences into Account (Form 1 Offences)** at **[13-200]**.

A restitution order may be made in respect of such offences as though the person had been convicted: s 34 *Crimes (Sentencing Procedure) Act 1999*.

Third party interests

Where any valuable security has been paid by a person liable to payment thereof, or, being a negotiable instrument, has been taken for a valuable consideration without notice or cause to suspect that the same had been dishonestly come by, a court may not order restitution: s 43(3) *Criminal Procedure Act 1986*.

Beyond this provision, civil law regulates the rights of third parties.

There is a general principle that restitution orders should only be made in very clear cases: *Stamp v United Dominions Trust (Commercial) Ltd* [1967] 1 QB 418.

Where third party interests are affected, the third party is entitled to be heard before the restitution order is made: *R v Macklin* (1850) 5 Cox CC 216; *Barclays Bank Ltd v Milne* [1963] 1 WLR 1241.

It seems settled that, where there are serious competing claims between third parties, then criminal courts should not exercise their discretion to make restitution orders.

Good behaviour bonds and restitution

For the power of the court to impose restitution in addition to orders under s 10 *Crimes (Sentencing Procedure) Act 1999* (which include good behaviour bonds), see **Availability**, above.

As to the power to impose restitution as a condition of either a s 10 dismissal or a s 12 suspended sentence, both those provisions are silent.

Victims Rights and Support Act 2013

The Victims Support Scheme was established by the *Victims Rights and Support Act 2013* for the provision of support for victims of acts of violence: see Pt 4. Concerning the eligibility for support, see Pt 4 Div 2. Provision for restitution by offenders is covered by Pt 5 Div 2. The Commissioner of Victims Rights has a discretion to make a provisional order for restitution by an offender: s 59.

Children's Court

The Children's Court has such power as magistrates generally to award restitution: *Children (Criminal Proceedings) Act 1987*, s 27. Specifically, nothing in the list of

penalties which the court may impose limits its power to make orders for restitution under s 43 *Criminal Procedure Act 1986*: s 33(5)(c) *Children (Criminal Proceedings) Act 1987*.

[10-550] Conditional liberty

Last reviewed: May 2023

See also commentary for **Section 21A(2)(j) — the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence** at **[11-150]**.

The courts have long recognised that the commission of an offence whilst the offender is subject to a form of conditional liberty is an aggravating factor at sentence: *Porter v R* [2008] NSWCCA 145 at [86]; *Maxwell v R* [2007] NSWCCA 304 at [27]; *RC v DPP* [2016] NSWSC 665 at [39]; *R v Tran* [1999] NSWCCA 109 at [15]; *Kerr v R* [2016] NSWCCA 218 at [71]–[72]. It is not necessary that the offence(s) committed is similar to the one that curtails the offender's liberty: *Frigiani v R* [2007] NSWCCA 81 at [26].

Whilst it is an aggravating subjective factor it is not to be considered as part of the objective seriousness of the crime: *Simkhada v R* [2010] NSWCCA 284 at [25]; *Martin v R* [2011] NSWCCA 188 at [7], [17]. See **[7-890] What is the standard non-parole period?** under the subheading "Other factors".

It is considered an abuse of freedom "by taking the opportunity to commit further crimes": *R v Richards* (1981) 2 NSWLR 464 at 465. Where the offender breaches a non-custodial sentencing option there is a "very real risk that the whole regimen of non-custodial sentencing options will be discredited": *R v Morris* (unrep, 14/7/95, NSWCCA), where the offender had committed offences which amounted to a breach of the recognizance.

Impact on rehabilitation

The commission of an offence whilst an offender is subject to conditional liberty can cast doubt on an offender's rehabilitation and has been described as a "[b]etrayal of the opportunity for rehabilitation" which should be "regarded very seriously": *R v Tran* [1999] NSWCCA 109 at [15] citing *R v Vranic* (unrep, 7/5/91, NSWCCA) and *R v McMahon* (unrep, 4/4/96, NSWCCA); *R v Cicekdag* [2004] NSWCCA 357 at [53]; *R v Fernando* [2002] NSWCCA 28 at [42].

Status of an escapee

It has been held that a person who commits offences while an escapee from lawful custody is, in terms of offence seriousness, in a scale above that of a person who commits offences while on conditional liberty on bail or parole: *R v King* [2003] NSWCCA 352 at [38].

On appeal

A failure of the Crown to draw the sentencing judge's attention to the fact that the offender was on conditional liberty (parole) at the time of committing the offence makes it difficult for the Crown to rely on that fact on an appeal against sentence: *R v Amohanga* [2005] NSWCCA 249 at [119].

As to the consequences of breaching various forms of conditional liberty, see further **Variation and revocation of CRO conditions** at **[4-730]** and **Breaches of non-custodial community-based orders** at **[6-600]**ff.

[10-560] Ameliorative conduct or voluntary rectification

Last reviewed: May 2023

A court may take into account the post-crime ameliorative conduct of the offender as a matter in mitigation of sentence: *Thewlis v R* [2008] NSWCCA 176 at [4]–[5], [40], [43]. The conduct is not relevant to the assessment of the objective gravity of the offence since by that time the offence is complete: at [38]. Simpson J said at [43]:

> it ought now be accepted that, in an appropriate case … conduct of the kind engaged in by the applicant warrants some consideration in mitigation of sentence. (I stress that I have twice referred to "mitigation of sentence". That is different from, and not to be confused with, mitigation of the offence: the latter concept is concerned with the evaluation of objective gravity.).

After two knife attacks, Thewlis immediately disclosed to neighbours what he had done, arranged for an ambulance to be called, and waited for police to arrive. Prompt medical attention played a role in saving the life of one of the victims: at [4], [33]. Simpson J also said ameliorative conduct does not come within s 21A(3)(i) *Crimes (Sentencing Procedure) Act 1999* (remorse shown by the offender for the offence) and is different from voluntary disclosure of guilt (*R v Ellis* (1986) 6 NSWLR 603).

Spigelman CJ in *Thewlis v R* relied upon the judgment of Hunt CJ at CL in *R v Phelan* (1993) 66 A Crim R 446. Spigelman CJ said at [4]–[5]:

> The reasons in *Phelan* were clearly appropriate in the context of a crime involving the loss of money. They, however, emphasise that something special is required for ameliorative conduct to result in mitigation of sentence. Merely taking a step to redress the effect of a crime on victims is not of itself enough.
>
> In the present case that special additional element is to be found in the fact that it does appear that the applicant's immediate recognition of his wrongful act played a significant, and quite possibly decisive role, in saving the victim's life.

Price J said at [46]: "I agree with Simpson J. I also agree with the observations made by Spigelman CJ".

[10-570] Deportation

Last reviewed: May 2023

Under the *Migration Act 1958* (Cth) an offender who is not an Australian citizen (non-citizen offender) may be deported for various reasons, including as a consequence of a sentence imposed for an offence. The impact of potential or actual deportation on non-citizen offenders varies, with some only being in Australia to commit an offence, while others are permanent residents with significant family, financial and community ties in Australia.

The Minister has a broad discretion to cancel a non-citizen offender's visa on character grounds but in some cases must cancel their visa:

1. **Discretionary cancellation provisions**: the Minister may cancel a non-citizen offender's visa, if they suspect the person does not pass the character test and it

is in the national interest to do so: s 501(2). There are a number of reasons why someone may not pass the character test, including that they have a substantial criminal record: s 501(6), (7). The offender may seek a merit review of any such decision: s 500(1)(b).

2. **Mandatory cancellation provisions**: the Minister must cancel a non-citizen offender's visa if they are serving a full-time sentence of imprisonment in a custodial institution and have been sentenced to at least 12 months imprisonment or have a conviction for a child sexual offence: s 501(3A) (mandatory cancellation). The offender may make an application to the Minister to revoke a mandatory cancellation: s 501CA(4).

In NSW, the long-standing position is that actual or potential deportation is a matter for the Executive government and is not relevant to sentencing: *R v Pham* [2005] NSWCCA 94 at [13]–[14]; *Kristensen v R* [2018] NSWCCA 189 at [34].

Sentencing structure including setting a non-parole period

A court cannot alter an otherwise appropriate sentence to avoid or facilitate a non-citizen offender's deportation: *Hanna v EPA* [2019] NSWCCA 299 at [65]; *R v Fati* [2021] kA 99 at [61]. In *R v MAO; ex parte A-G* [2006] QCA 99 at [16]–[18], the Queensland Court of Appeal found the judge erred in imposing a sentence of 11 months 3 weeks for child sexual offences so the sentence did not "endanger" the offender's residency status. In *R v Fati* the judge found there was "no doubt" a sentence of imprisonment was required, but fully suspended the sentence to facilitate the offender's immediate deportation. The South Australian Court of Appeal found it was wrong in principle to impose a "lesser sentence than is appropriate": at [61]–[69].

Deportation is also not generally a relevant consideration in determining whether or not to fix a non-parole period: *The Queen v Shrestha* (1991) 173 CLR 48 at 71; see also *He v R* [2016] NSWCCA 220 at [23]; *R v Calica* (2021) 43 NTLR 7 at [77]–[78], [140]. A primary benefit of parole is the offender's rehabilitation. A non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole. Deane, Dawson and Toohey JJ said at 71:

> This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country.

It is also impermissible to consider potential deportation in determining the length of the non-parole period even though deportation means the offender will not be supervised: *R v Pham* at [14]; *He v R* at [23]; *AC v R* [2016] NSWCCA 107 at [79]. Similarly, an offender who is likely to be deported should not be denied a finding of special circumstances if they would otherwise qualify for such a finding: *R v Mirzaee* [2004] NSWCCA 315 at [21].

Deportation as a matter in mitigation

Last reviewed: August 2024

There are two lines of conflicting authority in Australia as to whether the prospect of deportation can be taken into account as a factor in mitigation.

In NSW and Western Australia the longstanding approach is that it is an error to take the prospect of deportation into account as a mitigating factor. As previously

noted, deportation is a matter for the Commonwealth Executive government, and as "the product of an entirely separate legislative and policy area of the regulation of our society" cannot be taken into account on sentence: *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311; *R v Pham* at [13]–[14]; *Khanchitanon v R* [2014] NSWCCA 204 at [28]; *Kristensen v R* at [35]. This includes taking deportation into account as extra-curial punishment: *Khanchitanon v R* at [28].

This approach has not changed since the mandatory cancellation provisions were introduced in 2014. In *Kristensen v R*, Payne JA (RA Hulme and Button JJ agreeing) said at [34]–[35]:

> I see no reason based on the … [mandatory cancellation] provisions … to adopt any different approach to sentencing in New South Wales... True it is that the statute now has an automatic application, subject to safeguards and ultimately to review. The possibility of deportation was not, in *Mirzaee*, *Pham* and *AC*, a relevant consideration on sentence, even in fixing the offender's non-parole period. Deportation was a live issue in cases such as the present under the migration law prior to 2014. After the amendment, deportation remains a matter for the Commonwealth Executive government, subject to review within the Constitutional structure.

Further, the migration status of a non-citizen offender who has been residing in Australia is often unresolved until well after imposing the sentence so there may be practical difficulties quantifying the prospects of deportation: *Hanna v EPA* at [97]. If the longstanding position in NSW is to be challenged, the evidence about the applicant's likely deportation needs to be more than a speculative possibility: *Kristensen v R* at [35]. In *Kristensen v R* potential deportation was considered speculative because the mandatory cancellation of the offender's visa was subject to the offender applying to have it revoked. See also *R v Calica* at [157].

In NSW, there appears to be some divergence of views about taking deportation into account where it gives rise to exceptional circumstances due to the impact on non-citizen offenders' family and dependents: *Hanna v EPA* at [85]–[88]; see also **Hardship to family/dependents** at **[10-490]**. In *R v Kwon* [2004] NSWCCA 456 at [48] (which predates *R v Pham*) and *R v Hull* [2016] NSWSC 634 at [130]–[131], Supreme Court judges, at first instance, took the prospect of deportation into account in such circumstances. *R v Hull* was referred to with approval in the dissenting judgment in *R v Shortland* [2018] NSWCCA 34 at [124] (Hidden AJ), but in *Hanna v EPA* at [85]–[87] doubt was cast on the correctness of these decisions.

In Victoria, Queensland, South Australia and the Northern Territory, the prospect of deportation may be taken into account in mitigation as a personal circumstance of a non-citizen offender if there is an assessable risk of deportation and evidence it would cause hardship. This is on the basis that either the prospect of deportation may make incarceration more burdensome or, upon release the offender may lose an opportunity to settle in Australia: *Guden v R* (2010) 28 VR 288 at [25]–[29]; *Da Costa Junior v R* [2016] VSCA 49 at [24]–[25], [52]–[53]; *R v UE* [2016] QCA 58 at [16]; *R v Schelvis* [2016] QCA 294 at [72]; *R v Norris* [2018] 3 Qd R 420 at [31]–[45]; see also *Kroni v The Queen* (2021) 138 SASR 37 at [227]–[229]; *R v Calica*, above, at [156].

These different "state-based" approaches have been followed regardless of whether the offences are State or Commonwealth offences: *Sentencing of federal offenders in Australia: a guide for practitioners*, Commonwealth Director of Public Prosecutions,

7th edition, July 2024, at [512]ff. See for example, *Kristensen v R*. However, in obiter remarks, the five-judge Bench in *R v Calica* said deportation should be able to be taken into account in mitigation in appropriate Commonwealth cases: at [155].

Cases involving non-citizen offenders may give rise to issues of hardship in custody due to isolation: see further **Hardship in Custody**, **Foreign Nationals** at **[10-500]**.

Structuring a sentence

Actual or potential deportation is irrelevant to structuring a sentence: *R v Pham* at [13].

A court cannot alter an otherwise appropriate sentence to avoid the effect of the *Migration Act*: *Hanna v EPA* at [65]. In *R v MAO; ex parte A-G* [2006] QCA 99 at [16]–[18], the Queensland Court of Appeal found the judge erred in imposing a sentence of 11 months 3 weeks for serious child sexual offences so the sentence did not "endanger" the offender's residency status.

Nor should a court discriminate against non-citizen offenders in determining whether they can be eligible for release on parole: *The Queen v Shrestha* (1991) 173 CLR 48 at 71; see also *He v R* at [23]. A primary benefit of parole is the rehabilitation of an offender. A non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole. Deane, Dawson and Toohey JJ said at 71:

> This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country.

It is also impermissible to consider potential deportation in determining the length of the non-parole period even though deportation means the offender will not be supervised by NSW Community Corrections: *R v Pham* at [14]; *He v R* at [23]; *AC v R* at [79].

Similarly, an offender who is likely to be deported should not be denied a finding of special circumstances if they would otherwise qualify for such a finding: *R v Mirzaee* at [21].

[The next page is 5621]

Sentencing following a retrial

[10-700] "The ceiling principle"

Where an offender is convicted of an offence after a retrial, he or she should not ordinarily receive a longer sentence or non-parole period than that imposed after the first trial, unless there is some significant circumstance to be taken into account: *R v Gilmore* (1979) 1 A Crim R 416 at 419; *R H McL v The Queen* (2000) 203 CLR 452 at [72].

This principle is not intended to fetter the independent discretion of the sentencing judge: *R v Bedford* (1986) 5 NSWLR 711 at 714; *R v Merritt* [2000] NSWCCA 365 at [29]. It is open to the judge to impose a higher sentence if the original sentence was manifestly inadequate or "remarkably lenient": *R v Merritt* at [34]; *R v Hannes* [2002] NSWSC 1182. However, the exercise of a discretion that increases the original sentence is "necessarily rare": *R H McL v The Queen* at [72]. If a longer sentence is called for, the reasons for this should be specified: *R v Bedford* at 714.

The policy underlying this principle is that a person whose conviction is tainted by a defective trial should not run the risk of a heavier sentence on a new trial. There is a "public interest in ensuring orderly and proper administration of the criminal law" by exposing defects in trials on appeal: *R v Gilmore* at 420. It is also wrong that a person should "suffer ill-founded criminal judgement … and feel constrained to avoid exposing that defect": *R v Gilmore* at 420. Furthermore, the passing of a heavier sentence might appear to import an element of retribution as a consequence of the conviction on the first trial having been successfully overthrown: *R v Gilmore* at 420.

Significant circumstances might include escaping from custody or the committing of other offences while on bail: *R v Gilmore* at 419. Where there are multiple convictions, not all of which are the subject of sentencing after a retrial, it can be significant that the original sentences were modified by considerations of totality: *R v Bedford* at 714; *R H McL v The Queen* at [34], [74].

Where the findings at the retrial lead to an assessment of the offender's culpability greater than that of the first trial judge, a heavier sentence is warranted: *Tarrant v R* (2007) 171 A Crim R 425 at [39]. In *Tarrant v R* the offender received a longer sentence after a retrial in which the Crown case was limited to joint criminal liability, whereas liability as an aider and abettor had been available to the sentencing judge after the first trial.

The ceiling principle was applied where the offender was convicted and sentenced for a lesser offence following a successful appeal against conviction: *Armstrong v R* [2015] NSWCCA 273. Although a lighter sentence was imposed for the lesser offence the court ordered a greater level of accumulation for two unrelated offences. A proper application of the ceiling principle requires consideration of all components of the sentence including its commencement date relative to other sentences: *Armstrong v R* at [66]. The court held that the judge gave no reasons for not applying the ceiling principle and fell into error by regarding the earlier sentences as irrelevant: *Armstrong v R* at [53].

[The next page is 5651]

Parity

[10-800] Summary of relevant considerations

Last reviewed: August 2023

- The parity principle is based on the concept that like cases should be treated alike and different cases differently: *Green v The Queen* (2011) 244 CLR 462; *Lowe v The Queen* (1984) 154 CLR 606. See **[10-801]**, **[10-805]**.
- Ordinarily, related offenders should be sentenced at the same time by the same judge. The parties, particularly the prosecution, should take steps to ensure this occurs. This enables overall consideration of the relationship between the objective and subjective features of the offenders. See **[10-801]**.
- The parity principle is not confined to offenders charged jointly with the same offence. It extends to those engaged in the same criminal enterprise and may apply where the offenders are not co-offenders as such. See **[10-810]**.
- When co-offenders are sentenced by different judges, each offender is to be sentenced on the content of the statement of facts tendered against them. Differences of outcome may be explicable because of the evidence presented in each case. See **[10-801]**.
- Where one offender is sentenced in the Children's Court and the other in an adult jurisdiction, it is necessary to recognise the very different sentencing regimes and apply the special principles identified in *R v Boney* [2001] NSWCCA 432. See **[10-820]**.
- Whether or not a severity appeal is allowed, depends on whether the discrepancy is such as to warrant the conclusion that the degree of disparity is unjustified. See **[10-805]**, **[10-840]**.
- Generally, the Crown cannot rely on the parity principle in an appeal against sentence. See **[10-850]**.

[10-801] Introduction

Last reviewed: November 2023

The parity principle is an aspect of the systemic objectives of consistency and equality before the law — the treatment of like cases alike, and different cases differently: *Green v The Queen* (2011) 244 CLR 462 at [28]. The avoidance of unjustifiable disparity between the sentences imposed upon offenders involved in the same criminal conduct or a common criminal enterprise is a matter that is "required or permitted to be taken into account by the court" under s 21A(1) *Crimes (Sentencing Procedure) Act 1999*: *Green v The Queen* at [19]. The principle is applied at first instance and on appeal (see below). An assertion by an offender of unjustified disparity can be a separate ground of appeal: *Green v The Queen* at [32].

Sentencing courts, prosecutorial bodies and defence counsel should take steps to ensure related offenders are sentenced by the same sentencing judge, preferably at the same time: *Dwayhi v R* [2011] NSWCCA 67 at [44]–[45]. As a matter of practice, it is in the highest degree desirable that co-offenders be sentenced by one judge: *Postiglione v The Queen* (1997) 189 CLR 295. If this occurs, the judge is then in a position to consider the interrelationship between the objective and subjective features of the offenders in an overarching way: *Usher v R* [2016] NSWCCA 276 at [73].The desirability of this practice has been repeatedly emphasised on the basis that it serves the public interest in consistent and transparent sentencing of related offenders: *Dwayhi v R* at [33]–[43], [46]; *Ng v R* [2011] NSWCCA 227 at [77]–[78]; *Adams v R* [2018] NSWCCA 139 at [81]; *R v Lembke* [2020] NSWCCA 293 at [55]. Many of the parity problems that arise on appeal could be avoided if co-offenders were sentenced at the same time by the same judge.

If co-offenders are not sentenced by the same judge, questions may arise as to whether the second judge is bound by the findings of fact made by the first judge. Where sentenced by different judges, any discrepancy between the offenders' sentences must be judged by reference to the specific evidence, submissions and findings made in relation to each — different sentences may be explicable on that basis: *PG v R* [2017] NSWCCA 179 at [24], [48]; *Piao v R* [2019] NSWCCA 154 at [3]–[6]; [45]–[46]; *Tran v R (Cth)* [2020] NSWCCA 310 at [37]; see also *Rae v R* [2011] NSWCCA 211 at [54]. In *Baquiran v R* [2014] NSWCCA 221, the court held that although the parity principle applied, the second judge was not bound by the findings made by another judge in different sentencing proceedings: at [27].

In *R v Rosenberg* [2022] NSWCCA 295, the court stated that in such cases, leaving aside any consideration of parity and absent agreement to the contrary, each offender is to be sentenced on the content of the statement of facts tendered against them without regard to what might be said about them in any other statement of facts tendered against a co-offender: at [10]. The court in *R v Dyson* [2023] NSWCCA 132, applying *R v Rosenberg*, found a sentence to be manifestly inadequate as the sentencing judge had regard to a co-offender's sentence imposed in the Local Court in respect of different facts: at [55]. Sweeney J (Button and Hamill JJ agreeing) summarised the relevant principles in respect of such cases: *R v Dyson* at [54].

Lastly, the parity principle is not concerned with the comparison of sentences imposed on persons who were not co-offenders: *Kiraz v R* [2023] NSWCCA 177 at [43]; *Malouf v R* [2019] NSWCCA 307; *Baladjam v R* [2018] NSWCCA 304 at [148]–[149]; *Why v R* [2017] NSWCCA 101; *Meager v R* [2009] NSWCCA 215; *R v Araya* [2005] NSWCCA 283 at [66].

[10-805] A justifiable sense of grievance

The decision of *Lowe v The Queen* (1984) 154 CLR 606 is cited as the principal source of the parity principle. Dawson J, with whom Wilson J agreed, summarised the parity principle as follows at 623:

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or his involvement in the offence are different then different sentences may be called for but justice should be even-handed and it has come

> to be recognised both here and in England that any difference between the sentences imposed upon co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of a grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done.

See also Gibbs CJ at 609, Brennan J at 617 and Mason J at 610. There is also an exposition of the principle by Dawson and Gaudron JJ in *Postiglione v The Queen* (1997) 189 CLR 295 at 301. In *Green v The Queen* (2011) 244 CLR 462, the High Court considered the application of the parity principle in sentence appeals (see further below).

Inconsistency in the sentencing of co-offenders gives rise to a justifiable sense of grievance. Thus, in *Lowe v The Queen*, Mason J at 610 (as he then was) said:

> Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.

The test of unjustifiable disparity is an objective one: *Hiron v R* [2018] NSWCCA 10 at [50]; *Green v The Queen* at [31].

[10-807] Co-offenders with joint criminal liability

Last reviewed: August 2023

Where co-offenders agree to commit a crime, they will be liable for each other's actions when committing the crime as well as additional offences they foresaw might be committed: see *McAuliffe v The Queen* (1995) 183 CLR 108 at 114–115; *Criminal Trial Courts Bench Book* at **[2-740] Joint Criminal Liability**.

Although participants in a joint criminal enterprise are equally liable for the same crime, different sentences may be imposed after considering objective and subjective factors. Gibbs CJ in *Lowe v The Queen* (1984) 154 CLR 606 stated at 3:

> It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

In assessing the objective seriousness of the offence, it is often appropriate to differentiate between the relative culpability amongst co-offenders by reference to the conduct of each in the joint criminal enterprise: *R v JW* (2010) 77 NSWLR 7. However, there are limits to which this can occur with respect to the objective seriousness of the offence, because of the existence of the common purpose to commit the offence: *R v Wright* [2009] NSWCCA 3. In assigning roles to the specific participants, the sentencing judge should not lose sight of the fact that they were all participants in the crime: *R v JW* at [213]. Subjective features of individual offenders will result in differences — sometimes significant — in the sentences imposed between offenders:

R v JW at [166]. However, there are always differences in the objective and subjective elements in cases involving multiple offenders. Consideration should be given to whether the sentence imposed on a co-offender is reasonably justified given those differences: *Miles v R* [2017] NSWCCA 266 at [9].

Some of these issues are highlighted in *Rahman v R* [2023] NSWCCA 148 where the offender was sentenced with a co-offender for two counts of specially aggravated kidnapping in company occasioning actual bodily harm pursuant to s 86(3) *Crimes Act 1900* committed on the basis of a joint criminal enterprise to abduct and steal from the victims. The co-offender inflicted grievous bodily harm on one of the victims by striking them to the head with a handgun and it was accepted the applicant did not foresee this. Button J at [77]–[80] (McNaughton J agreeing) held that, as the injury was an objective feature of the offence's consequences, and there was no "greater" offence (such as kidnapping occasioning grievous bodily harm) it was correctly taken into account in the offender's case.

Whatever the consequences of an offence, the state of knowledge, belief, intention, recklessness, other form of foresight, or other states of mind (including complete inadvertence) on the part of an offender, constitute important matters on sentence feeding into the question of degrees of culpability, and appropriate punishment: *Rahman v R* at [79] (Button J (McNaughton J agreeing)).

In cases where a court cannot differentiate between the roles each offender played, the offender is to be sentenced on the basis they are criminally responsible for the full range of criminal acts, even though it is not known whether they personally performed them: *Beale v R* [2015] NSWCCA 120 at [59]; see also *GAS v The Queen* (2004) 217 CLR 198 at [22].

For a detailed discussion of the sentencing principles applied for joint liability see A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", *Sentencing Trends and Issues*, No 38, Judicial Commission of NSW, 2009.

The application of principles relating to the sentencing of offenders with joint liability is also discussed in the context of particular offences including: **Detain for advantage/kidnapping** at **[18-730]**; **Drug Misuse and Trafficking Act 1985 (NSW) offences** at **[19-870]**; **Robbery** at **[20-290]**; **Murder** at **[30-070]**; **Manslaughter** at **[40-050]**.

[10-810] Co-offenders convicted of different charges

Last reviewed: November 2023

Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of the application of the principle of parity: *Green v The Queen* (2011) 244 CLR 462 at [30]. Put simply, the parity principle is not confined to sentences imposed upon co-offenders who have committed the same crime; it can also be applied to sentences imposed upon persons who are co-offenders by virtue of having been engaged in the same criminal enterprise, regardless of the charges that have been actually laid against them: *Quinn v The Queen* (2011) 244 CLR 462 at [30]; *Elias v The Queen* (2013) 248 CLR 483 at [30]; *Kiraz v R* [2023] NSWCCA 177, at [42]; *Green v The Queen* at [30]; *Jimmy v R* (2010) 77 NSWLR 540 at [136]–[137], [202], [246]; *Turnbull v The Chief Executive of the Office of Environment and Heritage* [2018]

NSWCCA 229 at [23]. The High Court held in *Green v The Queen* that the Court of Criminal Appeal had erred by discounting the sentence imposed upon Taylor who was convicted of a lesser offence "as a comparator of any significance": *Green v The Queen* at [75].

The High Court acknowledged the statement in *Jimmy v R*, of Campbell JA at [203] which sets out "some of the limits" of the principle of parity. Howie J at [246] and Rothman J at [252] agreed. Campbell JA said at [203] [case references excluded]:

> There are significant limitations, however, on reducing a sentence on the basis of that of a co-offender who has committed a different crime. At least some of the limits on the use of the parity principle in such a case are:
>
> 1. It cannot overcome those differences in sentence that arise from a prosecutorial decision about whether to charge a person at all, or with what crime to charge them … [In this regard, *R v Kerr* [2003] NSWCCA 234 should no longer be followed: [117], [130], per Campbell JA; [247] per Howie J, [267] per Rothman J.]
> 2. If it is used to compare the sentences of participants in the same criminal enterprise who have been charged with different crimes, there can be significant practical difficulties. Those practical difficulties become greater the greater the difference between the crimes charged becomes, and can become so great that in the circumstances of a particular case a judge cannot apply it, or cannot see that there is any justifiable sense of grievance arising from the discrepancy …
> 3. It cannot overcome differences in sentence that arise from one of the co-offenders having been given a sentence that is unjustifiably low …
> 4. There are particular difficulties in an applicant succeeding in a disparity argument where the disparity is said to arise by comparison with the sentence imposed on a co-offender who has been charged with an offence that is less serious than that of the applicant … However *Nguyen* stands as one example where that result arose.

The majority in *Green v The Queen* acknowledged, at [30], the practical difficulties that can arise where there are great differences between co-offenders in the offences charged. In such cases, including where the offenders are charged with offences carrying different maximum penalties, the relevant comparison is more broad and impressionistic than might otherwise be the case: *Dayment v R* [2018] NSWCCA 132 at [65].

In *Gaggioli v R* [2014] NSWCCA 246, a co-offender pleaded guilty to a lesser charge with a lower maximum penalty. The court held that prosecutorial discretion is unreviewable and there could be no justifiable sense of grievance caused by the different approach taken by the prosecution regarding the two offenders.

In *Dunn v R* [2018] NSWCCA 108, the parity principle did not apply where the offender was sentenced for an offence but his co-offenders had the same offence taken into account on a Form 1. No relevant comparison can be made between a sentence imposed for an offence and an unspecified increase in a sentence resulting from the charge being taken into account on a Form 1: *Dunn v R* at [16].

The parity principle will apply where co-offenders are charged with a different number of offences and where an aggregate sentence has been imposed on one offender but not another. However, in such cases, a primary consideration in applying the parity principle will be the indicative sentence for the equivalent offence: *R v Clarke* [2013]

NSWCCA 260 at [68]; *Miles v R* [2017] NSWCCA 266 at [59]–[60]; *Bridge v R* [2020] NSWCCA 233 at [45]–[46].The application of the parity principle can depend on findings of facts about the role of individual offenders in a crime and the subjective features of individual offenders: *R v JW* (2010) 77 NSWLR 7. See **Co-offenders with joint criminal liability** at **[10-807]**.

See generally, A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", Sentencing Trends and Issues, No 38, Judicial Commission of NSW, 2009.

[10-820] Juvenile and adult co-offenders

Where one offender is sentenced in the Children's Court and the other in an adult's jurisdiction, it is proper for the court to recognise that the sentencing takes place in very different regimes: *R v Ho* (unrep, 28/2/97, NSWCCA). In *R v Colgan* [1999] NSWCCA 292, Spigelman CJ, after referring to *R v Govinden* [1999] NSWCCA 118, held at [15] that, although parity considerations do not arise when comparing a person sentenced in the Children's Court with adults:

> … that does not mean that the sentence imposed on a person in the Children's Court, which would otherwise give rise to issues of parity, is irrelevant. This is so for the reason that an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of the regimes.

In *R v Wong* [2003] NSWCCA 247, Kirby J said at [35]:

> The principles relating to parity, where the comparison is with a young offender, have been gathered by Wood CJ at CL in *R v Boney* [2001] NSWCCA 432. A number of propositions can be stated:
>
> - First, in fashioning a sentence for an adult involved in the same crime, it is relevant to have regard to a sentence imposed by the Children's Court upon a co-offender.
> - Second, the worth of that comparison, however, will be limited given the different sentencing objectives and other considerations in the Children's Court.
> - Third, in determining whether there is a justifiable sense of grievance, it must be recognised that a stage can be reached where the inadequacy of the sentence imposed upon a co-offender is such that any sense of grievance engendered by it cannot be regarded as legitimate (*R v Diamond* (NSW, CCA, 18.2.93, per Hunt CJ at CL).
> - Fourth, at an appellant level, where there is a justifiable sense of grievance in the adult offender, that does not oblige the court to intervene. It has a discretion to intervene. It should not intervene where to do so would produce a sentence which does not reflect the objective gravity of the crime.

See further **Subjective factors commonly relevant to robbery** at **[20-300]**.

[10-830] Parity and totality

In *Postiglione v The Queen* (1997) 189 CLR 295, the High Court considered the relationship between the principles of parity and totality. Dawson and Gaudron JJ pointed out that disparity is not simply the imposition of different sentences for the same offence but a question of disproportion between them. Parity is a matter to be determined by having regard to the circumstances of the co-offenders and their

respective degrees of culpability. Different criminal histories and custodial patterns may "justify a real difference in the time each will serve in prison" and "like must be compared with like" when applying the parity principle: at 878. Justice Kirby said that the parity and totality principles are in the nature of checks required out of recognition that the task of sentencing is not mechanical. The sentence may require adjustment because it is out of step with the parity principle or it may offend the totality principle because it is not "just and appropriate", as in the case of a "crushing" sentence. Any adjustments to sentence, his Honour observed "involve subtle considerations which defy precision either of description or implementation": at 901.

The analysis of Dawson and Gaudron JJ does not apply when one offender receives the benefit of the application of the totality principle because of committing multiple offences while another is only sentenced for the common offence: *Kelly v R* [2017] NSWCCA 256 at [32]. What ultimately must be considered is all the components of the sentence imposed on the co-offender including the facts and circumstances of the related and unrelated offences: at [40].

In the Court of Criminal Appeal decision consequent upon *Postiglione*, Hunt CJ at CL said the principle in *Lowe v The Queen* (1984) 154 CLR 606 remains unaffected by the High Court's decision: *R v Postiglione* (1997) 98 A Crim R 134.

For the totality principle, see **Application of totality principle** at **[8-210]**.

[10-840] Severity appeals and parity

The plurality in *Green v The Queen* (2011) 244 CLR 462 at [31]–[32] explained how the parity principle should be applied in severity appeals as follows:

> The sense of grievance necessary to attract appellate intervention [in a severity appeal] with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity. The court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise.
>
> A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive.

The test for establishing disparity has been described as whether the asserted disparity is "gross, marked or glaring" (see such examples as *Tan v R* [2014] NSWCCA 96 at [39] and *Wan v R* [2017] NSWCCA 261 at [48]). In *Cameron v R* [2017] NSWCCA 229 at [83]–[90], Hamill J observed the use of that epithet did not reflect the test which is whether the principles of equal justice have been misapplied. That approach was endorsed in *Miles v R* [2017] NSWCCA 266 at [9], [37]–[40] and *Daw v R* [2017] NSWCCA 327 at [19]–[20]; [62]. Using such descriptors is intended to ensure the principle applies when the discrepancy in sentences is *not reasonably explained* by the degree of difference between co-offenders and their offending: *Miles v R* at [40]; *Wan v R* at [42]; *DS v R* [2014] NSWCCA 267 at [39]. The principle is not to be applied in an unduly technical way: *Miles v R* at [38]; *Cameron v R* at [82].

However, no objection can be taken to the words "gross" or "glaring", if they are used to emphasise that in circumstances where the same judge sentenced both offenders and took the question of parity into account, an appellate court should be cautious to intervene; when considering whether there is a marked disparity to justify an objective sense of grievance, what is being reviewed are qualitative and discretionary judgments: *Borg v R* [2019] NSWCCA 129 at [88], [89] (Bathurst CJ; Hamill and N Adams JJ agreeing). It is not a further or additional requirement on appeal that the disparity be gross or glaring: at [90]. Whether an appellant has established that there is an unjustifiable disparity between their sentence and a co-offender's is a question of substance rather than form: *Kadwell v R* [2021] NSWCCA 42 at [13].

A blunt way to describe the question for the appellate court is: was the differentiation made by the judge one that was open in the exercise of discretion: *Lloyd v R* [2017] NSWCCA 303 at [97].

The discretion to reduce a sentence to a less than adequate level would not require an appellate court to reduce the sentence to a level which would be, as Street CJ put it in *R v Draper* (unrep, 12/12/86, NSWCCA), "an affront to the proper administration of justice": *Green v The Queen* at [33].

[10-850] Crown appeals and parity

Last reviewed: November 2023

The application of the parity principle in Crown appeals is different than when it is applied in severity appeals: *Green v The Queen* (2011) 244 CLR 462 at [34]–[36]. The purpose of Crown Appeals — of laying down principles for the governance and guidance of courts — is a limiting principle: *Green v The Queen* at [34]–[36]. If disparity is apprehended the residual discretion to dismiss a Crown Appeal is enlivened. The High Court framed the approach as follows in *Green v The Queen* at [37]:

> … a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender. The question would then arise: would the purpose of Crown appeals under s 5D be served by allowing the appeal? If the result of doing so would be a sentence "adequate" on its face, but infected by an anomalous disparity which is an artifact of the Crown's selective invocation of the Court's jurisdiction, the extent of the guidance afforded to lower courts may be questionable.

The High Court in *Green v The Queen* cited the following passage of Howie J in *R v Borkowski* [2009] NSWCCA 102 at [70] with approval:

> … the purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular individual. It has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles. That purpose can be achieved to a very significant extent by a statement of this Court that the sentences imposed upon the respondent were wrong and why they were wrong.

If the Court of Criminal Appeal concludes the inadequacy of the sentence appealed from is so marked that it amounts to "an affront to the administration of justice" which risks undermining public confidence in the criminal justice system, the court is

justified in interfering with the sentence notwithstanding the resultant disparity with an unchallenged sentence imposed on a co-offender: *Green v The Queen* at [42] citing *R v Harris* [2007] NSWCCA 130 at [83], [86].

In *Green v The Queen*, the High Court held that the Court of Criminal Appeal erred in failing to give adequate weight "to the purpose of Crown appeals and the importance of the parity principle": *Green v The Queen* at [4]. The court also erred in taking into account its opinion that the sentence imposed upon a co-offender was manifestly inadequate. The sentence had not been raised by a Crown appeal and had not been the subject of argument by the parties at the hearing of the appeal: *Green v The Queen* at [76].

Generally, the Crown cannot rely on the parity principle in an appeal against sentence to argue that a sentence should be increased: *R v Gu* [2006] NSWCCA 104; *R v Weismantel* [2016] NSWCCA 204 at [9]; *R v Lembke* [2020] NSWCCA 293 at [56]–[59]; *R v FF* [2023] NSWCCA 186 at [63]–[65]. Although the Crown may argue a sentence imposed on a co-offender indicates the marked inadequacy of the sentence imposed on a respondent to the appeal, if approached in that way the Crown must persuade the court of the similarity of the facts on which the respondent and other co-offenders were sentenced, their comparable roles in the offences, and why the sentence imposed is, by reference to those features, inadequate: *R v Lembke* at [60]–[61].

[The next page is 5711]

Section 21A factors "in addition to" any Act or rule of law

[11-000] Section 21A — aggravating and mitigating factors

Last reviewed: May 2024

Section 21A(1)–(5C) *Crimes (Sentencing Procedure) Act 1999* (NSW) provides as follows:

21A Aggravating, mitigating and other factors in sentencing

(1) **General**

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors**

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

(ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),

(e) the offence was committed in company,

(ea) the offence was committed in the presence of a child under 18 years of age,

(eb) the offence was committed in the home of the victim or any other person,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* of the Commonwealth),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim’s occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

(n) the offence was part of a planned or organised criminal activity,

(o) the offence was committed for financial gain,

(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender’s vehicle.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise,

(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),

(j) the offender was not fully aware of the consequences of his or her actions because of the offender’s age or any disability,

(k) a plea of guilty by the offender (as provided by section 22 or Division 1A),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23).

(n) an offer to plead guilty to a different offence where the offer is not accepted, the offender did not plead guilty to the offence and the offender is subsequently found guilty of that offence or a reasonably equivalent offence (this circumstance, among others, is provided for by section 25E(1)).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(5A) **Special rules for child sexual offences**

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5AA) **Special rule for self-induced intoxication**

In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

(5B) Subsections (5A) and (5AA) have effect despite any Act or rule of law to the contrary.

(5C) For the purpose of subsection (2)(p), an offence under any of the following provisions is taken to have been committed while a child under 16 years of age was a passenger in the offender’s vehicle if the offence was part of a series of events that involved the driving of the vehicle while the child was a passenger in the vehicle:

(a) section 13(2), 15(4), 18B(2), 18D(2), 22(2), 24D(1) or 29(2) of the former *Road Transport (Safety and Traffic Management) Act 1999*

(b) clause 16(1)(a), (b) or (c), 17(1) or 18(1) of Schedule 3 to the *Road Transport Act 2013*

Section 21A(6) defines "child sexual offence", "prescribed traffic offence", "self-induced intoxication" and "serious personal violence offence".

[11-010] Application of s 21A generally

Last reviewed: May 2024

While s 21A(1) requires the court to take into account the aggravating factors and mitigating factors in s 21A(2) and (3) respectively, it does not purport to codify the law in the area of aggravating and mitigating factors that can be taken into account at sentence: *Porter v R* [2008] NSWCCA 145 at [87].

Section 21A(1)(c) provides that in determining an appropriate sentence for an offence the court is to take into account "any other objective or subjective factor that affects the relative seriousness of the offence". The language employed is very broad: *R v Jammeh* [2004] NSWCCA 327 at [23]. See **Subjective matters at common law** at **[10-400]**ff.

The "matters" referred to in the suffix to s 21A(1) extend beyond the aggravating and mitigating factors tabled in s 21A(2) and (3): *Van Can Ha v R* [2008] NSWCCA 141 at [4].

Therefore, a judge can take account of the effect of the crime on the victim via ss 3A(g) and 21A(1)(c): *R v Jammeh* [2004] NSWCCA 327 at [23]. This is separate and different from applying s 21A(2)(g), which requires "the injury, emotional harm, loss or damage caused by the offence" to be "substantial" (discussed at **[11-120]**): *R v Jammeh* at [23].

Further, common law sentencing principles are preserved by s 21A(1) and must be applied: *Archer v R* [2017] NSWCCA 151 at [132]; *Porter v R* [2008] NSWCCA 145 at [87]; *Cvitan v R* [2009] NSWCCA 156 at [60]; *Meis v R* [2022] NSWCCA 118 at [39]–[43]. Section 21A(4) provides "the court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so." A sentencing principle, established by common law and not abrogated by the Act, is a rule of law: *R v Johnson* [2004] NSWCCA 76 at [33]. In enacting s 21A, it was the intention of Parliament to replicate the common law: *Meis v R* at [24]; *R v Way* (2004) 60 NSWLR 168 at [56]–[57], [103], [118]; *R v Wickham* [2004] NSWCCA 193 at [23].

For an aggravating factor to be taken into account it must be proved beyond reasonable doubt, while mitigating factors need only be proved on the balance of probabilities: *Olbrich v The Queen* (1999) 199 CLR 270 at [27]; *Meis v R* at [29], [47].

The aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law: *R v McNaughton* (2006) 66 NSWLR 566 at [34]. Parliament has not used the word "aggravation" in its narrow common law sense. The text of s 21A(1)(c) ("any other objective or subjective factor") and s 21A(2)(h) and (j) support that interpretation. For example, the aggravating factor under s 21A(2)(j), that the offence was committed

while the offender was on conditional liberty, is relevant as a subjective consideration but not as part of the assessment of the objective seriousness of the offence: *Elhassan v R* [2018] NSWCCA 118 at [14]; *Kelly v R* [2021] NSWCCA 205 at [16].

[11-020] Aggravating factors under s 21A(2) — summary of relevant considerations

Last reviewed: May 2024

- Aggravating factors under s 21A(2) must be proved beyond reasonable doubt. See **[11-040]**.
- Clear findings must be made in respect of s 21A(2) on the basis of the evidence and circumstances of the case. See **[11-030]**.
- Section 21A(2) is to be applied to individual offences, and not in a global way to multiple offences. See **[11-030]**.
- The aggravating factors in s 21A(2) are not to be used as a “checklist”. See **[11-030]**.
- Care should be taken not to double count an aggravating factor if it is:
  - an element of the offence;
  - part of the policy/rationale underlying the offence; or
  - an inherent characteristic of the offence. See **[11-040]**.
- The *De Simoni* principle generally applies in relation to s 21A(2) so an offender cannot be sentenced for a more serious offence. See **[11-050]**.
- The specific aggravating factors in s 21A(2)(a)–(p) are individually discussed from **[11-060]**ff.

[11-030] Application of s 21A(2) — procedural rules and findings

Last reviewed: May 2024

The Court of Criminal Appeal has developed specific approaches as to how s 21A(2) should and should not be applied in a given case. They are designed to encourage transparency, ensure procedural fairness and avoid double counting.

Section 21A should be raised during addresses

It is important that sentencing courts give careful consideration to the factors of aggravation in s 21A(2) to determine not only whether they are available as a matter of law but also whether they arise on the facts of the case: *R v Holten* [2005] NSWCCA 408 at [42]. It is necessary to consider the precise relevance of such matters in the circumstances of the individual case: *Elhassan v R* [2018] NSWCCA 118 at [25].

The judge should indicate to the offender’s legal representative that they are considering taking that matter into account so that counsel have the opportunity to persuade the judge that the aggravating feature is not present or should not be taken into account in the circumstances of the case: *R v Tadrosse* (2005) 65 NSWLR 740 at [19].

Further, while a sentencing judge is not bound to accept a Crown concession about a mitigating factor, if the judge has a concern about a factor, it is important they raise it at the time to give the offender’s counsel an opportunity to address it, before expressing their conclusion in the reasons for sentence: *Chemaissem v R* [2021] NSWCCA 66 at [72].

See further **Opportunity of addressing the court on issues** at **[1-040]**.

Clear findings must be made

The mandatory language used in s 21A(1) "the court is to take into account", and s 21A(2) and (3) "to be taken into account", does not require a court to engage in a ritual analysis of the possible s 21A factors. What is required is for the court to make findings about the factor in accordance with the evidence and circumstances of the case: *Van Can Ha v R* [2008] NSWCCA 141 at [4]; *Taylor v R* [2018] NSWCCA 255 at [56], [58]; *R v Wickham* [2004] NSWCCA 193; *R v King* [2004] NSWCCA 444 at [139]–[141].

The obligation to give reasons requires a sentencing judge to identify which matters have been taken into account: *DBW v R* [2007] NSWCCA 236 at [33], [36]. The judge should clearly identify "the relevant factors, the weight given to them, and their role": *R v Mills* [2005] NSWCCA 175 at [49]. In *R v Dougan* [2006] NSWCCA 34 at [30], the judge erred by failing to make clear precisely how the aggravating factor of threatened use of violence (s 21A(2)(b)) was taken into account in sentencing for the armed robbery offence. In *Meis v R* [2022] NSWCCA 118, the sentencing judge erred by failing to provide a reasoned explanation for treating the applicant's previous offence as an aggravating factor pursuant to s 21A(2)(d). The judge was required, by virtue of s 21A(1) and (4), to address the common law principles concerning prior record as set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465: [39]–[40], [42], [48]. Giving reasons for accepting matters of aggravation "enlightens the sentencing process" and informs the offender, the Crown and the community how the sentencing judge has applied the particular factor: *R v Walker* [2005] NSWCCA 109 at [32].

The court should be careful to make clear in its remarks whether it rejects or accepts matters of aggravation in s 21A(2) relied on by the Crown. If a judge does not expressly reject matters raised by the Crown, it will usually be taken on appeal that the judge accepted them: *R v Wilson* (2005) 62 NSWLR 346 at [42]; see also *Doolan v R* [2006] NSWCCA 29 at [20]; *Thorne v R* [2007] NSWCCA 10 at [68].

In distinction to the Court's approach in *R v Wilson* at [42], it was held in *DBW v R* that if a judge makes only a general reference to s 21A it may indicate they have considered the whole list of aggravating and mitigating factors but have only given weight to those identified in their remarks on sentence: [33].

It is erroneous to identify a precise amount which is added or deducted for each s 21A factor: *R v Johnson* [2005] NSWCCA 186 at [27]; *R v Taylor* [2005] NSWCCA 242 at [10].

In *Doyle v R* [2021] NSWCCA 297 RA Hulme J observed at [46] that invaluable assistance can be gained from the article "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43 where Howie J said:

- A judge who goes through the aggravating factors in s 21A(2) at the end of sentencing remarks as some kind of checklist is likely to fall into error by either double counting aggravating factors or by taking into account matters that have no real application to the particular case before the court.
- The risk of error increases if a judge feels obliged to go through those factors as a task that is independent from the general sentencing exercise of identifying objective and subjective features that are relevant to the sentencing discretion.

The use of checklists of aggravating factors (even in circumstances where they are ultimately not relied upon by the sentencing judge) was similarly discouraged in *Jackson v R* [2019] NSWCCA 101 at [29]–[30].

Applying s 21A where multiple offences committed

Where there are multiple offences, s 21A must be applied to individual offences and not in a general or global way. Where an aggravating factor is found to apply to one or more offences, but not all, it must be indicated in respect of which offence or offences the aggravating factor is taken into account: *R v Tadrosse* at [22]; *Aslett v R* [2006] NSWCCA 49 at [119]–[120]; and *RJA v R* [2008] NSWCCA 137 at [20].

A general or overall reference to which aggravating factors apply may lead to error where some of the factors do not apply to all of the offences for which the offender is being sentenced: *TS v R* [2007] NSWCCA 194 at [21]; *R v Tadrosse*. The Crown sentence appeal of *R v Packer* [2023] NSWCCA 87 is an example of a case where emotional harm to the victim (s 21A(2)(g)) was to be taken into account as an aggravating factor for all of the offences committed, which included sexual assault, and recording and distributing intimate images: [78]–[86].

[11-040] Limitations on the use of s 21A(2) factors

Last reviewed: May 2024

Section 21A(2) was not intended to extend the categories of aggravating factors recognised by the common law at the time the section was created: *Suleman v R* [2009] NSWCCA 70 at [26]. The court should always give attention to the words used to describe any aggravating factor, the policy rationale behind it and the fact that the Crown is to prove a matter of aggravation beyond reasonable doubt: *Gore v R* [2010] NSWCCA 330 at [105]; see also *Olbrich v The Queen* (1999) 199 CLR 270 at [27]; *Meis v R* [2022] NSWCCA 118 at [29].

Double counting

Section 21A(2) provides that “the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.” That provision prohibits double counting of aggravating features of an offence. In *Kassoua v R* [2017] NSWCCA 307, Basten JA at [14] identified a general risk involved in counting aggravating factors by reference to paragraphs of s 21A(2) because those factors are often not independent of each other and attempting to give weight to a particular factor “will result in double counting, or worse”.

Where an offender has been convicted of an aggravated form of an offence, it is not an error for the sentencing judge to consider other available circumstances of aggravation not charged on the indictment: *Ivimy v R* [2008] NSWCCA 25 at [28]. For example, in that case, the offender was convicted of aggravated indecent assault, with the pleaded circumstance of aggravation being that the victim was under 16 years of age, and the judge took into account another circumstance of aggravation (abuse of authority) under s 21A(2)(k).

The prohibition in s 21A(2) does not prevent the court from considering the nature and seriousness of the facts of the offence: *Bou-Antoun v R* [2008] NSWCCA 1 at [14]. For example, while the fact an offence was committed in company (s 21A(2)(e)) cannot have an additional effect where it is an element of the offence, a court is entitled to have

regard to the nature and extent of the company and the manner in which the presence and behaviour add to the menace of the occasion. These matters are relevant to the seriousness of the offence charged: *R v Way* (2004) 60 NSWLR 168 at [106]–[107].

In *Hamze v R* [2006] NSWCCA 36 at [29] it was held it is permissible for a court to take into account the fact of the threatened use of violence as an element of the offence of robbery and then have regard to the nature of the threat of violence under s 21A(2)(b) in considering the seriousness of the offence. Double counting occurs if the judge takes into account the fact of the threatened use of violence twice; that is, first as an element of the offence and then under s 21A(2)(b).

The different forms of double counting are discussed below. Direct double counting is discussed within the individual offence chapters in the **Particular offences** section beginning at **[17-000]**.

Double counting elements where the policy underlying the offence is given expression as a s 21A(2) factor

An element of an offence should not be treated as an aggravating factor if it merely reflects the policy underlying the offence: *Elyard v R* [2006] NSWCCA 43 at [9]–[10]. The task involves identifying the purpose underlying the inclusion of an element of a particular offence against the matters listed in s 21A(2). The court must consider any differences in the language used to describe the element of an offence and the description of the particular aggravating factor in question: *Elyard v R* at [9]–[10].

Double counting an inherent characteristic of an offence

An aggravating feature in s 21A(2) cannot be taken into account where it is an expected feature or result of the commission of the offence: *R v Youkhana* [2004] NSWCCA 412; *R v Solomon* [2005] NSWCCA 158 at [20]; *Elyard v R* at [39]. For example, for offences of aggravated dangerous driving causing grievous bodily harm or death, it will almost inevitably be the case that it is an inherent characteristic that the offence was committed without regard for public safety (s 21A(2)(i)): *Elyard v R* at [12], [43]. However, where a lack of regard for public safety is so heinous that it “transcends that which would be regarded as an inherent characteristic of the offence”, it may be given additional effect as an aggravating factor: *Elyard v R* at [10], [43]. To take it into account under s 21A, the court must find beyond reasonable doubt that the element exceeds that which would ordinarily be expected of the crime: *R v Yildiz* [2006] NSWCCA 97 at [39].

An inherent characteristic suggests something that is *always* present as a permanent and essential attribution: *Lee v R* [2019] NSWCCA 15 at [56]; *Couloumbis v R* [2012] NSWCCA 264 at [31]. For example, financial gain will almost inevitably be an inherent characteristic of large commercial drug supply: *Wat v R* [2017] NSWCCA 62 at [44]. However, it *not* an inherent characteristic of dealing in identification information with the intention of committing fraud: *Lee v R* at [55], [61]. In *Davies v R* [2019] NSWCCA 45, a child sexual assault case, it was permissible for the judge to take into account the victim’s vulnerability as an aggravating factor under s 21A(2)(l). Although young age is a source of vulnerability, neither very young age, nor vulnerability, are necessary elements of the offence. Child sexual assault covers a range of ages and children at the lower end of the range will generally be more vulnerable than older children in that range: *Davies v R* at [24].

For the application of this subsection to specific offences see: **Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999** at **[19-890]**, **Fraud offences** at **[19-980]**, **Detain for advantage/kidnapping** at **[18-720]**, **Sexual offences against children** at **[17-440]**, and **Robbery** at **[20-260]** (armed robbery).

[11-050] Section 21A(2) and the *De Simoni* principle

Last reviewed: May 2024

Section 21A(2) does no more than reflect the common law and therefore an aggravating factor in s 21A(2) cannot be taken into account if doing so would breach the *De Simoni* principle: s 21A(4); *Davies v R* [2019] NSWCCA 45 at [32]; *R v Johnson* [2005] NSWCCA 186 at [22]; *R v Wickham* [2004] NSWCCA 193 at [26]; *Rend v R* [2006] NSWCCA 41. For an explanation of the *De Simoni* principle see **[1-500] De Simoni principle**.

[11-060] Section 21A(2)(a) — victims who exercise public or community functions

Last reviewed: May 2024

Section 21A(2)(a) is directed at offences committed against victims who exercise public or community functions and the offence arose because of the victim’s occupation.

The common law has long recognised that people in certain occupations work under a degree of risk. For example, the fact that the victim is a police officer is treated as an aggravating factor: *R v Penisini* [2004] NSWCCA 339 at [20].

It is not essential the offender knew the victim fell within the particular category of victims, but it must be reasonably foreseeable: *R v Nguyen* [2013] NSWCCA 195 at [96]–[97]. In *R v Nguyen*, uniformed and plain clothes police officers attended a garage used by the respondent, announcing they were police officers, as they approached. The offender discharged a firearm and in an exchange of gunfire one police officer fatally shot another officer. The offender’s plea of guilty to manslaughter was accepted on the basis he genuinely believed the police officers were robbers. Nevertheless, the sentencing judge was correct to find the aggravating factor in s 21A(2)(a) operated as, despite the offender’s belief, it was also reasonably foreseeable the people were, in fact, police officers: at [38], [96].

There is provision for a higher standard non-parole period for the offence of murder involving certain categories of persons (see Table of Standard non-parole periods under s 54D *Crimes (Sentencing Procedure) Act 1999*) care needs to be taken to ensure there is no double counting of aggravating circumstances when consideration is being given to the sentencing of this class of persons.

[11-070] Section 21A(2)(b) — the offence involved the actual or threatened use of violence

Last reviewed: May 2024

For many offences, threatening or using violence is an element or inherent characteristic of the offence. Care must be taken to avoid double counting in such circumstances (see above at **[11-040]**). Also, if the threat or use of violence constitutes a more serious offence, it cannot be taken to aggravate an offence (see **[11-050]**).

For the application of s 21A(2)(b) to specific offences see: **Break and enter offences** at **[17-070]**; **Robbery** at **[20-260]** (s 97 armed robbery), **[20-270]** (s 98 robbery with wounding) and **[20-230]** (s 95(1) robbery in circumstances of aggravation); **Detain for advantage/kidnapping** at **[18-720]**; **Assault, wounding and related offences** at **[50-140]**.

[11-080] Section 21A(2)(c) — the offence involved the actual or threatened use of a weapon

Last reviewed: May 2024

For the application of s 21A(2)(c) to specific offences see: **Break and enter offences** at **[17-070]**; **Robbery** at **[20-260]** (s 97 armed robbery); **[20-270]** (s 98 robbery with wounding) and **Assault, wounding and related offences** at **[50-140]**.

The absence of a weapon is not a matter of mitigation: *Versluys v R* [2008] NSWCCA 76 at [37]. Where the assailant has used his or her hands instead of a weapon it does not follow that the offence is necessarily less serious than if a weapon was used: *Versluys v R* at [37].

[11-085] Section 21A(2)(ca) — the offence involved the actual or threatened use of explosives, or a chemical or biological agent

Last reviewed: May 2024

In *TC v R* [2009] NSWCCA 296 at [78] the offender assaulted and tied up the victim, then splashed petrol around her house, before setting fire to it. The Court of Criminal Appeal found the use of "explosives" applies to petrol in such circumstances and there was no error in it being taken into account as an aggravating factor for an offence of damage property with intent to danger life contrary to s 198 *Crimes Act 1900*: at [77]–[78].

[11-087] Section 21A(2)(cb) — the offence involved the victim being made to ingest intoxicating substances

Last reviewed: May 2024

Section 21A(2)(cb) may apply where an offender administers a drug to facilitate an offence. In *Irmak v R* [2021] NSWCCA 178 two offenders were convicted of a series of aggravated sexual assaults. A significantly aggravating feature of the offending was they made the young complainant, who was already intoxicated, ingest large quantities of methylamphetamine and gamma-hydroxybutyrate to ensure compliance with unwanted sexual conduct: at [309], [312]–[314].

[11-090] Section 21A(2)(d) — the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)

Last reviewed: May 2024

This subsection is discussed extensively in **Subjective matters** at **[10-400]**. Generally, an explanation should be given as to how any previous convictions have been taken into account on sentence, including regarding the application of common law principles such as those in *Veen v The Queen (No 2)* (1998) 164 CLR 465: *Meis v R* [2022] NSWCCA 118 at [41]–[43].

Under s 21A(6), a "serious personal violence offence" is a personal violence offence within the meaning of s 4 *Crimes (Domestic and Personal Violence) Act 2007* that is punishable by imprisonment for life or imprisonment of 5 years or more. The definition includes serious sexual offences.

[11-100] Section 21A(2)(e) — the offence was committed in company

Last reviewed: May 2024

Whether the aggravating factor of an offence being committed "in company" applies will depend on the facts of each case: *White v R* [2016] NSWCCA 190. In *Gore v R* [2010] NSWCCA 330, the Court held s 21A(2)(e) "relates to the presence of one or more persons with the offender in order to convey a threat of violence to the victim by the combined presence of more than one person": [101]. The mere fact two persons are in the company of each other during an offence is not, of itself, sufficient to satisfy s 21A(2)(e): *Gore v R* at [100]–[101]; *Pehar v R* [2020] NSWCCA 118.

In *White v R*, Simpson JA at [94] (Bathurst CJ agreeing), posed at least three questions on which to focus in determining whether an offence is committed in company:

(i) whether the presence of the other person is such as to have a potential effect on the victim, by way of coercion, intimidation or otherwise;

(ii) whether the presence of the other person is such as to have a potential effect on the offender, by offering support or encouragement, or "emboldening" that person;

(iii) whether the evidence establishes the other person is present, sharing a common purpose with the offender.

Simpson JA's reasoning in *White v R* was applied in *IS v R* [2017] NSWCCA 116. The words "in company" in s 21A(2)(e) have the same meaning as they have at common law and where the fact the offence was in company is an element of an aggravated offence: *Gore v R* at [100]–[101]; *White v R* at [2]–[4], [92]–[94]. The concepts are co-extensive: *White v R* at [92]. Where "in company" is an element of an offence, it is an error to consider s 21A(2)(e) as an aggravating factor: *Stevens v R* [2007] NSWCCA 152 at [35].

In *White v R* the sentencing judge erred by finding the offences were committed in company where the offender was accompanied by a friend, who was not physically present at the precise time the offences were committed: [96]–[98]. In *Gore v R*, the Court held s 21A(2)(e) had no application where the offender had used his wife to assist in his trading of drugs: [101]. Nor was it held to apply to those who assisted in committing the offence of supply prohibited drugs, in the nature of the upline supplier or the person to whom drugs were supplied: *Elliott v R* [2018] NSWCCA 69 at [26], [30].

In contrast, in *IS v R* [2017] NSWCCA 116, the Court held there was no error in a finding a robbery was aggravated by its commission in company as the two other offenders were in sufficient proximity to support the offender and intimidate the victim; one actively assisted the offender and the offender's own evidence established the other offenders present shared a common purpose with him: *IS v R* at [50]–[51].

R v Way (2004) 60 NSWLR 168 and *Book v R* [2018] NSWCCA 58 are further examples of the nuanced application of this aggravating factor to particular facts.

For the application of this subsection to specific offences see: **Application of s 21A to break and enter offences** at **[17-070]**; **Robbery** at **[20-260]** (armed robbery) and **[20-270]** (robbery with wounding); and **Common aggravating factors under s 21A and the common law** at **[50-140]**.

[11-101] Section 21A(2)(ea) — the offence committed in the presence of a child under 18

Last reviewed: May 2024

Section 21A(2)(ea) concerns the commission of an offence for which a child, who is not the victim, is present: *Arvinthan v R* [2022] NSWCCA 44 at [39]. It "is principally aimed at the deleterious effect that the commission of a crime, particularly one of violence, might have on the emotional well-being of a child [and]… to the child's moral values": *Gore v R* [2010] NSWCCA 330, per Howie AJ at [104]. For example, the supply of drugs in the presence of a child is a factor of aggravation": *Gore v R* at [104].

This aggravating factor can apply if the offender is also a child: *Lloyd v R* [2017] NSWCCA 303 at [71]–[72].

The "generalised presence" of a child is not sufficient to constitute an aggravating factor. In *McLaughlin v R* [2013] NSWCCA 152, the Court held it was an error to find two domestic assault offences were aggravated under s 21A(2)(ea) where the judge made no finding that the child was actually present or witnessed the offences: *McLaughlin v R* at [31]–[32]. Similarly, in *Alesbhi v R* [2018] NSWCCA 30, there was no basis for the sentencing judge to conclude an offence of affray was aggravated by the presence of children when the affray occurred outside and there was no evidence the children witnessed the offence or knew what was happening: *Alesbhi v R* at [55]–[56].

[11-105] Section 21A(2)(eb) — the offence was committed in the home of the victim or any other person

Last reviewed: May 2024

This factor is directed towards offences committed in the sanctity of the home, a place where a person is entitled to feel safe and protected: *Jonson v R* [2016] NSWCCA 286 at [41]; *R v Lulham* [2016] NSWCCA 287 at [5]; Second Reading Speech, Crimes (Sentencing Procedure) Amendment Bill 2007, NSW, Legislative Council, *Debates*, 17/10/2007, p 2669. In determining whether s 21A(2)(eb) applies, the entirety of the circumstances of offending needs to be considered: *R v Lau* [2022] NSWCCA 131 at [89]. It is also a matter for the sentencing judge's discretion: *R v Lulham* at [6].

The five-judge bench in *Jonson v R* held s 21A(2)(eb) is not restricted to cases where the offender was an intruder in the victim's home, overturning previous authority: [50].

A literal construction therefore includes a home in which the offender is lawfully present, including one in which the offender resides with the victim: *Jonson v R* at [40]. However, the fact the offence occurred in a home will not always be an aggravating factor and, for the factor to apply, the court must conclude, it actually aggravates the offence in question: *Jonson v R* at [52]; citing *Gore v R* [2010] NSWCCA 330 at [29]; see also *Doyle v R* [2021] NSWCCA 297. This aggravating factor may also apply to areas on the same premises reasonably adjacent to the home, such as the driveway: *R v Lulham* at [5].

For the application of this factor to break and enter offences see **[17-070] Application of s 21A to break and enter offences**.

[11-110] Section 21A(2)(f) — the offence involved gratuitous cruelty

Last reviewed: May 2024

Gratuitous cruelty under s 21A(2)(f) is needless yet intentional violence committed simply to make the victim suffer: *McCullough v R* [2009] NSWCCA 94 at [30]. The application of s 21A(2)(f) depends upon matters of fact and degree: *R v Atonio* [2005] NSWCCA 200 at [23].

For offences of violence, it requires more than commission of the offence without justification and causing great pain: *McCullough v R* at [30]. For example, if in a case of malicious wounding, torture was involved (*McCullough v R* at [31]), or it included kicking a pregnant woman (*R v King* [2004] NSWCCA 444 at [139]). Manslaughter involving a prolonged and violent assault on a defenceless infant established gratuitous cruelty in *R v Hoerler* [2004] NSWCCA 184 at [43], [64], and [80], as did murder in *Milat v R* [2014] NSWCCA 29 where, for the last ten minutes of the already seriously injured deceased’s life, he was subjected to “unimaginable torment”: [106].

Examples of cases where s 21A(2)(f) was not applied include:

- *Curtis v R* [2007] NSWCCA 11 where the offender stabbed a police dog while it restrained him on the basis the act lacked “sustained, continuing and sadistic qualities”: [62], [65].
- *Stevens v R* [2007] NSWCCA 152 where the offender exhibited cruelty towards the victims’ animals during a home invasion as it was not related to the offence and wasn’t mentioned in the agreed facts.

See also **Sexual offences against children** at **[17-541]** and **Assault, wounding and related offences** at **[50-140]**.

[11-120] Section 21A(2)(g) — the injury, emotional harm, loss or damage caused by the offence is substantial

Last reviewed: May 2024

Section 21A(2)(g) provides that whether the injury, emotional harm, loss or damage caused by an offence/s is substantial may be taken into account. At common law, the court may have regard to the harm done to the victim by the commission of the crime: *Signato v The Queen* (1998) 194 CLR 656 at [29]; see also **[10-070] Impact on the victim**. However, the offender may not be punished for a more serious offence than the one charged: *The Queen v De Simoni* (1981) 147 CLR 383 at 389; see also **[1-500] De Simoni principle**.

A court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen: *Josefski v R* [2010] NSWCCA 41 at [4], [38]–[39]; *R v Wickham* [2004] NSWCCA 193 at [25].

The injury, emotional harm, loss or damage under the provision is to be “substantial”, going beyond what could ordinarily be expected in relation to the particular offence: *R v Packer* [2023] NSWCCA 87 at [80], [82]. The term “substantial” is a wide one,

and its meaning will depend on the context in which it is used including the offence charged: *Chemaissem v R* [2021] NSWCCA 66 at [64]–[65]. Where multiple offences are committed, consideration should be given to which offences the aggravating factor applies: see for example *R v Packer* at [78].

Care must be taken to avoid double punishment where the injury etc forms an element of the offence, and the extent and nature of the injury or harm are relevant in assessing whether the aggravating factor applies: *Taylor v R* [2006] NSWCCA 7 at [40]. In such cases, the nature of the injury etc must take it outside that necessary to establish the element of the offence: *Heron v R* [2006] NSWCCA 215 at [49].

The aggravating factor must be proven beyond reasonable doubt: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]; *R v Tuala* [2015] NSWCCA 8 at [57], [77]. Although, for a child victim of sexual assault, harm may be able to be inferred: *Culbert v R* [2021] NSWCCA 38 at [113]–[119]; see also **[17-410] Sentencing for historical child sexual offences**. In certain circumstances, where a victim impact statement is the only evidence of harm, considerable caution must be exercised before it can be used to establish an aggravating factor to the requisite standard: *Culbert v R* at [119]; *R v Tualu* at [80]–[81]; *Gagan (a pseudonym) v R* [2020] NSWCCA 47 at [28]–[30]; see also **Victims and victim impact statements** at **[12-810]**. A causal connection between the offence and resulting harm must also be proved beyond reasonable doubt: *Erector Group Pty Ltd v Burwood Council* [2018] NSWCCA 56 at [92]; see also *RO v R* [2013] NSWCCA 162 at [91]–[92]. The provision also extends to injury, harm, loss or damage suffered by the victim's dependents: *Aslett v R* [2006] NSWCCA 360 at [37].

Emotional harm

Emotional harm generally refers to more than the transient or temporary shock or fright that anyone who felt their safety was in peril would suffer, but which passes within a relatively short time leaving no lasting ill-effects: *Huynh v R* [2015] NSWCCA 179 at [29]. However, such harm may amount to substantial emotional fear depending on the offending, informed by the common understanding of adult life: *Huynh v R* at [29]. Emotional harm may also be constituted by an appreciable psychological injury, whether permanent or not: *Huynh v R* at [29].

For some offences, like serious sexual assaults, sentencing judges are entitled to proceed on the basis they can be expected to have adverse psychological consequences, and therefore, care needs to be taken to avoid double counting substantial emotional harm: *Stewart v R* [2012] NSWCCA 183 at [61].

For the application of this subsection to specific offences see: **Break and enter offences** at **[17-070]**; **Dangerous driving and navigation** at **[18-390]**; **Robbery** at **[20-260]** (armed robbery) and **[20-270]** (robbery with wounding); and **Sexual assault** at **[20-810]**. See also H Donnelly "Assessing harm to the victim in sentencing proceedings" (2012) 24(6) *JOB* 45.

[11-130] Section 21A(2)(h) — offences motivated by hatred and/or prejudice against a group of people

Last reviewed: May 2024

Section 21A(2)(h) is directed towards offences motivated by hatred for, or prejudice against, a group of people (such as people of a particular religion, racial or ethnic origin,

language, sexual orientation or age, or having a particular disability), with the offender carrying out the offence because they believed the victim belonged to that particular group. The list of groups in s 21A(2)(h) is not exhaustive and includes, for example, paedophiles: *Dunn v R* [2007] NSWCCA 312 at [32].

Holloway v R [2011] NSWCCA 23 is an example of a case where the provision applied in the context of racial violence (at [32]), and *Aslett v R* [2006] NSWCCA 49, where it did not (as there was no evidence).

[11-140] Section 21A(2)(i) — the offence was committed without regard for public safety

Last reviewed: May 2024

Section 21A(2)(i) provides it is an aggravating feature of an offence if it is committed “without regard for public safety”. As the elements of some offences may include disregard for public safety (for example, dangerous driving and, possibly, firearms offences), for the provision to apply, the offending conduct must go beyond the objective element or underlying policy: *Elyard v R* [2006] NSWCCA 43 at [12]; see also *Trejos v R* [2017] NSWCCA 122 at [56] in relation to commercial drug supply.

This subsection is not directed to the specific victim of any offence, but to the danger caused to other members of the public by reason of the offence: *R v Chisari* [2006] NSWCCA 19 at [22]. It is the risk to public safety that falls to be assessed under s 21A(2)(i) and not what actually transpired: *R v Fryar* [2008] NSWCCA 171 at [34].

For the application of s 21A(2)(i) to specific offences see **Dangerous driving** at **[18-390]**; **Drug Misuse and Trafficking Act 1985 (NSW) offences** at **[19-890]**; **Firearms and prohibited weapons offences** at **[60-040]**–**[60-050]**; and **Damage by fire and related offences** at **[63-020]**.

[11-145] Section 21A(2)(ib) — the offence involved grave risk of death

Last reviewed: May 2024

Section 21A(2)(ib) provides that it is an aggravating factor if an offence “involved a grave risk of death to another person or persons”.

The aggravating factor may be established where there is no actual injury, for example, where a firearm is discharged directly at another person: *Z v R* [2015] NSWCCA 274 at [77]. In *Colomer v R* [2014] NSWCCA 51 at [38]–[40], the court held there was a grave risk of death by the offender pointing a loaded firearm at another person.

Further examples of the application of the provision include:

- *Wallace v R* [2014] NSWCCA 54, where the Court found that while the offender’s act of rescuing the victim after setting fire to a house knowing he was inside warranted amelioration of the sentence, the judge was entitled to give some weight to the aggravating factor: at [78]–[81]
- *R v Dennis* [2015] NSWCCA 297 (armed robbery with the infliction of grievous bodily harm) and *Kiernan v R* [2016] NSWCCA 12 (wounding with intent to cause grievous bodily harm), both involving cutting the victim’s throat with a knife.

[11-150] Section 21A(2)(j) — the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence

Last reviewed: May 2024

When an offence is committed whilst being on conditional liberty, this may amount to an aggravating factor. "Conditional liberty" is not defined in s 21A but captures the relevant common law principle: *Porter v R* [2008] NSWCCA 145 at [86]; see also **[10-550] Conditional liberty**. It includes offending committed while the offender is:

- on bail (*R v Deng* [2007] NSWCCA 216; *Archer v R* [2017] NSWCCA 151 at [85], [89]);
- on parole, including where revoked with retrospective effect (*Ahmad v R* [2022] NSWCCA 144 at [29]–[30]);
- serving a non-custodial sentence under the Act, including a bond without conviction pursuant to s 10 (since amended) (*Frigiani v R* [2007] NSWCCA 81 at [23]–[24]);
- subject to orders such as an apprehended violence order or offender prohibition order (*Turnbull v R* [2019] NSWCCA 97 at [21]; *Archer v R* at [85], [89]).

The term "conditional liberty" in s 21A(2)(j) includes where the foundational offence giving rise to the conditional liberty is not punishable by imprisonment: *Porter v R* at [86]. Section 21A(2)(j) may also apply if the foundational offence, for which the offender was on conditional liberty, was later withdrawn: *R v Deng* [2007] NSWCCA 216 at [64].

That the offence was committed in breach of an AVO and while the offender was on bail may be taken into account as distinct aggravating factors as breach of bail and being subject to an AVO are different concepts: *Archer v R* at [85], [89].

[11-160] Section 21A(2)(k) — abuse of a position of trust or authority

Last reviewed: May 2024

Abuse of trust and abuse of authority are distinct but related concepts which may overlap: *MRW v R* [2011] NSWCCA 260 at [78]; *PC v R* [2022] NSWCCA 107 at [72]–[73]. Their meanings reflect the common law: *Suleman v R* [2009] NSWCCA 70 at [26] approving *R v Wickham* [2004] NSWCCA 193 and *R v Johnson* [2005] NSWCCA 186; see also *Mol v R* [2017] NSWCCA 76 at [107].

The application of s 21A(2)(k) to child sexual offences can be complicated, especially when the offence includes an element that the victim is under the offender's authority: see *PC v R* at [80]; *HA v R* [2023] NSWCCA 274 at [112]. Notwithstanding, a breach of trust may be taken into account in relation to an offence with an element that the victim is under the offender's authority: *MRW v R* at [77]. However, undue weight should not be given to an abuse of trust where abuse of authority is an aggravating factor to avoid double counting: *MRW v R* at [78]. Further, not all child sexual offences involve an abuse of trust, and the aggravating factor may be taken into account: see for example *KJH v R* [2006] NSWCCA 189 at [29]. See also **Sexual offences against children** at **[17-560]**.

Position of trust

A "position of trust" is not a precise term but may be understood to cover relationships involving an obligation of care and protection, and will depend upon the relationship's

circumstances: *DPP (NSW) v Burton* [2020] NSWCCA 54 at [31]. For a relationship of trust to exist, there must be an established and special relationship between the victim and offender at the time of the offending “which transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings”: *Suleman v R* at [22].

Examples of such special relationships are parent and child, doctor and patient, priest and penitent and teacher and student: *Suleman v R* at [23]–[24]. Other examples of such relationships include:

- A senior medical practitioner who supervised and informally mentored a more junior colleague: *Kearsley v R* [2017] NSWCCA 28 at [2]; [15], [90].
- An employer whose employee abuses the trust placed in them by committing a fraud or dishonesty offence: *R v Stanbouli* [2003] NSWCCA 355 at [34]; see also **Fraud offences** at **[19-990]**.
- Health practitioners and their patients/clients including:
  - doctors: *R v Arvind* (unrep, 8/3/96, NSWCCA);
  - physiotherapists: *Jung v R* [2017] NSWCCA 24;
  - pharmacists: *R v Ibrahim* [2021] NSWCCA 296 at [44];
  - sleep technicians: *Khorami v R* [2021] NSWCCA 228 at [322]–[326].
- A correctional officer and inmate: *Waterfall v R* [2019] NSWCCA 281 at [35]–[36], [42].
- A professional artist and model: *Mol v R* [2017] NSWCCA 76 at [108].
- Former intimate partners: *Turnbull v R* [2019] NSWCCA 97 at [136].

Whether a position of trust exists depends upon the evidence of the circumstances attending a particular relationship, rather than the simple fact of it: *DPP (NSW) v Burton* at [31]. In *Suleman v R* at [28], the Court held the sentencing judge erred by finding that s 21A(2)(k) applied by virtue of the applicant’s dealings with investors and the fact he was a successful businessman in the Assyrian community. The provision also does not generally apply to the trust between friends within a close-knit group: *MAH v R* [2006] NSWCCA 226 at [69]. The seriousness of a breach of trust will depend upon the relationship and the circumstances of breach. Higher expectations are placed on some people such as registered health practitioners which informs any breach of trust by them: *R v Ibrahim* at [37]ff (involving a pharmacist); *R v Arvind* (involving a doctor); cf *Jung v R* [2017] NSWCCA 24 at [62]–[63] (involving a masseur).

[11-170] Section 21A(2)(l) — the victim was vulnerable

Last reviewed: May 2024

Section 21A(2)(l) provides that it is an aggravating feature of an offence if:

> the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim’s occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

Section 21A(2)(l) is concerned with the vulnerability of a particular class of victim who need to be especially protected: *R v Tadrosse* (2006) 65 NSWLR 740 at [24]–[26]; *Betts v R* [2015] NSWCCA 39 at [29]. It is the fact of a victim's vulnerability which aggravates the offence: *Sumpton v R* [2016] NSWCCA 162 at [147].

The examples of classes of vulnerable person in s 21A(2)(l) do not amount to an exhaustive list: *Ollis v R* [2011] NSWCCA 155 at [96]; *Perrin v R* [2006] NSWCCA 64 at [35]; *Longworth v R* [2017] NSWCCA 119 at [17]. The occupations listed in the provision often involve work in isolation and sometimes involve significant amounts of money: *Longworth v R* at [17]–[18] (involving a security guard at a licensed venue); *Veale v R* [2008] NSWCCA 23 at [18] (involving a service station owner banking cash).

A combination of factors may operate to render a victim vulnerable: *Ollis v R* at [96]. For example, an elderly victim who lived alone (*Katsis v R* [2018] NSWCCA 9 at [62]), an adolescent student with limited English travelling alone on public transport (*Ollis v R*), an intoxicated taxi passenger (*Ali v R* [2010] NSWCCA 35 at [36]–[39]). The aggravating factor may also apply to vulnerable victims of a particular age even though an element of the offence concerns the victim's age: *RJA v R* [2008] NSWCCA 137 at [13]; see below.

However, it is not directed to vulnerability in a general sense, for example, to:

- a female being alone at night: *Doolan v R* [2006] NSWCCA 29 at [25]–[26];
- persons in the community vulnerable to a proficient fraudster armed with forged documents: *R v Tadrosse* at [26];
- a threat posed by a particular class of offender: *R v Tadrosse* at [26]–[27]; *Betts v R* at [29];
- a person who is not powerful or aggressive like the perpetrator of a violent offence: *R v Williams* [2005] NSWCCA 99; or
- a victim not armed in a like manner to an assailant, generally: *Morris v R* [2007] NSWCCA 127 at [15].

Child sexual assault

Fine distinctions have been drawn regarding the application of s 21A(2)(l) and the vulnerability associated with age in the context of child sexual assault.

Davies v R [2019] NSWCCA 45, *R v Pearson* [2005] NSWCCA 116, *R v JTAC* [2005] NSWCCA 345 are decisions relating to child sexual offences where s 21A(2)(l) was held to apply. Section 21A(2)(l) may also be taken into account in relation to an offence of s 66C *Crimes Act 1900*, notwithstanding the offence is concerned to protect the vulnerable: *Shannon v R* [2006] NSWCCA 39.

R v JDB [2005] NSWCCA 102 and *R v Boulad* [2005] NSWCCA 289 at [21] are decisions relating to child sexual offences where the court held s 21A(2)(l) did not apply.

For the application of s 21A(2)(l) to specific offences see **Drug Misuse and Trafficking Act 1985 (NSW) offences** at **[19-890]**; **Robbery** at **[20-290]**; and **Sexual assault** at **[20-810]**.

[11-180] Section 21A(2)(m) — the offence involved multiple victims or a series of criminal acts

Last reviewed: May 2024

Section 21A(2)(m) enables the court to take into account multiple victims or a series of criminal acts concerning an offence. This includes in relation to a “rolled up” charge: *Johnston v R* [2017] NSWCCA 53. As explained by Howie J in *R v Tadrosse* (2006) 65 NSWLR 740 at [29], s 21A(2)(m):

> … is concerned with the situation where a single offence contains a number of allegations of criminal acts that are part and parcel of a single course of criminal conduct. A charge of this nature will be frequently found in cases of fraud or dishonesty perpetrated against a single victim such as a charge of embezzlement or larceny as a servant. It is also common to charge multiple instances of supplying drugs over a lengthy period of time as one offence under s 25 of the *Drug Misuse and Trafficking Act*. Of course there are offences that have, as an element of the offence, multiple acts of criminality, such as an offence of ongoing drug supply under s 25A of the *Drug Misuse and Trafficking Act* or an offence of persistent sexual abuse of a child under s 66EA of the *Crimes Act*. When sentencing for such an offence, the court must bear in mind the prohibition against taking into account as a matter of aggravation that which is an element of the offence charged.

Section 21A(2)(m) does not generally apply to multiple offences with multiple victims and acts of criminality: *Gray v R* [2018] NSWCCA 39 at [46]; *Aslett v R* [2006] NSWCCA 360 at [38]; *R v Tzanis* [2005] NSWCCA 274 at [19]; *R v Janceski* [2005] NSWCCA 288; *Magnuson v R* [2013] NSWCCA 50 at [56]; *R v Tadrosse* at [28]. In these cases, the principle of totality is to be applied (see **[8-200] The principle of totality**). In respect of representative charges, to apply s 21A(2)(m) may result in impermissible double counting as it generally involves an acceptance of similar but uncharged offending to disentitle the offender to leniency on the basis the offence was an isolated one: see for example *JAH v R* [2006] NSWCCA 250; *Clinton v R* [2018] NSWCCA 66 at [37]–[39]; see also **[10-030] Uncharged acts**.

Where an offender is charged with multiple offences, in which the victims are the same for each offence, there are not, in relation to each offence, multiple victims for the purpose of s 21A(2)(m): *McCabe v R* [2006] NSWCCA 220 at [10]. However one offence may have multiple victims, as may a series of offences: *Hockey v R* [2006] NSWCCA 146 at [16].

Section 21A(2)(m) does not apply to Form 1 matters: *Hawkins v R* [2006] NSWCCA 91 at [28]–[29].

[11-190] Section 21A(2)(n) — the offence was part of a planned or organised criminal activity

Last reviewed: May 2024

It is prudent for a sentencing judge to raise with the parties his or her intention to take this aggravating factor into account: *Stokes v R* [2008] NSWCCA 123 at [14]. The

scope of s 21A(2)(n) was considered in *Hewitt v R* [2007] NSWCCA 353 where Hall J at [25] derived the following general propositions from prior cases about the operation of the provisions:

(a) The wording of the provision conveys more than simply that the offence was planned: *Fahs v Regina* …

(b) In a case where an offender has been charged with multiple drug trafficking offences, a conclusion may be drawn that it is part of a planned or organised criminal activity …

(c) The expression "*organised criminal activity*" may embrace the activities of several people or it may involve activity carried out by one person. In *NCR Australia v Credit Connection* [2005] NSWSC 1118, Campbell J observed at [72]:

> "In deciding whether the aggravating factor in para (n) is present, there is first a question of construction about what is meant by 'organised criminal activity'. In one sense, 'organised criminal activity' involves the activities of several people that are planned or co-ordinated to carry out the crime. That is the sense involved in media discussion about whether organised crime is on the increase. In another sense, however, it can include activity that is carried out by just one person, concerning which that person engages in planning or preparation."

His Honour also observed:

> "There is no reason as a matter of ordinary English, to think that 'planned criminal activity' has any necessary element in it of there being more than one person involved" (at [74] and [75]).

(d) Offences committed over a period of time may involve sufficient repetition and system to lead to the conclusion that they were organised within the meaning of paragraph (n): *NCR Australia* (supra) at [76].

(e) In determining whether the facts give rise to "planning" as an aggravating factor, it is necessary to consider and refer to both the evidence that may affirm, and the evidence that may negative the drawing of such a conclusion. This Court in *Regina v Reynolds* [2004] NSWCCA 51, in determining on the facts of that case that evidence of planning was very limited but that it did exist and was of greater significance than that considered by the sentencing judge, observed at [39]:

> "It may be that, had he considered the evidence in detail, his Honour would nevertheless have reached a factual finding similar to that which he did. The error lies in his failing to make reference to evidence pointing to a contrary conclusion. In particular, the list of businesses was, in my view, quite strong evidence of a degree of planning. The absence of a disguise is only one factor pointing in the other direction, or pointing to poor, rather than no, planning."

(f) Planning that is "… *somewhat haphazard, clumsy in many respects and bound to fail* …" may nevertheless be sufficient so as to enliven the application of s 21A(2)(n): *Regina v Willard* [2005] NSWSC 402 per Whealy J at [32]. [Emphasis in original.]

The fact there are several offences revealing some broad pattern of behaviour does not mean there is relevant "planning" for the purposes of s 21A(2)(n): *RL v R* [2015] NSWCCA 106 at [36]–[37]. In *RL v R*, a child sexual assault case, the court held the applicant's offences committed over a five-year period, did not involve planning but rather demonstrated opportunistic behaviour.

There may be a "logical difficulty" in finding an offence was planned if it is accepted there was some level of duress or intimidation on the offender to participate in the offence: *SS v R* [2009] NSWCCA 114 at [99]; see also *Legge v R* [2007] NSWCCA 244 at [33].

It is unclear whether planning under s 21A(2)(n) applies only where the offender has been involved in the planning of the offence, or whether it is sufficient the offence itself was planned to take planning into account as an aggravating factor. Simpson J in *Legge v R* said at [34]:

> S[ection] 21A(2)(n) was not, in my opinion, intended to be used to aggravate an offence where the offender being sentenced was not involved in, or part of, the planning and organisation.

However, in *DPP (NSW) v Cornwall* [2007] NSWCCA 359, Latham J said at [56]:

> Section 21A(2)(n) fixes upon this characteristic of the offence, not the degree to which an individual offender contributes to the planning.

In *Pham v R* [2020] NSWCCA 269, the Court found it was unnecessary to resolve this apparent tension because despite there being limited evidence of the offender's actual contribution to the planning of the offence, a significant hydroponic operation in 16 premises and his involvement which included leasing many of the premises in false names, demonstrated his knowing participation in the offence's "planning and organisation".

Fullerton J also commented that the apparent tension in the approaches in *Legge v R* and *DPP (NSW) v Cornwall* reflect their different factual contexts:

> … the extent to which the statutory feature of aggravation in s 21A(2)(n) applies in an individual case depends on the particular offence charged; the particular offending for which a person is to be sentenced within what might be, in any given case, a broad category of offending; the extent of the involvement of a particular offender in that offence, including cases where an offender might be subject to threats of violence or non-exculpatory duress before participating in the offence; together with the significance of the role played by that person in the commission of the offence and his or her knowledge of the criminal enterprise in which they are engaged.

For the application of this subsection to certain offences, see **[17-070] Application of s 21A to break and enter offences**; **[17-440] Sexual offences against children**; **[19-890] Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999**; and **Fraud offences** at **[19-990]**.

[11-192] Section 21A(2)(o) — the offence was committed for financial gain

Last reviewed: May 2024

Where financial gain is an inherent characteristic of the offence, such as with many fraud offences, financial gain cannot be taken into account as an aggravating factor under s 21A(2)(o) unless its nature or extent is unusual: *Clinton v R* [2018] NSWCCA 66 at [20]; cf *Lee v R* [2019] NSWCCA 15 at [55], [61] (in relation to identity fraud under s 192J *Crimes Act 1900*). It also should not be taken into account as an

aggravating factor, if it is an element of the offence or an inherent characteristic of that kind of offence: *Mansour v R* [2011] NSWCCA 28 at [46]; see also *Clinton v R* at [21]–[22].

For the application of this section to certain offences, see **[19-890] Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999** and **[19-990] Aggravating factors** (for fraud).

[11-195] Section 21A(2)(p) — child under 16 years in offender's vehicle

Last reviewed: May 2024

Section 21A(2)(p) provides it is an aggravating factor for a prescribed traffic offence if it is committed while a child under 16 years of age was a passenger in the offender's vehicle. A "prescribed traffic offence" is defined in s 21A(6).

[11-200] General observations about s 21A(3)

Last reviewed: August 2024

Some of the mitigating factors set out under s 21A(3) reciprocally mirror the aggravating factors set out in s 21A(2). For example, the circumstance that the injury, emotional harm, loss or damage caused by the offence was substantial is an aggravating factor (s 21A(2)(g)); while the circumstance that the injury, emotional harm, loss or damage caused by the offence was not substantial is a mitigating factor (s 21A(3)(a)).

Mitigating factors must be proven on the balance of probabilities: *Olbrich v The Queen* (1999) 199 CLR 270 at [27]; *Meis v R* [2022] NSWCCA 118 at [29], [47].

[11-210] Section 21A(3)(a) — the injury, emotional harm, loss or damage caused by the offence was not substantial

Last reviewed: August 2024

This factor operates so as to mitigate the objective seriousness of the offence and is the converse of the aggravating factor set out under s 21A(2)(g) (discussed at **[11-120]**).

The term "substantial" is a wide one and its meaning will depend on the context on which it is used including the offence charged: *Chemaissem v R* [2021] NSWCCA 66 at [64]–[65]. That an injury does not constitute grievous bodily harm does not, of itself, mean it is not substantial: *Chemaissam v R* at [66].

When considering s 21A(3)(a), a court should not assume there is no lasting impact on a victim. For example, in respect of an armed robbery offence, the court should assume the effect of the offence upon a victim is substantial (although not as an aggravating factor under s 21A(2)(g)) and this is to be taken into account in the penalty to be imposed: *R v Bichar* [2006] NSWCCA 1 at [22], applying *R v Solomon* [2005] NSWCCA 158.

Considerable caution is required in attempting to apply s 21A(3)(a) to drug supply offences on the basis the offence was foiled and the drugs not disseminated: *Taysavang v R* [2017] NSWCCA 146 at [47]–[53]; *R v Chan* [1999] NSWCCA 103 at [21]; see also **[19-860] Supplying to undercover police**. Further, generalised forms of

harm arising from the commercialisation of drug supply include the funding of drug manufacturers and importers, and engagement of law enforcement time and resources: *Taysavang v R* at [48].

While evidence may be called from a victim regarding this mitigating factor, for example, in a victim impact statement, the sentencing judge determines whether such evidence is to be accepted and what weight is to be attributed to it: *AC v R* [2016] NSWCCA 107 at [49].

Further, that there is no substantial loss or damage resulting from the offence does not necessarily diminish the offender's criminality. "Although it is calculated to reduce the demands of retribution, it does not impact on the weight to be given to most of the purposes of sentencing": *Van Can Ha v R* [2008] NSWCCA 141 at [43].

[11-220] Section 21A(3)(b) — the offence was not part of a planned or organised criminal activity

Last reviewed: August 2024

This factor, when present, will detract from the objective seriousness of an offence and may be contrasted with offences that are planned or organised prior to their commission: see s 21A(2)(n) (see **[11-190]**). A claim of spontaneity under s 21A(3)(b) was rejected in the malicious damage of property by fire case of *Porter v R* [2008] NSWCCA 145 at [46].

[11-230] Section 21A(3)(c) — the offender was provoked by the victim

Last reviewed: August 2024

This provision gives statutory recognition to the principle that, where offences are committed under provocation, the provocation mitigates the seriousness of the offence: *R v Engert* (1995) 84 A Crim R 67 at 68 and 71; *R v Cioban* [2003] NSWCCA 304.

However, the explanation of an offender's conduct, whether characterised as provocation or not, does not always operate as a mitigating factor. The motive must impinge on the offender's moral culpability. The degree to which motive can be seen as pertinent depends on all the circumstances, the most significant of which is the nature of the offence: *R v White* (unrep, 23/6/98, NSWCCA). An offender cannot simply take the law into their own hands: *R v Buddle* [2005] NSWCCA 82 at [11].

Where provocation is established such that it is a mitigating factor under s 21A(3)(c), it is a fundamental quality of the offending which may reduce its objective seriousness. There cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account: *Williams v R* [2012] NSWCCA 172 at [42]. The absence of provocation is not a factor in aggravation and does not increase the objective seriousness of the offence: *Williams v R* at [43]. In *Pitt v R* [2014] NSWCCA 70 at [57], [65], the extreme provocation of the deceased and his brother towards the offender was one of the bases upon which the Court intervened and reduced the sentence for manslaughter.

Evidence of "relationship tension and general enmity … leading up to the offence", while part of the overall circumstances in which the offence occurred, "does not constitute evidence of provocation such as to amount to mitigation": *Shaw v R* [2008] NSWCCA 58 at [26].

[11-240] Section 21A(3)(d) — the offender was acting under duress

Last reviewed: August 2024

In ordinary language, duress implies forcible restraint and compulsion: *R v N* [1999] NSWCCA 187 per Adams J at [35].

Section 21A(3)(d) must be interpreted in light of the common law on the subject. Where an offender commits a crime while acting under duress which falls short of a complete defence to the charge, this "non-exculpatory duress" is capable of being a mitigating factor at sentence: *Tiknius v R* [2011] NSWCCA 215 (although the case concerned a Commonwealth offence the Court declared the common law on the subject). Non-exculpatory duress may be taken into account as a mitigating factor for two reasons: it may affect the degree of the offender's subjective or moral culpability, and their prospects of rehabilitation: *Tiknius v R* at [41]. It is relevant to the assessment of objective gravity if an offence is committed because of threats and fear of harm to oneself or others rather than financial profit or greed. These matters bear upon the moral or true culpability of an offender: *R v Hasan* (2005) 2 AC 467 at [22]. Where the source of duress is conduct of persons in another country a court is entitled to approach such claims with a significant degree of circumspection as claims may be easily made: *Tiknius v R* at [45].

Where the offender satisfies the court that the commission of the offence was affected by duress, the weight given to that factor involves the court considering matters including the form and duration of the offender's criminal conduct, the nature of the threats made, and opportunities available to the offender to report the matter to relevant authorities: *Tiknius v R* at [49]. Johnson J said at [51]:

> General deterrence has a very substantial role on sentence in cases where non-exculpatory duress is relied upon by the offender … The grooming and pressuring of persons to become involved in drug importation offences have been said to be "unremarkable features of many importation offences" … At times, the persons targeted by those recruiting them are said to have submissive or compliant personalities … [Case citations omitted.]

The High Court decision of *Muldrock v The Queen* (2011) 244 CLR 120 did not place duress, provocation, mental state and mental illness outside the scope of objective features, or confine duress to a purely subjective consideration, and the Court of Criminal Appeal continues to apply *Tiknius v R* (a decision pre-*Muldrock v The Queen*): *Giang v R* [2017] NSWCCA 25 at [32]–[33]; see also *Tepania v R* [2018] NSWCCA 247 at [112]. Case examples include: *Hurkmans v R* [2024] NSWCCA 126 at [84]–[86]; *Eyeson v R* [2024] NSWCCA 52 at [40]–[41], [54]; *DG v R (No 1)* [2023] NSWCCA 320 at [34]–[35]; *Qaumi, Farhad v R* [2020] NSWCCA 163 at [467]; *Kuti v R* [2012] NSWCCA 43; *Lindsay v R* [2012] NSWCCA 124; *Cherdchoochatri v R* [2013] NSWCCA 118; *RCW v R (No 2)* [2014] NSWCCA 190. Accordingly, non-exculpatory duress may be relevant to the assessment of objective seriousness: *Tepania v R* at [112].

In considering these factors, it is important to note the distinction between moral culpability and objective seriousness, and where they may overlap: see *DS v R* (2022) 109 NSWLR 82 at [96]; *Paterson v R* [2021] NSWCCA 273 at [29]; **[9-710] The difficulty of compartmentalising sentencing considerations**.

In *Kuti v R*, duress was a mitigating factor to some extent, but not such as to remove the need for deterrence: [41]. In *Lindsay v R*, the judge was not convinced that pressure from the offender's "creditors" was "pressing on him as a motivation to commit [the] crime": [15], [17]–[18].

In *R v Ceissman* [2004] NSWCCA 466 at [24] Wood CJ at CL considered "economic duress" as a motive for participation in the offence of aggravated break enter and steal in company, contrary to s 112(2) *Crimes Act*, and held that it did not mitigate the offender's objective criminality. The offender's participation in the offence stemmed from independent criminal conduct arising out of his continued association with career criminals: [24]. This principle was applied by Spigelman CJ in *R v N* at [57]–[59].

In *Nye v R* [2018] NSWCCA 244, the Court accepted there had been duress where the offender committed serous drug offences to obtain protection from threats to him and his family. The person providing the protection was not connected to the person who issued the threats, however, while there had been duress, the attenuation of the duress, the seriousness of the offences, and the "necessity" to commit them flowing from the offender's refusal to seek assistance from authorities, had a bearing on the offender's moral culpability: [67]–[75].

[11-250] Section 21A(3)(e) — the offender does not have any record (or any significant record) of previous convictions

Last reviewed: August 2024

At common law offenders without prior convictions may generally expect to be treated more leniently than those with previous convictions. The presence of relevant priors is an aggravating factor: see s 21A(2)(d) (see **[11-090]**); see also discussion of **Prior record** at **[10-400]**.

Section 21A(3)(e) recognises a record of previous convictions may exist but not be significant for sentencing purposes. If not significant, the offender is entitled to the benefit of their record as a mitigating factor (subject to weight): *Meis v R* [2022] NSWCCA 118 at [37].

Where the offender has a record of previous convictions at the time of appearing for sentencing, but the record is in relation to offences which were committed after the offence before the court, the absence of a prior record as a mitigating factor is not necessarily a mitigating factor: *R v MAK & MSK* [2006] NSWCCA 381 at [59]–[61].

[11-260] Section 21A(3)(f) — the offender was a person of good character

Last reviewed: August 2024

See discussion in **Subjective matters** at **[10-410]**.

The reference to "good character" in s 21A(3)(f) relates to the character of the offender prior to the commission of the offence: *Lozanovski v R* [2006] NSWCCA 143 at [12]; *Aoun v R* [2007] NSWCCA 292 at [22].

In *R v PGM* [2008] NSWCCA 172, Fullerton J considered that where there is a pattern of re-offending over an extended period in the course of an ongoing relationship fostered for the commission of the offence, "a finding that the criminal conduct is out of character fails to recognise that a determined and conscious course of offending … diminishes the mitigating impact of a finding of good character": [44].

In *Athos v R* (2013) 83 NSWLR 224, Price J (Beazley P and Johnson J agreeing) at [36] indicated certain categories of offences where it had been held limited weight may be given to good character:

- Child pornography offences (*R v Gent* [2005] NSWCCA 370 at [64]; see also **[17-750]**);
- White-collar crime (*R v Gent* at [59]);
- Drink driving offences (*Application by the Attorney General under section 37 of the Crimes (Sentencing Procedure) Act)* (2004) 61 NSWLR 305);
- Drug couriers (*R v Leroy* (1984) 2 NSWLR 441 at 446–447);
- Federal drug importation offences to which s 16A(2)(m) *Crimes Act 1914* (Cth) has application (*R v Gent* at [56]); and,
- Child sex offences (*Ryan v The Queen* (2001) CLR 267 at [34]; see also **[17-570]**).

There is no closed category of offences to which less weight should be given to evidence of prior good character: *R v Gent* at [61] cited in *Athos v R* at [37]. In *Athos v R*, possessing a prohibited firearm was held not to be in a category of offence where less weight is to be afforded to prior good character: [37]–[45]. A similar, albeit qualified, finding was made in relation to domestic violence offences in *Wornes v R* [2022] NSWCCA 184 at [36].

Similar limitations apply in fraud cases where a person has been appointed to a position of trust because of their good character: *R v Gentz* [1999] NSWCCA 285 at [12]; see also **[20-000] Mitigating factors**. This is also the case where offending has taken place over a period of time or the offender has engaged in a course of conduct to avoid detection: *R v Smith* [2000] NSWCCA 140 at [20]–[24]; *R v Phelan* (1993) 66 A Crim R 446; *R v Houghton* [2000] NSWCCA 62 at [18].

Section 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence (as defined in s 21A(6)), an offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

It was observed by Hodgson JA in *Aoun v R* [2007] NSWCCA 292 at [23] that:

> if there is evidence suggesting criminal conduct other than that for which an offender is being punished, that may be taken into account by a sentencing judge in deciding whether or not the accused has shown previous good character on the balance of probabilities …

For s 21A(5A) to apply, the sentencing judge should make an express finding specific to the offender that good character or lack of previous convictions assisted the offender in the commission of the offence: *NLR v R* [2011] NSWCCA 246.

See **Good character** at **[17-570] Mitigating factors**; **Special rule for child sexual offences** at **[10-410] Good character**.

[11-270] Section 21A(3)(g) — the offender is unlikely to re-offend

Last reviewed: August 2024

This mitigating factor involves a favourable assessment or prediction relating to an offender's future offending behaviour. It is commonly linked to a positive finding that

the offender has good prospects for rehabilitation and, accordingly, will often influence the selection of the dominant purpose of sentencing. Its influence is particularly noticeable in borderline cases of imprisonment, where the sentencing court resolves not to impose a full-time custodial sentence on the basis that neither the principle of general deterrence nor concern for protection of society from the offender appear justified.

Notwithstanding the above, an offender’s likelihood of reoffending should not be conflated with their prospects of rehabilitation; they are separate and distinct factors and, if applicable, must be addressed separately: *TL v R* [2020] NSWCCA 265 at [316]; [369]; *Zuffo v R* [2017] NSWCCA 187 at [47]; *Meoli v R* [2021] NSWCCA 213 at [29], [38]. For example, an offender may be in need of rehabilitation, notwithstanding they are unlikely to reoffend, as rehabilitation is a broader concept than the likelihood of reoffending: *Zuffo v R* at [47]; *R v Pogson* (2012) 82 NSWLR 60 at [118], [120]. In *Meoli v R*, the Court held the judge did not err by not addressing the unlikelihood of reoffending notwithstanding the judge’s finding the offender’s prospects were guarded as not every listed factor in s 21A(3) calls for a specific finding; only those arising in the circumstances of the case: [40]–[43].

[11-280] Section 21A(3)(h) — the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise

Last reviewed: August 2024

In *Elyard v R* [2006] NSWCCA 43 the court held that the judge failed to take into account the applicant’s good prospects of rehabilitation, per s 21A(3)(h). The judge found that the applicant had poor prospects of rehabilitation without providing a cogent basis for rejecting the psychologist’s report, which referred to the applicant’s objective progress in terms of a significant and measurable improvement in attitudes to drugs and alcohol abuse. Basten JA and Hall J, in separate judgments, found that his Honour failed to give proper weight to the psychologist’s opinions: Basten JA at [27], Hall J at [92].

In the circumstances of a case, it may be that even though someone is unlikely to re-offend, their prospects of rehabilitation are not so favourable: *Barlow v R* [2008] NSWCCA 96 at [91]. It was possible to reconcile these seemingly inconsistent findings on the facts in *Barlow v R*. See also **[11-270] Section 21A(3)(g) — the offender is unlikely to re-offend**.

[11-290] Section 21A(3)(i) — remorse shown by the offender

Last reviewed: August 2024

Remorse shown by the offender can be taken into account under s 21A(3)(i) if:

(i) The offender provides evidence they have accepted responsibility of their actions, and

(ii) The offender has acknowledged any injury, loss or damage caused by their actions or made reparation for such injury, loss or damage (or both).

For an explanation of remorse at common law see *Alvares v R* [2011] NSWCCA 33 at [44] extracted at **Subjective matters** at **[10-420]**. In essence remorse means regret

for the wrongdoing the offender's actions caused and, as a feature of post offence conduct, may be relied upon to mitigate penalty: *Windle v R* [2011] NSWCCA 277 at [44]. In accordance with the provision, before a judge takes remorse into account in mitigation, they should make a finding as to whether the expression of remorse is genuine: *Pritchard v R* [2022] NSWCCA 130 at [90].

The question of whether remorse is shown will turn on whether "evidence" has been *provided* (s 21A(3)(i)). There is a tension in the authorities regarding how evidence of remorse is to be given, for example, in affidavits or reports tendered, or in an offender's sworn evidence, before it is accepted by a court.

In *R v Qutami* [2001] NSWCCA 353, the Court cautioned against uncritical reliance on an offender's statements contained in tendered reports where they do not give evidence: [59]. In *Lloyd v R* [2022] NSWCCA 18, the Court said that this statement is not a principle, and if it were, it would be a "wrong principle", and that the weight and cogency of the evidence is always a matter for the individual assessment of the sentencing judge: [45].

Decisions which discuss how evidence of remorse is to be given before it is accepted, and considerations of weight, include:

- *Alvares v R* (see [65]);
- *Butters v R* [2010] NSWCCA 1 (see [16]–[18]);
- *Care v R* [2022] NSWCCA 101 at [97]–[98];
- *CR v R* [2020] NSWCCA 289 (see [75]);
- *Doumit v R* [2011] NSWCCA 134 (see [19]);
- *Halac v R* [2015] NSWCCA 121 (see [106]);
- *Imbornone v R* [2017] NSWCCA 144;
- *Lai v R* [2021] NSWCCA 217 (see [80]);
- *Mun v R* [2015] NSWCCA 234 (see [37]);
- *Pfitzner v R* [2010] NSWCCA 314 (see [33]);
- *Pritchard v R* (see [90]);
- *R v Elfar* [2003] NSWCCA 358 (see [25]);
- *R v Harrison* [2002] NSWCCA 79 (see [44]);
- *Sun v R* [2011] NSWCCA 99 (see [25], [31]);
- *Van Zwam v R* [2017] NSWCCA 127 (see [6], [110]).

A judge is not obliged to accept assertions of contrition made by an offender: *R v Stafrace* (1997) 96 A Crim R 452 per Hunt CJ at CL, followed in *R v Nguyen* [2004] NSWCCA 438 at [21]. If a judge is not to believe the offender's expressions of remorse in sworn evidence, they should make some comment to that effect: *Mihelic v R* [2019] NSWCCA 2 at [77].

A judge should not look for evidence of contrition (or lack of contrition) at the time of the commission of the offence, without regard to evidence of contrition later: *R v Johnston* [2005] NSWCCA 80 at [28]. Further, the absence of remorse cannot operate to aggravate the term of sentence: *Roff v R* [2017] NSWCCA 208 at [19], [25].

The strength of the Crown case is a relevant consideration in relation to the evaluation of remorse: *R v Sutton* [2004] NSWCCA 225 at [12]; *R v Thomson* (2000) 49 NSWLR 383 at [137].

The court should not quantify the reduction for remorse either separately or as part of the utilitarian discount for the plea: *R v Borkowski* [2009] NSWCCA 102 at [32]. Given that s 21A makes specific provision for remorse to be considered as a separate mitigating factor, to include it as a factor contributing to the percentage discount for the plea of guilty can give rise to a perception of double counting: *Kite v R* [2009] NSWCCA 12 at [12]. In *Ristevski v R* [2022] NSWCCA 38, the judge erred by referring to remorse and contrition only in the context of the utilitarian discount for the guilty plea without discrete consideration of those matters: [32]–[33]; [55].

Remorse is a major factor in determining whether an offender is unlikely to re-offend (s 21A(3)(g)) and has good prospects of rehabilitation (s 21A(3)(h)). “Without true remorse it is difficult to see how either finding could be made”: *R v MAK & MSK* [2006] NSWCCA 381 at [41]. However, while the three concepts are interconnected, remorse is not a prerequisite to a finding of good prospects of rehabilitation, and the three concepts should not be conflated: *BP v R* [2010] NSWCCA 159 at [84]; *MLP v R* [2014] NSWCCA 183 at [34]; *Pritchard v R* at [95], [101]. Further, the failure of an offender to remember or explain their conduct is not mutually exclusive with a finding of genuine remorse: *Pritchard v R* at [97]; *Medcalf v R* [2016] NSWCCA 209 at [37].

The reference in s 21A(3)(i)(ii) to reparation as a mitigating factor requires that, before this factor comes into play, there must be evidence the reparation has already been made at the time of sentence: *R v Cage* [2006] NSWCCA 304 at [34]. Repayment of the proceeds of crime is not necessarily evidence of genuine remorse: *Chahal v R* [2017] NSWCCA 203 at [39].

[11-300] Section 21A(3)(j) — the offender was not fully aware of the consequences of their actions because of their age or any disability

Last reviewed: August 2024

It has not been judicially determined how the expression “not fully aware of the consequences of his or her actions because of the offender’s age” is to be applied or whether it adds anything to the common law on the subject. A narrow reading would suggest the subsection would apply to very young offenders. The common law recognises “the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law”: *KT v R* [2008] NSWCCA 51 at [23]. Similarly, it is doubtful whether the subsection adds to the common law in relation to the relevance of the offender’s mental condition at sentence as expressed in *Muldrock v The Queen* (2011) 244 CLR 120 at [54]. In *Taylor v R* [2006] NSWCCA 7, the Court held the sentencing judge failed to have regard to the offender’s “disability” and that his mental condition was a mitigating factor under s 21A(3)(j): [25], [30]–[31].

See further, **Subjective matters** at **[10-460]** and **[15-090] Sentencing principles applicable to children dealt with at law**.

[11-310] Section 21A(3)(k) — a plea of guilty by the offender

Last reviewed: August 2024

See **Guilty pleas** at **[11-500]**.

[11-320] Section 21A(3)(l) — the degree of pre-trial disclosure by the defence

Last reviewed: August 2024

The court can, on a case by case basis, impose pre-trial disclosure requirements on both the prosecution and the defence, in order to reduce delays in complex criminal trials: see Ch 3 Pt 3 Div 3 *Criminal Procedure Act 1986*.

Although s 22A *Crimes (Sentencing Procedure) Act* provides that a court may take into account the degree to which the offender cooperates with the court in making pre-trial disclosures, and may impose a lesser penalty than it would otherwise (s 22A(1)), any such lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence (s 22A(2)).

See **Power to reduce penalties for pre-trial disclosure** at **[11-910]**.

[11-330] Section 21A(3)(m) — assistance by the offender to law enforcement authorities

See **Power to reduce penalties for assistance to authorities** at **[12-200]**.

[11-335] Section 21A(5AA) — special rule for intoxication

Section 21A(5AA) provides:

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

For a discussion of the effect this subsection has on the common law, see **Subjective matters** at **[10-480]**ff and **Special Bulletin No 6 — Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014**. It has effect despite any Act or rule of law to the contrary.

[11-337] Section 21B — sentencing patterns and practices

Section 21B *Crimes (Sentencing Procedure) Act 1999* provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied *at the time the offence was committed*, not at the time of sentencing: s 21B(2). These provisions apply to proceedings commenced on or after 18 October 2022: see *Crimes (Sentencing Procedure) Amendment Act 2022*. Prior to the insertion of s 21B, unless the offence was a child sexual offence (see s 25AA(1) (rep)), the court was required to sentence in accordance with the sentencing patterns and practices existing *at the time of the offence*: *R v MJR* (2002) 54 NSWLR 368; see also **Sentencing practice after long delay** in **[10-530] Delay**. Section 25AA(1) continues to apply to proceedings commenced from 31 August 2018 to 17 October 2022.

Exceptions to s 21B(1)

Section 21B(3) provides that a court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the *time the offence was committed* if:

(a) the offence is not a child sexual offence; and

(b) the offender establishes that there are exceptional circumstances.

(See also **[17-410] Sentencing for historical child sexual offences**).

Further, s 21B(4) provides that a court, when varying or substituting a sentence, must do so in accordance with the sentencing patterns and practices *at the time of the original sentencing*.

[11-340] Section 24A — mandatory requirements for supervision of sex offenders and prohibitions against child-related employment to be disregarded in sentencing

The *Crimes Amendment (Sexual Offences) Act 2008* inserted s 24A (effective 1 January 2009). Section 24A(1) provides that, in sentencing an offender, the court must not take into account as a mitigating factor the fact that the offender has or may become a registrable person under the *Child Protection (Offenders Registration) Act 2000* as a consequence of the offence.

Section 24A was amended by the *Crimes (Sentencing Procedure) Amendment Act 2010* to further provide that the court must not take into account, as a mitigating factor, the fact the offender is prohibited from engaging in child-related employment under the *Commission for Children and Young People Act 1998* because of their conviction for a serious sex offence, the murder of a child or a child-related personal violence offence. Such an offender’s status as a “prohibited person” is not extra-curial punishment.

Section 24A was further amended by the *Crimes (Serious Sex Offenders) Amendment Act 2013*, which commenced on 19 March 2013. Section 24A(1)(d) was inserted to provide that the fact that an offender is subject to an order under the *Crimes (High Risk Offenders) Act 2006* must not be taken into account as a mitigating factor. The amendments were a consequence of renaming the *Crimes (Serious Sex Offenders) Act* as the *Crimes (High Risk Offenders) Act 2006* which extended the application of the Act to high risk violent offenders as well as serious sex offenders.

See further discussion of extra-curial punishment in **Sexual offences against children** at **[17-570]**.

[11-350] Section 24B — confiscation of assets and forfeiture of proceeds of crime to be disregarded in sentencing

Section 24B prevents a court from taking into account, as a mitigating factor, the consequences of any confiscation or forfeiture order imposed on the offender because of the offence. See *R v Hall* [2013] NSWCCA 47 for an approach to a drug proceeds order.

[11-355] Section 24C — disqualification of parliamentary pension

The *Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act 2017* inserted s 24C into the *Crimes (Sentencing Procedure) Act*

1999 to preclude consideration of loss of parliamentary pension as mitigating factor in sentencing. The amendments have a retrospective effect in the sense that they do not only apply to Members of Parliament convicted forthwith: Sch 1, cl 11A *Parliamentary Contributory Superannuation Act 1971*. Section 24C was first applied in *R v Macdonald* [2017] NSWSC 638 at [262].

[The next page is 5791]

Guilty pleas

[11-500] Introduction

Last reviewed: March 2024

Until the introduction of Pt 3, Div 1A *Crimes (Sentencing Procedure) Act 1999* on 30 April 2018, the common law recognised that sentencing judges had a broad discretion to discount a sentence for the utilitarian value of a plea of guilty.

In *Siganto v The Queen* (1998) 194 CLR 656 at [22], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

A "sentencing discount" is a reduction in the otherwise appropriate sentence by a quantifiable amount due to a specific policy consideration — in the case of a guilty plea — a utilitarian benefit: *R v Borkowski* [2009] NSWCCA 102. It is applied after the otherwise appropriate sentence has been determined: at [32]–[33].

In the Second Reading Speech to the Justice Legislation Amendment (Committals and Guilty Pleas) Bill, the Attorney General said Pt 3, Div 1A was introduced to replace "the existing common law sentence discount for the utilitarian value of a guilty plea" for offences dealt with on indictment: NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 October 2017, p 12. It is apparent from the language of ss 25A(2) and 25D(1) that the scheme is mandatory: *Gurin v R* [2022] NSWCCA 193 at [22].

[11-503] Impermissible to penalise offender for pleading not guilty

Last reviewed: March 2024

A court is not permitted to penalise an offender for pleading not guilty. In *Siganto v The Queen* at [22] it was said:

> A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.

The court judges an offender for the crime, not for the defence: at [21], affirming the proposition expressed in DA Thomas, *Principles of Sentencing* (2nd Ed), 1979, Heinemann, London, p 50. See also *Cameron v The Queen* (2002) 209 CLR 339. The High Court in *Siganto v The Queen* at [21] also affirmed the following passage from *R v Gray* [1977] VR 225 at 231:

> It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence.

[11-504] Obligations of the court taking the plea

Last reviewed: March 2024

Where both parties to proceedings are present, s 192(2) *Criminal Procedure Act 1986* provides that the court must "state the substance of the offence" to an accused and ask if they plead guilty or not guilty. The stating by the court of the substance of the offence is not of itself a condition precedent to the validity of a plea of guilty, and it is not the purpose of ss 192 and 193 that the power to convict is not enlivened unless this has occurred: *Collier v Director of Public Prosecutions* [2011] NSWCA 202 at [59].

The purpose of s 192(2) is to ensure that, to the knowledge of the court, an accused adequately understands the charge they are pleading to: at [53]. To ensure that an unrepresented accused understands the charges and unequivocally plead to those charges, the court must state the substance of each offence to them and take separate pleas for each: at [59].

An "accused person" is defined to include a "legal practitioner representing an accused person": s 3. Where an accused is legally represented, the practitioner can enter a plea.

The court should, as a matter of practice, at least draw the legal representative's attention to the Court Attendance Notice/s (CAN) and the offences stated in them. This would amount to substantial, if not exact, compliance with s 192(2): at [55], [59]. In a busy Local Court it may be highly inconvenient to individually state multiple charges suggesting that it was not the purpose of s 192(2) to invalidate pleas or convictions if that section is not complied with: at [55].

Section 193(1) *Criminal Procedure Act* provides that the court must convict the accused or make the order accordingly *if* "the accused person pleads guilty, and does not show sufficient cause why he or she should not be convicted or not have an order made against him or her".

[11-505] Setting aside a guilty plea

Last reviewed: March 2024

Section 207 *Criminal Procedure Act 1986* makes provision for the setting aside of a conviction after the withdrawal of a plea of guilty. It provides:

> (1) An accused person may, at any time after conviction or an order has been made against the accused person and before the summary proceedings are finally disposed of, apply to the court to change the accused person's plea from guilty to not guilty and to have the conviction or order set aside.
>
> (2) The court may set aside the conviction or order made against the accused person and proceed to determine the matter on the basis of the plea of not guilty.

An accused seeking to withdraw a guilty plea after conviction must demonstrate a miscarriage of justice has occurred: *R v Boag* (unrep, 1/6/94, NSWCCA); *White v R* [2022] NSWCCA 241 at [58]. The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered: *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA);

R v Van [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163] extensively reviews the case law.

An accused seeking to withdraw a guilty plea before conviction must demonstrate whether the interests of justice require it: *White v R* at [59]–[61], [68]–[69]; *Maxwell v The Queen* (1996) 184 CLR 501 at 531. The "interests of justice" test is broader than the "miscarriage of justice" test and may focus on matters beyond the integrity of the plea, although this will often remain the inquiry's focal point: *White v R* at [65]. Bell CJ, Button and N Adams JJ in *White v R* at [65] set out the following non-exhaustive list of factors affecting the interests of justice [case references and citations omitted].

- the circumstances in which the plea was given;
- the nature and formality of the plea;
- the importance of the role of trial by jury;
- the time between entry of the plea and the application for its withdrawal;
- any prejudice to the Crown from the plea's withdrawal;
- the complexity of the charged offence's elements;
- whether the accused knew all of the relevant facts intended to be relied upon by the Crown;
- the nature and extent of legal advice to the accused before entering the plea;
- the seriousness of the alleged offending and likely penalty;
- the accused's subjective circumstances;
- any intellectual or cognitive impairment suffered by the accused;
- any reason to suppose that the accused was not thoroughly aware of what they were doing;
- any extraneous factors bearing on the plea when made, including threats, fraud or other impropriety;
- any imprudent and inappropriate advice given to the accused affecting their plea;
- the accused's explanation for seeking to withdraw the plea;
- any consequences to victims, witnesses or third parties that might arise from the plea's withdrawal; and
- whether there is a real question about the accused's guilt.

See also Johnson J's summary of the principles in appellate decisions governing an application to withdraw a plea of guilty in *R v Wilkinson (No 4)* [2009] NSWSC 323 at [41]–[48].

An application to withdraw a plea of guilty in the Local Court cannot be treated on appeal as an application for an annulment of a conviction and the District Court will fall into jurisdictional error by doing so: *DPP v Arab* [2009] NSWCA 75 at [39].

[11-510] Summary of the two guilty plea discount schemes

Last reviewed: March 2024

There are two distinct guilty plea discount schemes provided for in the *Crimes (Sentencing Procedure) Act 1999*:

1. A mandatory sentencing discount scheme contained in Pt 3, Div 1A which applies to an offence dealt with on indictment: see **[11-515]**.
2. Section 22 concerns offences dealt with summarily or an offence dealt with on indictment to which Pt 3, Div 1A does not apply: see **[11-520]** and **[11-525]**.

A guilty plea is a factor to be taken into account in mitigation of a sentence under s 21A(3)(k) of the Act. An offer to plead guilty to a different offence, where the offer is not accepted and the offender is subsequently found guilty of that offence, or a reasonably equivalent offence, is a mitigating factor under s 21A(3)(n). See **Section 21A — aggravating and mitigating factors** at **[11-000]**.

[11-515] Guilty plea discounts for offences dealt with on indictment

Last reviewed: March 2024

Part 3, Div 1A of the *Crimes (Sentencing Procedure) Act 1999* provides for a scheme of fixed sentencing discounts for the utilitarian value of a guilty plea for offences dealt with on indictment.

The provisions limit the discretion of a sentencing judge with respect to the quantum of the discount for a guilty plea after an offender has been committed for trial. A maximum discount of 25% is only available if the plea was entered in the Local Court.

The scheme does not apply to:

- Commonwealth offences: s 25A(1)(a)
- offences committed by persons under 18 years at the time of the offence if they were under 21 years when the relevant proceedings commenced: s 25A(1)(b)
- a sentence of life imprisonment: s 25F(9)
- offences dealt with summarily or an offence dealt with on indictment to which Pt 3, Div 1A does not apply: s 22(5).

An offender bears the onus of proving, on the balance of probabilities, that there are grounds for the sentencing discount: s 25F(5).

The court must indicate how the sentence imposed was calculated where a discount is applied, or give reasons for reducing or refusing to apply the discount: s 25F(7). Failure to comply with Pt 3, Div 1A does not invalidate the sentence: s 25F(8).

Mandatory discounts

Section 25D establishes inflexible temporal limits governing the degree of discount available at specified procedural intervals in the committal and trial process, and imposes graduated discounts based on the timing of the entry or indication of a guilty plea: *Gurin v R* [2022] NSWCCA 193 at [24], [26].

Section 25D(1) requires a sentencing court to apply a discount for the utilitarian value of a guilty plea, in accordance with the balance of the section, if the offender pleaded guilty before being sentenced. It is clear from the language of s 25D(1)

that such discounts are made solely "for the utilitarian value of a guilty plea": *Doyle v R* [2022] NSWCCA 81 at [18]. Remorse (s 21A(3)(i) *Crimes (Sentencing Procedure Act)*) and/or a willingness to facilitate the administration of justice (s 22A *Crimes (Sentencing Procedure Act)*) are conceptually distinct and must be considered separately: *Doyle v R* at [16]–[19].

Section 25D(2) *Crimes (Sentencing Procedure) Act* prescribes the following mandatory discounts for the utilitarian value of a guilty plea:

- 25%, if the guilty plea was accepted in committal proceedings: s 25D(2)(a)
- 10%, if the offender pleaded guilty at least 14 days before "the first day of trial of an offender" (defined in s 25C(1)), or at the first available opportunity after complying with the pre-trial notice requirements: s 25D(2)(b)
- 5%, in any other case: s 25D(2)(c).

The "first day of the trial of an offender" is defined in s 25C(1) as:

> the first day fixed for the trial of the offender or, if that day is vacated, the next day fixed for the trial that is not vacated.

The word "vacated" means adjourned before the trial commenced: *Gurin v R* at [27], [29]. The adjournment resets the clock, providing the offender with another opportunity to enter a guilty plea 14 days before the next day fixed for trial, but once the trial commences the opportunity for a 10% reduction is lost: at [29].

The mandatory discount scheme also applies to an offence the subject of an ex officio indictment or a count for a new offence added to an existing indictment where the offender pleads guilty as soon as practicable after the ex officio indictment is filed or the indictment is amended to include the new count: s 25D(3). However, the offender is not entitled to the 25% discount if:

- the elements of the new offence are substantially the same as those of the offence in the original indictment (and the penalty is the same or less), or
- the offender previously refused an offer to plead guilty to the new offence made by the prosecutor which was recorded in a negotiations document: s 25D(4).

Section 25D(4) forecloses the availability of large sentencing discounts when there are earlier opportunities for both parties to offer and negotiate a guilty plea. It would otherwise be inimical to the principle objective of the early appropriate guilty plea scheme to allow for the maximum discount to be available: *R v Doudar* [2020] NSWSC 1262 at [63]. "Substantially the same" in s 25D(4)(a) should be given its natural and ordinary meaning: [64]. In *R v Doudar*, the sentencing judge rejected a submission that a 25% discount should be given and concluded a 10% discount for a guilty plea to accessory after the fact for murder was appropriate, because that offence occurred within substantially the same factual and evidentiary matrix as the original murder charge for which the offender had been committed for trial: [63], [65], [67].

The scheme also applies to an offender who pleads guilty after being found fit to be tried and whose matter was not remitted to a magistrate for further committal proceedings: s 25D(5). A 25% discount is only available if the offender pleads guilty as soon as practicable after being found fit to be tried: s 25D(5)(a). In *Stubbings v R* [2023] NSWCCA 69, the court found the offender did not plead guilty as soon as practicable after he was found fit: [56].

In determining whether a plea was entered as soon as practicable, the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to a legal representative: s 25D(6). In *Stubbings v R*, the court held that this evaluative assessment is made from the offender's point of view, taking into account the time period which, viewed objectively, is appropriate or suitable in the circumstances: [51].

Discounts when plea offer to different offences refused when made

Section 25E provides for discounts where a guilty plea is made for a different offence but refused. The relevant discounts are set out in s 25E(3) and are available if the offender's offer to plead guilty to a different offence was recorded in a negotiations document, was for an offence that was not "the subject of the proceedings" and was not accepted by the prosecutor:

- and the offender was subsequently found guilty of the different offence or a reasonably equivalent offence (s 25E(1)), or
- was accepted by the prosecutor after committal and the offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender (s 25E(2)).

The discounts prescribed in s 25E(3) are intended to operate as incentives to offenders to offer realistic pleas of guilty: *Black v R* [2022] NSWCCA 17 at [41].

A "negotiations document" is defined in s 25B to include a case conference certificate. In *Ke v R* [2021] NSWCCA 177, the court concluded it was unfair that the applicant's sentence was discounted by 10%, and not 25%, following her guilty plea in the District Court to an offence of dealing with the proceeds of crime being reckless to that fact (*Crimes Act 1900*, s 193B(3)). She had offered to plead guilty to that offence before being committed for trial but it had been rejected. Nor was it recorded in the case conference certificate filed on committal as required by s 75 *Criminal Procedure Act 1986*. Bellew J (Adamson J agreeing; see also Brereton JA at [63] to similar effect) held that the phrase "an offer recorded in a negotiations document" in s 25E(2)(a) should be construed as meaning "an offer which was recorded *or which was required to be recorded* in a negotiations document" (emphasis added): at [339]. His Honour said, at [338], that accepting any other interpretation would:

> …bring about a result which … could not possibly have been intended by the Parliament when enacting the scheme. Specifically … it could not possibly have been the Parliament's intention, in enacting s 25E, to bring about a result whereby an offender was deprived of the benefit of a significant discount on [their] sentence as the result of both parties to the proceedings simply overlooking a requirement to record the undisputed fact of a previous offer to plead guilty. That is particularly so in circumstances where the clear intention of the Parliament, reflected in s 75(1)(b), was that any offer to plead guilty to (inter alia) a different offence be recorded in the case conference certificate.

The phrase "the offence the subject of the proceedings", in s 25E(1)(b) and s 25E(2)(b), was considered in *Black v R*. Simpson AJA (Ierace and Dhanji JJ agreeing) concluded that it was clear that only one offence, the principal offence, was intended to be the subject of the proceedings, and that it was irrelevant that, for the purposes of the charge certificate, multiple offences may be "the subject of the proceedings": [30]–[36]. This, her Honour observed, produced a fair result: at [38]. Denying a discount to an offender

who had offered a realistic plea of guilty to an alternative charge, merely because it was specified in either the charge certificate or case conference certificate, undermines the purpose for which the reduction was prescribed, and was potentially unfair: at [41].

Not allowing or reducing the discount

Despite the mandatory terms of s 25D(1), s 25F provides that the court can refuse to give a discount or a reduced discount if:

- the offender's culpability is so extreme the community interest in retribution, punishment, community protection and deterrence warrants no, or a reduced, discount: s 25F(2), or
- the utilitarian value of the plea was eroded by a factual dispute which was not determined in the offender's favour: s 25F(4).

If a case conference certificate was filed, the prosecutor cannot submit that no discount should be given unless the defence was notified of the prosecution's intention to do so either at or before the conference: s 25F(3).

[11-520] Guilty plea discounts for offences dealt with summarily and exceptions to Pt 3 Div 1A

Last reviewed: March 2024

Part 3, Div 1A *Crimes (Sentencing Procedure Act 1999* limits the operation of s 22 to offences dealt with summarily and "to a sentence for an offence dealt with on indictment to which Div 1A does not apply": s 22(5). Section 22(1) provides that a court may impose a lesser penalty after considering:

(a) the fact of the guilty plea,

(b) the timing of the plea or indication of intention to plead, and

(c) the circumstances in which the offender indicated an intention to plead guilty.

Section 22(1A) provides that the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence. It reflects the common law on the subject.

The "circumstances" a court can take into account for the purposes of s 22(1)(c) can include those beyond the offender's control such as number and type of charges, the fitness of the offender to plead, offers to plead which are initially rejected but later accepted, or where the prosecution adds to the charges and indicates it will amend the charge at a later time to specify a more appropriate offence.

Guideline for guilty plea discount

In *R v Thomson and Houlton* (2000) 49 NSWLR 383 Spigelman CJ (Wood CJ at CL, Foster AJA, Grove and James JJ agreeing) set out the following guideline at [160]:

> (i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
>
> (ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all

of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.

(iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

[*Note*: The top of the range would be expected to be restricted to pleas at the earliest possible opportunity and should not be given, save in an exceptional case, after a matter has been set down for trial. A discount towards the bottom of the range is appropriate for late pleas, for example, those entered on the date fixed for trial, unless there are particular benefits arising from the prospective length and complexity of the trial: at [155]. The complexity of the issues about which evidence will have to be gathered and adduced will affect the value of the plea. The greater the difficulty of assembling the relevant evidence and the greater the length and complexity of the trial, the greater the utilitarian value of a plea: at [154]. Rare cases involving exceptional complexity and trial duration may justify a higher discount: at [156]. A discount within the range specified will not mean that a trial judge's exercise of discretion cannot be subject to appellate review: at [158].]

(iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

[*Note*: There are circumstances in which the protection of the public requires a long sentence to be imposed such that no discount for the plea is appropriate: at [157].]

The range of discount referred to in *R v Thomson and Houlton* is a guideline only. In a given situation it creates no presumption or entitlement to a particular discount: *R v Scott* [2003] NSWCCA 286 at [28]; *R v Newman* [2004] NSWCCA 113 at [12] and *R v Araya* [2005] NSWCCA 283 at [44].

The R v Borkowski principles

In *R v Borkowski* [2009] NSWCCA 102, Howie J (McClellan CJ at CL and Simpson J agreeing) at [32] summarised the following "principles of general application" when a sentence is discounted for a guilty plea:

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].

2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].

3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.

4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.

5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186 [Principle 5 no longer applies: see below].
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic* [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* (*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The trial judge erred in *R v Borkowski* by giving the offender a 25% utilitarian discount for a guilty plea taken at first arraignment when the discount should not have been more than 15%.

Bathurst CJ in *R v AB* [2011] NSWCCA 229 at [3], said courts should "... generally continue to follow the approach in *R v Borkowski* … the principles have to be applied by reference to the particular circumstances in any case".

The discount for a plea is not fixed and may be eroded as a result of the manner in which the sentence proceedings are conducted: per Johnson J at [33]; Bathurst CJ at [2] agreeing. AB was given a "generous" (at [24]) 25% discount for a guilty plea entered in the Local Court following a significant dispute on sentence which was resolved against him.

The position in relation to principle 5 in *R v Borkowski* is now that reflected in *Panetta v R* [2016] NSWCCA 85 that any *Ellis* discount must be numerically quantified. See **Voluntary disclosure of unknown guilt** at **[12-218]**.

As to principle 6, when an aggregate sentence is imposed a separate discount must be applied to each indicative sentence: *Bao v R* [2016] NSWCCA 16 at [41], [44]. See **Aggregate sentences** below.

As to principle 7, a discount for the guilty plea was withheld in *Milat v R* [2014] NSWCCA 29 at [92] on the basis of the extreme circumstances of the murder. The range of cases where no discount may be given extends to those where the sentence imposed is less than the statutory maximum: *Milat v R* at [72], [75]. The plurality in *R v El-Andouri* [2004] NSWCCA 178 at [34] purported to confine the circumstances in which a plea will not warrant any discount to cases where the protection of the public requires a long sentence, or for which the maximum sentence is appropriate notwithstanding the plea. However, this statement is merely a gloss on the guideline judgment in *R v Thomson and Houlton* (2000) 49 NSWLR 383 and has the potential to misrepresent what the Chief Justice actually said: *Milat v R* at [81], [83]. Spigelman CJ did not define a closed category of cases but merely acknowledged there will be cases where the discount is withheld: *Milat v R* at [84].

Principle 8 in *R v Borkowski*, generally applies subject to Bathurst CJ's statement in *R v AB* at [3] that it is permissible for a court in specific instances to have regard to the reason for the delay in the guilty plea. In *Shine v R* [2016] NSWCCA 149, the applicant at no time denied committing the offence but awaited the outcome of a psychiatric evaluation before entering a plea: at [95]. A similar situation occurred in *Haines v R* [2016] NSWCCA 90. In both cases a utilitarian discount of 25% was warranted in the circumstances notwithstanding the timing of the plea: *Shine v R* at [95]; *Haines v R* at [33].

As to principle 9 in *R v Borkowski*, where the delay in the guilty plea is caused by the offender's legal representative and is not the fault of the offender, its utilitarian value is not undermined: *Atkinson v R* [2014] NSWCCA 262. The whole history of the matter can be considered in assessing the utilitarian value of the plea: *Samuel v R* [2017] NSWCCA 239 at [60]. In *Samuel v R*, the 8-year delay between the offender absconding (after being charged) and his guilty plea in the Local Court, meant his plea could not be characterised as "early". The delay caused unnecessary expenditure of resources and a loss of efficiency for the criminal justice system: at [57]–[59].

Transparency

The guideline encouraged transparency in decision-making and favours expressly quantifying the discount (often expressed as a percentage reduction in the otherwise appropriate sentence) when the court takes a guilty plea into account in sentencing: *R v Thomson and Houlton* (2000) 49 NSWLR 383.

In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ said at [15] that the reason for issuing the guideline:

> included the need to ensure that participants in the New South Wales criminal justice system had no reason to be sceptical about whether or not the benefits of a guilty plea were in fact made available to accused.

Although quantification of the discount is preferable, a failure to do so does not by itself establish error: *R v Simpson* (2001) 53 NSWLR 704 at [82]–[83]; *R v DF* [2005] NSWCCA 259 at [15]; *R v Henare* [2005] NSWCCA 366 at [26].

Whether a failure to explicitly state that a guilty plea has been taken into account indicates it was not given weight depends on the circumstances of the particular case and the content of the reasons: *Woodward v R* [2014] NSWCCA 205 at [6]. Where

there is a real possibility the plea was not properly considered, failure to refer to the issue in the judgment should be treated as a material error: *Lee v R* [2016] NSWCCA 146 at [37].

Aggregate sentences

Where a court imposes an aggregate sentence, the discount for the guilty plea must be stated for each indicative sentence, not the aggregate sentence: *Elsaj v R* [2017] NSWCCA 124 at [56]; *PG v R* [2017] NSWCCA 179 at [71]–[76]; *Berryman v R* [2017] NSWCCA 297 at [29]. However, in *Davies v R* [2019] NSWCCA 45, the court held it was entirely appropriate for the sentencing judge to apply an across-the-board discount in the circumstances of that case where there was no or little information about the plea negotiations for each offence and the pleas were eventually entered at the same time: at [47].

Willingness to facilitate the course of justice

In *Cameron v The Queen* (2002) 209 CLR 339, the majority of the High Court refined the test for taking into account a plea of guilty: at [12]. In their joint judgment, Gaudron, Gummow, Callinan JJ said at [14]:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

According to the majority, a plea of guilty may be taken into account in mitigation of sentence if it evidences a willingness on the part of the offender to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice: at [19]. This is a subjective test and requires more than simply deciding whether economic benefits flow from the plea.

In *R v Sharma* (2002) 54 NSWLR 300 the court held that the reasoning of the majority in *Cameron v The Queen* concerning the application of general sentencing principles, in the context of a WA statute, was not applicable in NSW because the common law principles enunciated there had been modified by statute: at [38]. The court found that the proper construction of s 22 *Crimes (Sentencing Procedure) Act 1999* permits the sentencer to take into account the objective utilitarian value of the plea: at [62]. Spigelman CJ (with whom Mason P, Barr, Bell and McClellan JJ agreed) said at [52]:

> The mandatory language of s 22 must be followed whether or not by doing so the court can be seen to "discriminate", in the sense that word was used in the joint judgment in *Cameron* … The court must take the plea into account even if there is *no* subjective intention to facilitate the administration of justice. However, viewed objectively, there will always be *actual*, as distinct from *intended*, facilitation of the administration of justice by reason of "the fact" of the plea. The use of the word "must" and the reference to "the fact" of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The *actual* facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

Thus a court must take the plea into account even if there is no subjective intention to "facilitate the administration of justice", as explained in *Cameron v The Queen*. The

principles outlined in *R v Thomson and Houlton* (2000) 29 NSWLR 383, regarding the weight to be given to the utilitarian value of the plea, for saving the expense of a "contested hearing", must therefore be given their full force.

The court also held that there was nothing in the NSW Act that expressly or implicitly referred to the common law requirement of "equal justice". While the court did not doubt the application of this principle in NSW, it was not a principle that must be invoked to construe s 22 restrictively, in the absence of any indication to the contrary: *R v Sharma* (2002) 54 NSWLR 300 at [65]. There was nothing in *Cameron v The Queen* that called into question the ability of a State Parliament to adopt a form of differentiation which may be, or appear to be, "discriminatory" in the sense that the words were used in *Cameron v The Queen*: at [67].

[11-525] Whether guilty plea discount given for Form 1 offences

Last reviewed: March 2024

There is no statutory or common law requirement to take into account that an offender pleaded guilty to an offence if it is being taken into account on a Form 1: *Gordon v R* [2018] NSWCCA 54 at [95]. Requiring a court to consider the procedural history of Form 1 offences when assessing the discount for the guilty plea for the primary offence would add significant complexity to the sentencing task: at [96]–[98].

See **Taking further offences into account (Form 1 offences)** at **[13-200]**ff.

[11-530] Combining the plea with other factors

Last reviewed: March 2024

Care needs to be taken when there are a number of grounds for extending leniency, such as a plea of guilty with a measure of remorse, as well as the offender's assistance to authorities and promise of future assistance.

Discounts for assistance and a guilty plea should ordinarily be a single, combined figure: *SZ v R* [2007] NSWCCA 19; *R v El Hani* [2004] NSWCCA 162 at [69]; *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [160] at (ii); *R v Gallagher* (1991) 23 NSWLR 220 at 228.

The court held in *SZ v R* at [9] that, since the decision of *R v Thomson and Houlton*, where the utilitarian value of the plea could be as high as 25%, the courts have had less scope to give a discount for assistance in cases of an early plea. A combined discount for pleas of guilty and assistance should not normally exceed 50%: at [3]. A combined discount exceeding 50% should be reserved for exceptional cases: at [53]. It would be in a rare case that a discount of more than 60% would not result in a manifestly inadequate sentence: at [11].

See **Application of discount** at **[12-230]**.

[The next page is 5851]

Power to reduce penalties for pre-trial disclosure

The degree of pre-trial disclosure by the defence (as provided by s 22A) is a mitigating factor to be taken into account in determining the appropriate sentence for an offence: s 21A(3)(l) *Crimes (Sentencing Procedure) Act 1999*.

[11-910] Section 22A

Section 22A *Crimes (Sentencing Procedure) Act 1999* provides as follows:

> (1) A court may impose a lesser penalty than it would otherwise impose on an offender who was tried on indictment having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial or otherwise).
>
> (2) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

In *R v Way* (2004) 60 NSWLR 168, Spigelman CJ at [45] said of a previous form of the provision:

> The discretion under ss 22A and 23 is subject to a qualification, which is not expressly mentioned in s 22, namely that any lesser penalty that is imposed "must not be unreasonably disproportionate to the nature and circumstances of the offence."

Matters under s 22A can be taken into account as part of the instinctive synthesis approach to sentencing: *Droudis v R* [2020] NSWCCA 322 at [103]. There is no requirement to specify a percentage discount or quantify mathematically the extent by which a sentence has been reduced. This is consistent with the matters referred to in ss 22, 22A and 23 of the Act being treated as mitigating factors in s 21A(3)(k), (l) and (m): at [104]. In *Droudis v R*, the court concluded the sentencing judge, who had conducted a judge-alone trial, gave proper consideration to the nature of the assistance provided by the applicant in facilitating the efficient conduct of the trial as required by s 22A and that even if he had taken this into account as a mitigating factor this would not have been an error: at [99]–[100].

In *Droudis v R (No 16)* [2017] NSWSC 20, the sentencing judge made some observations concerning the co-operation envisaged by s 22A which he found extended to admissions, disclosures made before or during the trial and limiting the facts in issue. All of those had occurred in that case, satisfying his Honour that the offender took steps to facilitate the administration of justice and was entitled to credit under s 22A: at [112]–[113].

Generally, in cases where the facilitation of the administration of justice makes a significant difference to the ultimate sentence, it may be appropriate to specify the penalty that would have otherwise been imposed. This provides transparency to the sentencing process and encourages an accused and their legal representatives to conduct criminal trials efficiently and expeditiously. However, a failure to do so, of itself, will not establish error: *Droudis v R* [2020] NSWCCA 322 at [105].

[The next page is 5901]

Power to reduce penalties for assistance to authorities

In *York v The Queen* (2005) 225 CLR 466, Gleeson CJ at [3] observed:

> It is common sentencing practice to extend leniency, sometimes very substantial leniency, to an offender who has assisted the authorities, and, in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the steps that will need to be taken to protect the offender when released. The relevant principles are discussed, for example, in *R v Cartwright* (1989) 17 NSWLR 243; *R v Gallagher* (1991) 23 NSWLR 220.

The basis of a court's power to discount any sentence for a State offence where the offender has provided assistance to law enforcement authorities is found in s 23(1) *Crimes (Sentencing Procedure) Act 1999*.

For the statutory provisions and principles applicable to sentencing Commonwealth offenders who have provided assistance, see **General sentencing principles applicable** at **[16-010]**.

[12-200] Statutory provision

Last reviewed: August 2023

Section 23 *Crimes (Sentencing Procedure) Act 1999* provides as follows:

> **23 Power to reduce penalties for assistance provided to law enforcement authorities**
>
> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
>
> (2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:
>
> (a) (repealed)
>
> (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,
>
> (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,
>
> (d) the nature and extent of the offender's assistance or promised assistance,
>
> (e) the timeliness of the assistance or undertaking to assist,
>
> (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,
>
> (g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,
>
> (h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,

(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,

(j) (repealed)

(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:

(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and

(b) state the penalty that it would otherwise have imposed, and

(c) where the lesser penalty is being imposed for both reasons — state the amount by which the penalty has been reduced for each reason.

(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.

[12-205] Rationale

Last reviewed: August 2023

Frequently the only source of information about an actual or contemplated crime comes from other criminals, and it is in the public interest to encourage offenders to supply such information to authorities, including the police, and to give evidence against other offenders. Section 23 is the statutory expression of the policy to encourage the supply of full and frank information to authorities by granting an offender an appropriate reward regardless of whether the assistance was motivated by genuine remorse or self-interest: see *R v Cartwright* (1989) 17 NSWLR 243 per Hunt and Badgery-Parker JJ at 252; endorsed in *R v XX* [2017] NSWCCA 90 at [46].

If the giving of assistance is motivated by genuine remorse or contrition, then even greater leniency may be extended to the offender under normal sentencing principles and as to these, and other considerations relevant to the rationale for the discount, in *R v Cartwright* at 252, their Honours said:

> It is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information.
>
> In order to ensure that such encouragement is given, an appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. What has to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless an offender discloses everything which he knows. To this extent, the enquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the

> information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.
>
> Again, in order to ensure such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities as comprehended by the offender himself. [emphasis in original]

The rationale for the discount as explained in *R v Cartwright* remains valid, despite the enactment of s 23: *AGF v R* [2016] NSWCCA 236 at [35]–[36].

[12-210] Procedure

Last reviewed: August 2023

Presenting evidence of assistance

It is incumbent on the offender to establish that a discount for assistance should be provided: *R v SS* [2021] NSWCCA 56 at [74]; *Ahmad v R* [2021] NSWCCA 30 at [36]. However, the Crown has an obligation to assist the offender discharge this burden as a matter of public interest and practicality because it may be difficult for an offender to adduce such evidence: *R v Cartwright* (1989) 17 NSWLR 243 at 254–255; *R v Bourchas* [2002] NSWCCA 373 at [99].

Evidence of assistance is typically in the form of an affidavit, or letter, of assistance by a senior law enforcement officer who identifies the assistance provided and makes an assessment as to its value. A statement taken from an offender provided on the basis the evidence contained in it will not be used against them (an induced statement) may also be tendered to demonstrate to the sentencing court the extent of their assistance for the purpose of mitigation. When the offender's statement is tendered it is encumbent on the parties to identify for the sentencing court any limitations on its use: *Macallister (a pseudonym) v R* [2020] NSWCCA 306 at [39]–[41].

A statement of assistance is tendered for the sole purpose of s 23. As is the case when an offender's induced statement is tendered, the basis for tendering an affidavit, or letter, of assistance should be agreed and clearly stated and the question of whether there is any restriction on its use identified: *Neil Harris (a pseudonym) v R* [2019] NSWCCA 236 at [61]. The same caution used when considering an induced statement should also be exercised when a letter of assistance is tendered for the sole purpose of s 23: *Neil Harris (a pseudonym) v R* at [61] applying the principles in *R v Bourchas* at [99]. See further **Offender's induced statement cannot be used adversely** below.

Maintaining confidentiality of material

Evidence of assistance relied on in sentence proceedings must be dealt with carefully to maintain its confidentiality. It is prudent to raise with the parties the approach to be taken in an individual case.

Appropriate non-publication orders should be tailored to ensure the offender has the opportunity to consider and test the accuracy of the evidence and to make submissions. Depending on the nature of the material, this may require providing an offender's counsel with access to the material on certain terms: *HT v The Queen* (2019) 269 CLR 403 at [45]–[46], [57], [66]–[67]. In *HT v The Queen* the High Court concluded the appellant was denied procedural fairness during the Crown sentence appeal because she was not provided with access to the affidavit of assistance provided by police. The fact the affidavit was not adverse to her was irrelevant: *HT v The Queen* at [25]. See also **[1-349] Closed court, suppression and non-publication orders** in the *Criminal Trial Courts Bench Book*.

There is a tension in s 23 between the obligation to provide reasons in open court and the need to protect confidentiality. Revealing the fact or detail of assistance may put an offender or their family at risk, and undermine or destroy the benefits law enforcement authorities may obtain from that assistance. In a sentencing judgment it is preferable to do no more than indicate that consideration has been given to the material and draw conclusions about its utility. Providing a detailed exposition of the factors in s 23(2) may defeat the purpose of the statutory provision: *Greentree v R* [2018] NSWCCA 227 at [55]–[56]. For example, in *Greentree v R* the court found it was not an error for the judge to refer to the "significance and the usefulness" of the assistance without elaboration. Such an approach appropriately balanced the obligation to provide reasons with the need to protect confidentiality: at [56].

Offender's induced statement cannot be used adversely

An offender's induced statement, while it may be admitted in the offender's sentence proceedings, cannot be used against them: *R v Bourchas* at [99].

In *R v Bourchas*, the appellant entered a guilty plea at the earliest opportunity and provided significant assistance to the authorities. On sentence, the Crown tendered, over objection, his long and detailed statement, which was made following a promise that it would not be used against him. The sentencing judge admitted the statement and took information in it into account when sentencing the appellant, including information unfavourable to him, which was not otherwise in evidence.

The court held that the judge erred in taking into account the appellant's statement otherwise than as evidence of his assistance to authorities: at [100]. Giles JA, at [99], summarised his findings in relation to the issue as follows:

1. The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation.
2. The Crown should assist the offender in the discharge of that burden.
3. The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender.
4. A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly.
5. When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is

prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way.

6. In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.

See also *JMS v R* [2010] NSWCCA 229 at [29]; *Govindaraju v R* [2011] NSWCCA 55 at [66].

[12-215] Broad scope of s 23(1)

Last reviewed: August 2023

Section 23 takes an expansive approach to what constitutes "assistance": *R v XX* [2017] NSWCCA 90 at [53].

Assistance to authorities most commonly occurs in the form of implicating accomplices and/or giving evidence as a Crown witness: see for example, *Abbas v R* [2013] NSWCCA 115; *R v DW* [2012] NSWCCA 66. However, voluntary disclosure to law enforcement authorities of otherwise unknown guilt also falls within the ambit of s 23: *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [41], [71]; *Panetta v R* [2016] NSWCCA 85 at [33]–[34]; *Le v R* [2019] NSWCCA 181 at [50]–[52]; *Ahmad v R* [2021] NSWCCA 30 at [24]. A discount granted for this type of assistance is commonly referred to as an *Ellis* discount (from *R v Ellis* (1986) 6 NSWLR 603 discussed further below at **[12-218] Voluntary disclosure of unknown guilt — Ellis discounts**.

Another situation where a discount was afforded arose in *RJT v R* [2012] NSWCCA 280 where an offender being sentenced for two child sexual assault offences told police he was sexually assaulted by his grandfather as a child. It was held that while s 23 extended to assistance of this kind the level of discount should be more limited than otherwise applied (10% was found to be appropriate): at [9]–[10].

However, not all information provided by an offender amounts to assistance for the purposes of s 23. For example, the mere fact an offender participates in a recorded interview and makes admissions about the offence does not amount to assistance within the meaning of s 23(1): *Le v R* [2019] NSWCCA 181 at [53]–[54], [56]; *Browning v R* [2015] NSWCCA 147 at [123].

In *Vaiusu v R* [2022] NSWCCA 283, it was held that the offender, who had entered into negotiations with police for the surrender of unlawful firearms, was not entitled to a discount as a concluded agreement had not been reached, and he had not "undertaken to assist" in accordance with s 23(1): at [67].

The court in *R v XX* [2017] NSWCCA 90 made the following observations (at [32]–[35]) about s 23(1) in light of the text of the provision and the historic and extrinsic materials:

- "Assistance" is not defined in the provision and the meaning should be approached as being relatively expansive. The only limitations are that the assistance be given to "law enforcement authorities" in the "prevention, detection or investigation, or in proceedings relating to" an offence;

- The reference to "any other offence" in the text of the provision clearly contemplates that the assistance may have been provided in relation to an offence other than the one for which the offender is being sentenced;
- Nothing in s 23(1) suggests that the assistance must have been provided after the offender's arrest; past assistance, provided prior to arrest or even the offender's commission of the subject offence, is therefore capable of falling within the provision.

The court went on to note that not all conduct of an offender which helps the authorities falls within s 23(1), citing unwitting assistance (*R v Calderoni* [2000] NSWCCA 511 at [9]) and pre-trial disclosure (s 22A *Crimes (Sentencing Procedure) Act 1999*) as examples: at [32], [39].

Section 23(1) confers a discretion and not an obligation on a sentencing judge to proffer a discount when assistance has been provided: *R v XX* at [31]. The factors listed under s 23(2) are relevant not only to an assessment of the level of discount that must be provided, they must also be considered as part of the assessment of whether any discount should be provided: *R v XX* at [61]; *Le v R* at [55].

In noting the example given by RA Hulme J in his dissent in *RJT v R* at [40], of where an offender seeks a discount on the basis that he reported a home burglary to police many years before, the court stated that even if that situation fell within s 23(1), a proper application of the criteria in s 23(2) would compel the conclusion that no lesser penalty should be imposed: *R v XX* at [53].

The sentencing judge in *R v XX* erred by allowing the respondent a 15% discount under s 23 in circumstances where, six or seven years before his arrest for child sexual offences, he had assisted in the prosecution of a conspiracy to murder charge: *R v XX* at [63]. Although that assistance was within the scope of s 23(1), the proper exercise of the discretion could only have led to a refusal to impose a lesser sentence. The assistance and the subject offence were entirely unrelated, there was no ongoing risk of reprisals and the respondent had already derived a benefit ($17,000) from providing that assistance (all matters under s 23(2)(i), (g) and (f) respectively): *R v XX* at [62].

Because s 23 applies to *Ellis* discounts, it follows that a sentencing court must also consider the factors in s 23(2) when determining whether to proffer the discount: *R v AA* [2017] NSWCCA 84 at [45]. The sentencing judge in that case erred by failing to do so before stating he was granting the offender a "further *Ellis* type discount": at [49].

[12-218] Voluntary disclosure of unknown guilt — the Ellis principle

Last reviewed: August 2023

In *R v Ellis* (1986) 6 NSWLR 603, decided before the enactment of s 23, the court held that an offender who voluntarily discloses their involvement in serious crime about which the police had no knowledge was entitled to a "significant added element of leniency". In *R v Ellis*, not only did the respondent plead guilty, but he voluntarily disclosed to police for the first time his involvement in seven armed robberies. The degree of leniency afforded to an offender in cases of this kind will vary depending on the likelihood of discovery of the offence: *R v Ellis*, per Street CJ at 604.

Although since at least *CMB v Attorney General for NSW* (2015) 256 CLR 346, it has been accepted that assistance of this kind may entitle an offender to a reduced sentence under s 23, *R v Ellis* and the cases which have considered it provide guidance as to why such assistance may justify a sentence discount under s 23: see *R v SS* [2021] NSWCCA 56 at [43]–[44], and the discussion at [59]–[65].

In *Ryan v The Queen* (2001) 206 CLR 267, McHugh J discussed the extent to which leniency may be extended pursuant to *R v Ellis*, saying at [15], that:

> The statement in *Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency" is a statement of a general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.

In *R v GLB* [2003] NSWCCA 210, the court held at [33] that, although some discount should be allowed:

> a sentencing judge is not required, in every case in which there has been a voluntary disclosure of guilt by the offender, to allow a considerable or significant discount because of the voluntary disclosure of guilt or to say in the judge's remarks on sentence that the judge has allowed a considerable or significant discount on this ground.

Howie J said in *Lewins v R* [2007] NSWCCA 189 at [18]:

> Although the leniency referred to in these decisions extends to those cases where the offender volunteers additional criminality otherwise unknown to the police, the extent of the leniency will obviously not be of the same significance as in those cases where the police are unaware of any criminal offences committed by the offender. It is a matter of degree. In some cases the known criminality might be so great that little leniency can be shown for the further offences revealed by the offender.

In *Panetta v R* [2016] NSWCCA 85, the applicant was entitled to considerable leniency for his confession in circumstances where there was no prospect of the offence (murder) or the offender's involvement in it coming to light: at [70]. On the other hand, in *R v SS*, the offender was not entitled to leniency for assistance because of his admissions as there was independent evidence of his guilt: at [83].

The entitlement to a discount applies, albeit to a lesser extent, where (precipitated by the co-offender) the police are close to identifying the offender and then the offender voluntarily surrenders and confesses: see *R v Hasan* [2005] NSWCCA 21 at [23].

Relevance to remorse and contrition

The voluntary confession of criminality will also be relevant to other, more general considerations such as remorse, the prospects of rehabilitation and the likelihood of further offending: *Lewins v R* at [18]; see also **[10-420] Contrition** and **[11-290] Section 21A(3)(i) — remorse shown by the offender**. In *R v SS*, although the applicant was not entitled to a discount for assistance, his admission supported a finding of genuine remorse: at [85]. The court can also take into account that there has been a long delay between the commission of the crime and sentencing, and that the offender

had since been rehabilitated. On the other hand, a lengthy period of concealment and lying to the police are factors not to be ignored: *R v Baldacchino* (unrep, 3/11/98, NSWCCA).

[12-220] "Unreasonably disproportionate" penalty — s 23(3)

Last reviewed: August 2023

A court is required to consider all the matters listed under s 23(2) *Crimes (Sentencing Procedure) Act 1999* and must not reduce a sentence so that it becomes unreasonably disproportionate to the nature and circumstances of the offence: s 23(3). Hence, there is a limit to the value provided by assistance to authorities. In *R v Chaaban* [2006] NSWCCA 107 at [3] Hunt AJA said:

> In *Regina v Gallagher* (1991) 23 NSWLR 220 at 232 — well before s 23(3) was enacted — Gleeson CJ (with whom I expressly agreed on this issue, at 234), after pointing out that discounts of this kind are for the benefit of both the Crown and the offender, and that there is usually no-one to put an opposing or qualifying point of view, said:
>
> > "Public confidence in the administration of criminal justice would be diminished if courts were to give uncritical assent to arguments for leniency, which are being jointly urged by both the prosecution and the defence, in circumstances which may call for a close examination of the alleged assistance. *Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which supports [the discounts given], it constitutes an affront to community standards.* If sentencing principles are capable of producing an outcome of that kind, then that calls into question their legitimacy." [emphasis added in Hunt AJA's judgment.]

Section 23(3) is the statutory enactment of this principle from *R v Gallagher*. The term "unreasonably" in s 23(3) is given a wide operation: *CMB v Attorney General of NSW* (2015) 256 CLR 346 at [78].

It is inappropriate to apply a discount for assistance to the authorities "wholly to the non-parole period [as such] an approach [is] only likely to skew the whole sentencing exercise, particularly after a large discount has been given for the guilty pleas when fixing the head sentences": *R v MacDonnell* [2002] NSWCCA 34 at [48]. Where an aggregate sentence is imposed the discount must be applied to each indicative sentence, not the aggregate sentence: *TL v R* [2017] NSWCCA 308 at [102]–[103].

Necessity of court to scrutinise the information

It is common in cases where leniency is being sought on behalf of a person who has co-operated with the authorities that the argument in favour of such leniency comes from the Crown as well as the offender.

The prosecuting authorities themselves have gained, or hope to gain, from the assistance in question, and it is understandable that they regard it as advancing the interests which they represent to see that such assistance is suitably and publicly rewarded. There is, however, usually no-one to put an opposing or qualifying point of view. This raises the need for special care on the part of the court, which must be astute to ensure it is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it: *R v Gallagher* at 232; *R v Fisk* (unrep, 21/7/98, NSWCCA).

An inquiry relating to the quality of the assistance should be dealt with in a broad and general way and not descend into minute detail lest it subvert the benefit otherwise afforded to the public interest: *R v Cartwright* (1989) 17 NSWLR 243 at 253. Where information given to assist authorities is only partly true and does in fact assist the authorities, the fact it was partly false does not itself disentitle the offender from a reduction in sentence: *R v Downey* (unrep, 3/10/97, NSWCCA).

Resolving assertions on appeal that sentence unreasonably disproportionate

In a Crown appeal against sentence where a lesser sentence has been imposed to take into account the offender's assistance to law enforcement authorities, the issue for the Court of Criminal Appeal is not whether it regards the sentence as "unreasonably disproportionate" within the meaning of s 23(3), but whether it was open to the sentencing judge to decide that the sentence actually imposed was not unreasonably disproportionate. The focus is on whether the primary judge's conclusion was open. Whether a sentence is unreasonably disproportionate is a judgment about which reasonable minds may differ: *CMB v Attorney General (NSW)* at [78].

See also **Appeals** at **[70-000]**ff.

[12-225] Requirement to indicate reduction for assistance — s 23(4)

Last reviewed: August 2023

Section 23(4) requires a court, which imposes a lesser penalty because the offender has assisted or has undertaken to assist, to indicate that a lesser penalty is being imposed. The court must state the penalty that otherwise would have been imposed and the amount by which the sentence is reduced.

The text of s 23(4)(b) — that the court is to "state the penalty that it would otherwise have imposed" — refers to the appropriate penalty disregarding only the assistance to the authorities: *R v Ehrlich* [2012] NSWCCA 38 per Basten JA at [11] and Adams J at [33]. Where full time imprisonment is imposed, compliance with s 23(4) will generally, if not invariably, permit the discount to be identified, even if not expressly stated, by calculating the proportion of the sentence imposed of that which would otherwise have been imposed, each of which are to be stated: *R v Ehrlich* at [9]. Where the court imposes a more lenient sentencing option because of the offender's assistance, the court should state what the harsher option would have been had the offender not assisted.

Because s 23 also applies to *Ellis* discounts, the court is required under s 23(4) to state the nature and extent of any reduction of the sentence which would otherwise have been imposed absent that disclosure of guilt and quantify the discount separately: *Panetta v R* [2016] NSWCCA 85 at [1], [33]–[34], [60]; *R v AA* [2017] NSWCCA 84 at [43].

Where a discount is given for a guilty plea, and past and future assistance, in most cases the court will be required to indicate the discount for all three to comply with s 23(4): *LB v R* [2013] NSWCCA 70 at [44]. Compliance with ss 23(3) and 23(4) cannot be fulfilled by a statement of individual discounts followed by a process of "compression" to achieve a result that does not contravene s 23(3): *LB v R* at [45].

In *R v AA*, the court considered the impact of a failure to comply with s 23(4), noting that while s 23(6) provides that the failure to comply with s 23(4) does not "invalidate

the sentence", s 101A of the Act provides that a "failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence". The combined effect of the provisions is therefore that a failure to comply with s 23(4) is not a jurisdictional error but complaints about such failures fall to be considered as part of the appellate process: *R v AA* at [44].

A court must also avoid double counting an element on sentence, for example when assistance also reflects contrition: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see **[10-420] Contrition**.

[12-230] Applying the discount

Last reviewed: August 2023

The factors in s 23(2) are relevant not only to an assessment of the level of discount that must be provided. They must also be considered as part of the assessment of whether any discount should be provided: *R v XX* [2017] NSWCCA 90 at [61]; *Le v R* [2019] NSWCCA 181 at [55]. If a sentencing court is to reduce a sentence because of an offender's assistance, regard must be paid to the mandatory considerations in s 23(2) and the discount must be specified: *Ahmad v R* [2021] NSWCCA 30 at [36], [41]. Even if a court chooses not to impose a lesser penalty for the assistance given regard must still be had to the matters identified in s 23(2): *Ahmad v R* at [41]; *R v AA* [2017] NSWCCA 84 at [45].

Method of calculation of discount — combined or separate?

Section 23(4) does not prescribe a method or manner in which the discounting is to be achieved: *R v Ehrlich* [2012] NSWCCA 38 at [7]. Although Gleeson CJ's remarks in *R v Gallagher* (1991) 23 NSWLR 220 are qualified by s 23(4) their "tenor is not diminished": *R v Ehrlich* per Basten JA at [7]. Gleeson CJ said in *R v Gallagher* at 230:

> … it is essential to bear in mind that what is involved is not a rigid or mathematical exercise, to be governed by "tariffs" derived from other or different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise that must display due sensitivity towards all the considerations of policy which govern sentencing as an aspect of the administration of justice.

Different approaches have been taken to discounting: *R v Ehrlich* per Basten JA at [11]; Adams J at [33]. There is authority which permits discounts to be separately identified and then applied consecutively: *R v Ehrlich* at [11]. Another commonplace approach is to identify individual discounts and add them so as to achieve a single global figure: *R v Ehrlich* at [11]–[12].

Neither approach is erroneous because s 23(4) "says nothing as to the manner in which the discounting is to be achieved. Indeed, on one view, the manner in which it is achieved is irrelevant: the selected reduction can be expressed in a number of different ways, none of which is prohibited": *R v Ehrlich* per Basten JA at [11]. The real issue with respect to the allowance of a discount on two bases is to avoid double counting of a particular element: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see **[10-420] Contrition**.

The court in *CM v R* [2013] NSWCCA 341 at [45] held that there was no reason for the judge to confine the discount to just one of the five sentences. Rather, the judge should have discounted each sentence which should have had a modest bearing on the overall term: *CM v R* at [48]. When there is a degree of accumulation of multiple sentences it is necessary to ensure that any discount is not eroded by the process of accumulating sentences: *CM v R* at [44]. Discounts applied to individual sentences need not be reflected with mathematical precision in the overall or effective term. There is, however, a need for some proportionality: *CM v R* at [48].

Level of discount

It is not helpful to speak of a level of discount as being generally available: *R v Ehrlich* per Basten JA at [11]; *Hamzy v R* at [74]. It makes assumptions about the matters to which the court must have regard in s 23(2) and runs the risk of selective reliance on authorities to the exclusion of others. There are decisions such as *R v NP* [2003] NSWCCA 195 at [29] and *Z v R* [2014] NSWCCA 323 at [43] which permitted a discount for assistance of up to 50%. As Gleeson CJ said in *R v Gallagher* at 230 "what is involved is not a rigid or mathematical exercise, to be governed by 'tariffs' derived from other and different cases": *R v Ehrlich* at [6]; see also *Buckley v R* [2021] NSWCCA 6 at [1]. The process embarked upon in reducing a sentence for assistance is not one of arithmetic calculation or the blind application of percentage discounts: *Haouchar v R* [2014] NSWCCA 227 per Rothman J at [39]. Beazley JA said in *R v Z* [2006] NSWCCA 342 at [88]:

> the focus should not be so much upon the precise numerical value of the discount but rather upon the question whether, after all relevant matters have been taken into account, the sentence imposed is appropriate.

The relevant restraint derives from the requirement in s 23(3) that the sentence not be disproportionate to the nature and circumstances of the offence: *Buckley v R* at [1]; [87].

In *SZ v R* [2007] NSWCCA 19 at [44], the court held that generally only a single, combined discount for both a guilty plea and assistance should be given because applying two discrete discounts may lead to error "unless the court is conscious of the overall discount being given and considers whether a discount of that degree can result in a sentence that does not infringe s 23(3): at [11], [44]. This approach was confirmed in *Panetta v R* [2016] NSWCCA 85.

Some guidance about the constraint in s 23(3), that the sentence not be unreasonably disproportionate to the nature and circumstances of the offence as it applies to a combined discount for a plea of guilty and assistance, may be obtained from:

- Generally, a combined discount of more than 50% will not comply with s 23(3) and rarely will a discount of more than 60% be appropriate: *SZ v R* at [11]; *Z v R* at [33]; *Panetta v R* at [75], [7].
- A combined discount of 50% incorporates an offender serving their sentence in more onerous conditions, otherwise the combined discount should not normally exceed 40%: *Brown v R* [2010] NSWCCA 73 at [38]; *Haouchar v R* [2014] NSWCCA 227 at [37].
- In *SZ v R*, the judge erred by giving a combined discount of 62.5%, reflecting a 25% discount for a guilty plea and 50% discount for assistance. However, given the

unusual circumstances in *Panetta v R* (a voluntary confession to murder where the applicant's involvement was unlikely to have been discovered) a combined discount of 60% (50% for assistance and 10% for his guilty plea) was appropriate: at [7], [76]. See also *R v NP* [2003] NSWCCA 195 at [30] involving a 60% combined discount for plea of guilty and assistance.

However, the court in *Buckley v R*, while acknowledging that earlier cases such as *SZ v R*and *Z v R*expressed and endorsed the view that a single combined discount should not normally exceed 50%, reiterated the importance of assessing the facts and circumstances of the particular case, including most significantly, s 23(3), concluding that the effective constraint is not a rigid mathematical rule but the constraint established by s 23(3): at [1]; [87]. In *McKinley v R* [2022] NSWCCA 14, Rothman J (Macfarlan JA and Dhanji J agreeing) addressed this more directly, observing, at [48]–[49], that cases such as *R v Sukkar* [2006] NSWCCA 92, *SZ v R* and *FS v R* [2009] NSWCCA 301, which said it would be a rare case where a combined discount of more than 60% would not result in a manifestly inadequate sentence, "probably did not withstand later authority criticising an arithmetic approach to sentencing." His Honour emphasised at [50] that determining "the reduction for assistance pursuant to the terms of s 23 … depends on assessment of the mandatory considerations prescribed by s 23(2)."

Ultimately, the sentencing judge must stand back and ask whether the resulting sentence is just and reasonable, not only to the offender but also to the community at large after taking into account the various statutory and common law principles and applying such discounts that arise on the particular facts: *SZ v R* at [5]. The court in *SZ v R* also held that it is important to avoid double counting in cases of assistance by finding special circumstances after the non-parole period has already been reduced: at [11].

The advent of more standardised discounts, such as the utilitarian value of a guilty plea being as high as 25%, following the decision of *R v Thomson and Houlton* (2000) 49 NSWLR 383, means courts have less scope to give a discount for assistance in cases of an early plea: *SZ v R* at [9]. The statutory fixed discounting scheme for the utilitarian value of a guilty plea in matters dealt with on indictment in Pt 3, Div 1A, *Crimes (Sentencing Procedure) Act 1999* may operate to similar effect: see **Guilty plea discounts for offences dealt with on indictment** at **[11-515]** and **Combining the plea with other factors** at **[11-530]**.

See also **Combining the plea with other factors** at **[11-530]**.

Assistance and not guilty pleas

Z v R [2014] NSWCCA 323 held that *SZ v R* [2007] NSWCCA 19 does not govern the scenario where an offender pleads not guilty and provides substantial assistance to authorities. It is wrong to proceed on the basis that *SZ v R* prescribes a ceiling for the level of discount in such a case; the primary judge had therefore erred in construing s 23 with an implied algorithm to conclude a discount for assistance alone was confined to 25%: *Z v R* at [33]. The court stated that "[t]o construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty": *Z v R* at [34].

[12-240] Promised assistance

Last reviewed: August 2023

Appeals following a failure to provide promised assistance

The Crown may appeal against the reduced sentence if the person fails to fulfil their promise of assistance: s 5DA *Criminal Appeal Act 1912*. In *R v KS* [2005] NSWCCA 87 Wood CJ at CL said at [19]:

> The ability of the Crown to invoke this section is a very important part of the criminal justice system. Persons who give undertakings and who receive the benefit of those undertakings by way of a discounted sentence can, subject to exceptional circumstances, expect to have their sentences increased if they renege on their undertaking to give evidence. The departure from an undertaking of that kind is not to be regarded lightly and it will normally justify appellate intervention.

Where the undertaking is to give evidence, adherence to that undertaking requires more than simply attending court: *R v X* [2016] NSWCCA 265 at [43]. In *R v X*, the respondent gave an undertaking to give evidence as a Crown witness in accordance with an earlier police statement. Although he attended court and gave evidence, in some respects the evidence was diametrically opposed to what he had told police in his statement: *R v X* at [44]–[46]. See also *R v MG* [2016] NSWCCA 304 at [42].

In *R v James* [2014] NSWCCA 311, where the failure to wholly or partly fulfil an undertaking was disputed between the parties, it was accepted that the court would at least have to be "comfortably satisfied" the undertaking had not been fulfilled, which it was not in the circumstances. Although it was not necessary to determine in light of that conclusion, the court questioned whether parity of reasoning with *The Queen v Olbrich* (1999) 199 CLR 270 would require satisfaction of that fact beyond reasonable doubt: *R v James* at [46].

Exercising the 5DA discretion

The appellate court's power to vary a sentence under s 5DA(2) is discretionary, and the court may exercise its discretion not to intervene in an appropriate case, despite an offender not fulling their promise to assist: *CC v R* [2021] NSWCCA 71 at [68]–[71]; see also *R v Skuthorpe* [2015] NSWCCA 140 at [36].

The exercise undertaken by the court is not one of punishment, but of withdrawing an unearned benefit from a person who entered into a bargain and then failed to fulfil it: *R v Dimakos (a pseudonym)* [2018] NSWCCA 78 at [50]; see also *CC v R* at [67] and the cases there cited. There are obvious systemic reasons why such a person should, except in unusual circumstances, suffer consequences as a result: *R v Dimakos* at [53].

In *R v OE* [2018] NSWCCA 83 the court, at [55], summarised the proper approach to reversing or adjusting a sentence to take account of a failure to adhere to an undertaking upon which a discount has been given as follows:

1. remove all the discounts to find the starting point of the head sentence at first instance;
2. apply any discount for a guilty plea and any remaining discount for assistance to calculate the head sentence; and
3. apply the same ratio of non-parole period to head sentence as fixed by the first instance sentencing judge.

See also: *R v GD* [2013] NSWCCA 212 at [48]–[52]; *R v Shahrouk* [2014] NSWCCA 87 at [65].

Difficulties may arise where the reason advanced for not fulfilling an offer of assistance is that the respondent has been threatened. In *R v Bagnall and Russell* (unrep, 10/6/94, NSWCCA), the court exercised its discretion not to disturb the sentences even though the respondents failed to comply with their undertakings because the authorities had failed to provide reasonable protection for them. Simpson J said of cases where threats have been made in *R v El-Sayed* (2003) 57 NSWLR 659 at [32]–[35]:

> Generally speaking (apart from situations such as that which arose in *Bagnall and Russell*) the reason for any failure to honour the undertaking is of little materiality. Where, as is here put forward, the reason for the failure to honour the undertaking lies in an understandable fear resulting from threats, that circumstance does not affect the fact that the undertaking has not been honoured. The basis for the discount lies in a factual assumption — that certain evidence will be given. If the evidence is not given, then the factual underpinning for the discount disappears. The discount has been given on a premise which has subsequently been proven to be false …
>
> …
>
> It would be anomalous if an offender, such as the present respondent, who was, at the time of sentencing, willing and able to give assistance, but subsequently, by reason of threats of the same kind, found himself or herself unable or unwilling to do so, could retain the benefit given. There is no reason of principle why the two offenders should be distinguished and one should receive a reduction in sentence and the other be denied it, merely by reason of the timing of the threats. In my opinion, the fact that the threats were made does not justify the court in declining to exercise the s 5DA(2) discretion in favour of the Crown.

However, each case must be decided on its own facts and the discretion to dismiss an appeal is not limited to cases where the authorities fail to provide the prisoner with reasonable protection: *R v Chaaban* [2006] NSWCCA 352 at [47] and [55].

The power under s 5DA does not allow the court to review the sentence generally: *R v Waqa* [2004] NSWCCA 405 at [26]; *R v Douar* [2007] NSWCCA 123 at [32]. Given s 5DA(2) empowers the court to re-sentence "as it thinks fit", the court is not limited to merely reapplying the discount given for an unfulfilled promise to give future assistance: *R v GD* at [41] per Button J, *R v Shahrouk* at [51]. Subsequently however, in *R v OE*, Button J emphasised that *R v GD* was to be read "in the unusual context of that appeal; namely the failure of the sentencing judge to provide any allocation between past and future assistance": at [61].

Co-operation post sentencing

Assistance rendered *after* sentence is a matter for the Executive, not the courts, except (rarely) to correct an erroneous basis of sentencing: *R v Moreno* (unrep, 4/11/94, NSWCCA). Therefore, an offender appealing against the severity of their sentence may not seek a reduction of sentence on the ground of assistance given to authorities after the date of sentencing: *Khoury v R* [2011] NSWCCA 118 at [111]–[112]. The appeal court must find error before evidence of post-sentencing events, such as unanticipated

assistance to authorities, may be taken into account: *R v Gallagher* (1991) 23 NSWLR 220; *R v Willard* [2001] NSWCCA 6 per Simpson J at [24]–[27]; *Douar v R* [2005] NSWCCA 455 at [126].

[The next page is 5961]

Court to take other matters into account (including pre-sentence custody)

Section 24 *Crimes (Sentencing Procedure) Act 1999* provides that the court must take into account time served in custody and the fact that the person has been the subject of a community correction order, conditional release order or an intervention program order.

24 Court to take other matters into account

In sentencing an offender, the court must take into account:

(a) any time for which the offender has been held in custody in relation to the offence, and

(b) in the case of an offender who is being sentenced as a result of failing to comply with the offender's obligations under a community correction order, conditional release order or intervention program order:

(i) the fact that the person has been the subject of such an order, and

(ii) anything done by the offender in compliance with the offender's obligations under the order, and

(c) in the case of an offender who is being sentenced as a result of deciding not to participate in, or to continue to participate in, an intervention program or intervention plan under an intervention program order, anything done by the offender in compliance with the offender's obligations under the intervention program order, and

(d) in the case of an offender who is being sentenced following an order under section 11(1)(b2):

(i) anything done by the offender in compliance with the offender's obligations under the order, and

(ii) any recommendations arising out of the offender's participation in the intervention program or intervention plan.

[12-500] Counting pre-sentence custody

Last reviewed: March 2024

The ambit of the phrase in s 24(a) — "any time for which the offender has been held in custody in relation to the offence" — has been a source of ambiguity. The provision is silent on the question of whether pre-sentence custody attributable both to other offences and the offence for which the offender stands for sentence should be taken into account. The section also leaves the issue of exactly how such time is to be taken into account to the sentencer's discretion.

Section 47(2) *Crimes (Sentencing Procedure) Act 1999* allows the court to direct that a sentence is taken to have commenced before the date on which the sentence is imposed ("backdating") and s 47(3) provides, inter alia, that:

> … in deciding the day on which the sentence is taken to have commenced, the court must take into account any time for which the offender has been held in custody in relation to the offence to which the sentence relates.

The section does not oblige a court to backdate a sentence, but the pre-sentence custody served by an offender "in relation to the offence" must be taken into account when deciding whether the sentence should commence before the sentence date: *Kaderavek v R* [2018] NSWCCA 92 at [20].

An offender granted bail on one charge is not in custody "in relation to" it for the purposes of s 47(3) if they are being held on remand for an unrelated charge: *Rafaieh v R* [2018] NSWCCA 72 at [44], [50]. The fact an offender is not entitled to be released from custody for one offence but was granted bail in respect of another does not alter their bail status in respect of the latter: at [59]–[60].

Section 47(2)(b) provides for a court to direct that a sentence of imprisonment commence on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly consecutively) with some other sentence of imprisonment. See further **Forward dating sentences of imprisonment** at [7-547].

Backdating the sentence is usual practice

Backdating a sentence by a period equivalent to the pre-sentence custody is the preferable, and usual, approach: *Wiggins v R* [2010] NSWCCA 30 at [2], [3]–[6]; *Martinez v R* [2015] NSWCCA 5 at [19]; *Salafia v R* [2015] NSWCCA 141 at [65]; *Kaderavek v R* [2018] NSWCCA 92 at [20]. Before the enactment of the provisions of the Act, it was accepted at common law, in cases such as *R v McHugh* (1985) 1 NSWLR 588, that where there had been a continuous period of pre-sentence custody, the practice was to backdate a sentence to take account of pre-sentence custody, rather than to discount or reduce it. Nothing in s 47 of the Act prevents backdating a sentence for an offence even where there has been discontinuous custody: *R v Newman and Simpson* [2004] NSWCCA 102 at [26].

In *R v Newman and Simpson* at [26]–[31], Howie J summarised the reasons in favour of backdating:

- It preserves the denunciatory and deterrent value of the sentence so that it is, and appears to be, adequate both to public perception and when it appears in statistical information.
- It makes it clear to the defendant and to the appeal court that the offender has received a reduction in sentence for pre-sentence custody.
- It avoids questions of disparity when comparing one sentence to another that has been markedly reduced by pre-sentence custody.
- It avoids skewing statistical information on that offence where there are very few comparable sentences for similar offences and avoids giving a false indication of the range of sentence that have been imposed for a similar offence or similar offender.
- It avoids lengthy sentences being imposed in years, months and days, which may suggest that sentencing is an exact science and that a sentence can be determined to a precise number of days.

When reducing a sentence may be appropriate

The length of a sentence should not be discounted unless reasons are clearly articulated for adopting that approach: *Wiggins v R* at [3], [8]; *R v Newman and Simpson* at [25];

R v Jammeh [2004] NSWCCA 327 at [18] and *R v Howard* [2001] NSWCCA 309 at [24]. However, there are some situations where it will not be appropriate or even permissible to backdate a sentence and, in such cases, the sentence can be reduced to take this time into account.

One such situation, identified by Badgery-Parker J in *R v Deeble* (unrep, 19/9/91, NSWCCA) at 3–4 and applied in *R v Leete* [2001] NSWCCA 337 at [29], is where a sentencer may reduce a sentence to three years or less, thereby making an offender's release upon expiry of the non-parole period an entitlement rather than based on eligibility: *Wiggins v R* at [8]; *White v* R [2009] NSWCCA 118. See also s 158 *Crimes (Administration of Sentences) Act 1999*.

Another relates to the nature of the sentencing option selected by the sentencer as it is not possible to backdate some sentencing options. Intensive correction orders (ICOs), community correction orders and community release orders each commence on the date on which they are made (ss 71(2), 86 and 96 respectively) and therefore cannot be backdated to take into account any period of pre-sentence custody. Thus, any such period must be taken into account by reducing the term of sentence. Taking this approach with respect to an ICO was endorsed by the court in *Mandranis v R* [2021] NSWCCA 97 at [61]. See also *R v Edelbi* [2021] NSWCCA 122 at [79]–[80].

Method of crediting custody time

Where a defendant is given credit for a period of pre-sentence custody, this time should be reflected in both the total sentence and the non-parole period: *R v Newman and Simpson* at [25] and *R v Youkhana* [2005] NSWCCA 231 at [10]. Under the proper approach — fixing the sentence and the non-parole period, and then making allowance for the period in custody — the applicant gets the benefit of the whole of the period served where it is deducted from the non-parole period. The judge erred in *R v Youkhana* by taking into account the periods spent in custody when setting the head sentence. The period spent in custody must be deducted from the whole of the sentence including the non-parole period. The difference between the approach adopted and the correct approach is most obvious when there is no finding of special circumstances. In such a case, the offender obtains the benefit of only 75% of the period served by way of a reduction in the non-parole period. The mathematical problem would not have arisen had the judge backdated the commencement of the sentence.

On some occasions it is sufficient for a sentencing judge to express in the remarks on sentence that a period of pre-sentence custody has been "taken into account": *R v Frascella* [2001] NSWCCA 137; *R v Rose* [2001] NSWCCA 370 and *R v Deron* [2006] NSWCCA 73 at [9]. However, such an incantation may not be sufficient where there has been an irregular period of pre-sentence custody. Where a sentence is expressed in whole years, it may be more difficult to infer the sentencing judge has actually taken this period of custody into account: *R v Galati* [2003] NSWCCA 148.

In *R v Bushara* [2006] NSWCCA 8 at [37] it was held that when sentencing an offender for multiple offences, a judge must ensure that pre-sentence custody is deducted from the aggregate non-parole period. Consideration must be given to the period of pre-sentence custody when considering the relationship between the aggregate non-parole period and balance of the term: at [22], [24], [35]. The effective sentence in *Bushara* did not reflect the finding of special circumstances.

It is an error for a judge to revoke bail so a period of custody counts towards the sentence by reason of s 24(a): *R v West* [2014] NSWCCA 250. In *R v West*, the judge unilaterally revoked the offender's bail while an intensive correction order (ICO) report was obtained, stating this gave the offender about four months of full-time custody, after which the judge imposed an ICO for a period of two years. This approach did not accord with usual sentencing practice which requires that the sentencing discretion be exercised immediately before a sentence is passed, rather than conditionally in advance and in two stages: at [36], [41], [43].

Provision of pre-sentence custody information

In *Mattiussi v R* [2023] NSWCCA 289, Hulme AJ (Adamson JA and Button J agreeing) at [70]–[73] made observations regarding the need for simplicity in the Crown's provision of pre-sentence custody information to a sentencing judge. The date, or range of dates, to which a sentence should be backdated is an essential matter of which the judge should be informed in addition to the actual period of pre-sentence custody: [71]. It is unhelpful to *only* tell a judge there was a period of pre-sentence custody of a certain number of years, months or days: [73].

[12-510] What time should be counted?

Last reviewed: May 2024

Parole revoked as a consequence of a subsequent offence

When a person commits an offence whilst on parole, they may spend time in custody referable to that offence ("the second offence"), if bail is refused. However, the Parole Authority may, on occasions, revoke the person's parole due to the second offence and order the person to serve the remaining period of the first sentence. An offender may thus be in custody referable to two offences; namely, the revocation of parole for the first offence(s) and the second offence.

Where parole is revoked as a consequence of the commission of a subsequent offence(s), it is a matter within the sentencer's discretion whether the subsequent sentence should be backdated only to the time the offender was taken into custody for the subsequent offence: *Callaghan v R* [2006] NSWCCA 58 at [21]–[23]. Simpson J said at [22]–[23]:

> [22] … a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.
>
> [23] It would, in my opinion, in some cases be unfair not to backdate to some point (not necessarily the date of revocation of parole) before the expiration of the earlier parole period. It is always open to an offender to seek and be granted parole even after a revocation; to sentence in such a way as to commence the subsequent sentence only on the date of expiration of the whole of the previously imposed head sentence is to assume that, absent the subsequent offences, the offender would not have been granted a second chance at parole.

A number of matters inform the exercise of the discretion: first, the fact that imprisonment for the period of the revoked parole is due to the original sentence and revocation occurred because the offender had been unable to adapt to civilian life;

second, the fact that the revocation arises in consequence of a new offence for which a fresh sentence is being imposed, rather than for some unconnected cause; third, the proportion of time the offender complied with the terms of parole; and, fourth, the periods of revocation: *R v DW* [2012] NSWCCA 66 at [35].

This principle does not apply if parole has not been revoked by the Parole Authority. In a case where an offender has committed a subsequent offence, the court should not treat parole as having been notionally revoked: *R v Skondin* [2006] NSWCCA 59 at [16]–[17].

In *R v Callaghan* and *R v DW*, parole was revoked for an earlier sentence solely due to commission of the second set of offences. The court in both cases held that the judge did not err by refusing to backdate to the date the applicant was taken into custody.

Parole revoked as a consequence of breach of another condition of parole

Where parole is revoked for unrelated reasons, such as a breach of the conditions of parole and not the commission of the subject offence (for example, reporting or non-association requirements or for an unrelated offence), time spent in custody as a consequence of the breach is not taken into account upon sentence for the second offence: *R v Bojan* [2003] NSWCCA 45 and *R v Walker* [2004] NSWCCA 230. This time is not "referable" to the second offence, as required by ss 24 and 47 *Crimes (Sentencing Procedure) Act 1999*. As an example, see *R v Kitchener* [2003] NSWCCA 134 at [56] (a two-judge bench case).

However, the matter is not as clear cut as it seems. The parole status of the defendant may be affected by the commission of the second offence. In such a case, the court may need to attempt the hypothetical exercise of deciding what the applicant's parole position would have been, had the second offence not been committed: *R v Walker*. It was said in *R v Walker* that the court will need to determine whether the second offence has caused a continuation of the revocation of parole. In *R v Walker* it was held that where the revocation of parole has been continued partly due to the commission of the second offence, pre-sentence custody referable to the continuation of the revocation of the parole may be taken into account upon sentence for the second offence.

A court has a discretion to impose a partially concurrent or wholly cumulative sentence upon a revoked parole period. The discretion has to be exercised in a principled way: *Barnes v R* [2014] NSWCCA 224 at [28]–[29].

In *Barnes v R*, the applicant had his parole revoked for an offence and was then sentenced for a subsequent offence with the sentence to commence at the expiry of the revoked parole period. The court, at [27], rejected the applicant's argument that imposing a sentence that was totally cumulative made no allowance for the offender having a second chance at parole for the first offence.

Revocation of intensive correction order

When an intensive correction order (ICO) is revoked because of subsequent offences, the court is required to take a similar approach in relation to the resulting time spent in custody to that taken with parole revocation: *Edquist-Wheeler v R* [2024] NSWCCA 49 at [41]–[43]; see above at **Parole revoked as a consequence of a subsequent offence** and **Parole revoked as a consequence of breach of another condition of parole**. In *Edquist-Wheeler v R*, where the offender's ICO was revoked because of the fresh

offence, the Court held the sentencing judge should have imposed a sentence allowing for greater concurrency with the revoked ICO, having regard to the criminality of both offences, to avoid the perception of the offender being doubly punished: [41]–[43].

Time already counted in previous proceedings

If a court takes account of the whole period of pre-sentence custody, it is not appropriate to again take that pre-sentence custody into account when sentencing the defendant for the second group of offences: *R v Wood* [2005] NSWCCA 159 at [5]; *Martinez v R* [2015] NSWCCA 5.

Time spent in custody in relation to another matter for which the offender is acquitted

Where an offender is sentenced in relation to one matter, time spent in custody referable exclusively to an unrelated offence, which has been successfully appealed, is not to be taken into account as a form of credit: *R v Niass* (unrep, 16/11/88, NSWCCA); *R v David* (unrep, 20/4/95, NSWCCA). In *R v Niass*, Lee CJ at CL said at 2:

> … there is good reason to keep intact the division between the functioning of the court dealing with a particular offender in respect of the offence on which he comes before the court and taking into account periods spent in custody in respect of that offence, and the function which the State has undertaken on occasions to recompense persons who, when the justice system has miscarried may seek solatium.

R v Niass was subsequently confirmed by the five-judge bench decision of *Hampton v R* [2014] NSWCCA 131 at [35].

Although not taken into account as a form of credit, time spent in custody in relation to another offence, which is successfully appealed, may be taken into account where the sentence has been served under particularly onerous conditions. For example, see *R v Evans* (unrep, 21/5/92, NSWCCA) and *Kljaic v R* [2023] NSWCCA 225.

In *R v Karageorge* [1999] NSWCCA 213 it was held that the time spent in custody was referable not only to the offence, which was subsequently successfully appealed, but also to a different offence, for which the offender was sentenced. The case emphasises the prudence for defence representatives of ensuring bail is formally refused to enable the custody time to be "referable" to that offence.

Similarly, time spent in custody in relation to offences for which an offender is discharged or acquitted is not to be taken into account as a form of credit: *Hampton v R* at [27]; *Rafaieh v R* [2018] NSWCCA 72 at [74]. Bare reliance on a period of custody for an unrelated matter, without more, is extraneous to the exercise of sentencing discretion for other matters, particularly in the case of broken periods of custody: *Hampton v R* at [30].

Although statutory provisions in NSW confirm that time in custody relating to the instant offence is a mandatory factor to be taken into account on sentence, there is nothing requiring a judge to take custody for an unrelated offence into account: *Hampton v R* at [26], [28]; *Rafaieh v R* at [74]; ss 24(a), 47(3) *Crimes (Sentencing Procedure) Act*.

Pre-sentence custody served in protection

The courts no longer assume that being in protective custody will place an offender in a more onerous prison environment than that of the general prison population:

Clinton v R [2009] NSWCCA 276. If an offender wants such a consideration taken into account, the offender should present evidence of it: *R v Jarrold* [2010] NSWCCA 69 [26]–[27]. Where an offender has spent a period of pre-sentence custody in protection which is more onerous, this may be given greater value than the actual time spent in custody: *R v Rose* [2004] NSWCCA 326. The reduction depends on the circumstances of the particular case.

The decision of *R v Rose* "is not authority for a mathematical approach to determining the relevance of time spent in protection": *Clinton v R* at [21]. A mathematical formula is not appropriate as there are too many variables, there is not always a significant difference between being on protection and being part of the normal prison population and there may be some benefits from being on protection that offset some of the deprivations: at [25].

Form 1 offences and pre-sentence custody

Pre-sentence custody referable to a Form 1 matter "should normally be taken into account" by backdating the sentence for the principal offence to which the Form 1 is attached, because Form 1 matters "normally have an impact, sometimes a substantial impact on the sentence passed for the principal offence": *Sultana v R* [2007] NSWCCA 107 at [15].

Immigration detention

A court may have regard to detention in an immigration facility notwithstanding an offender has been granted bail for an offence. The sentencing judge in *R v Parhizkar* [2013] NSWSC 871 took into account "in an unquantifiable sense" that the length of time the offenders were kept in immigration detention was "exacerbated by the fact that there have been pending criminal proceedings against them": at [108]. On appeal, the applicant argued that he should have been given a quantified allowance for immigration detention: *Parhizkar v R* [2014] NSWCCA 240 at [69]. Basten JA noted at [70] that the argument was not drawn to the judge's attention and that no evidence of the circumstances of the period in immigration detention was presented to the judge. Basten JA held (Price J at [93] and McCallum J at [98] agreed) that in those circumstances it could not be said the judge erred in the approach that was taken.

In *R v Dadash* [2012] NSWSC 1511 and *Marai v R* [2023] NSWCCA 224, immigration detention after the offender was granted bail was taken into account as part of the backdating of the sentence. In *Marai v R*, Sweeney J (Kirk JA agreeing) held the applicant's detention was referable to the offence for sentence as the Commonwealth Director of Public Prosecutions requested the applicant's visa be cancelled after bail was granted: [95].

In the ACT, immigration detention time linked to the offending is taken into account: *Islam v R* [2014] ACTCA 2 at [6]. The Crown conceded before the sentencing judge that the seven-month-period of immigration detention while Mr Islam was awaiting trial should be accounted for in determining the backdating of his sentence: at [7]. The backdating provision in s 63(2) *Crimes (Sentencing) Act 2005* (ACT) uses the same expression — "held in custody in relation to the offence" — in s 24 *Crimes (Sentencing Procedure) Act 1999* (NSW).

[12-520] Intervention programs

Last reviewed: March 2024

Section 24(b) *Crimes (Sentencing Procedure) Act 1999* requires a sentencing court to take into account the fact an offender has been the subject of an intervention order and "anything done by the offender in compliance with the offender's obligations under the order". Part 4 of the *Criminal Procedure Act 1986* provides for the recognition and operation of intervention programs. According to s 346, an intervention program is "a program of measures declared to be an intervention program under s 347." Clause 31 *Criminal Procedure Regulation 2017* declares that the Circle Sentencing Intervention Program is an intervention program for the purposes of Ch 7, Pt 4 of the *Criminal Procedure Act 1986*: see **Intervention programs** at [5-430].

An accused person or offender may be referred to an intervention program:

- as a condition of bail under the *Bail Act 2013*
- with an adjournment and a grant of bail before a finding of guilt is made
- where there is a finding of guilt and a dismissal of charges without a conviction under s 10 of the *Crimes (Sentencing Procedure) Act*, or
- where sentence is deferred under s 11.

See Note to Ch 7, Pt 4 *Criminal Procedure Act 1986*.

Section 11(4) *Crimes (Sentencing Procedure) Act* permits the court to make an order that an offender may participate, or be assessed for participation, in a program for treatment or rehabilitation that is not an intervention program.

[12-530] Quasi-custody bail conditions — residential programs

Last reviewed: March 2024

Time spent in a residential program, either in conformity with a bail requirement or under a s 11 adjournment, may constitute a period of quasi-custody, which may be taken into account to reduce the sentence eventually imposed: *R v Eastway* (unrep, 19/5/92, NSWCCA); *R v Campbell* [1999] NSWCCA 76; *R v Delaney* (2003) 59 NSWLR 1; *Kelly v R* [2018] NSWCCA 44. This may be done by reducing or backdating the sentence: *Reddy v R* [2018] NSWCCA 212 at [31]. A failure of a court to take account of time actually spent in a residential program constitutes an error in the exercise of the sentencing discretion: *Renshaw v R* [2012] NSWCCA 91 at [29]; *Hughes v R* [2008] NSWCCA 48 at [38]. Where there is an evidentiary foundation for it to be taken into account, the sentencing judge may be obliged, in some circumstances, to have regard to it even when not specifically requested: *Bonett v R* [2013] NSWCCA 234 at [50]; see also *Kelly v R* at [48]–[49].

Residential rehabilitation programs that have constituted quasi-custodial conditions include Odyssey House, the Salvation Army's Bridge Program, Guthrie House, Selah House, the Glen Rehabilitation Centre, ONE80TC (a Teen Challenge initiative), the Northside Clinic, Byron Private Treatment Centre, William Booth House and Bennelong Haven.

A reduction in sentence does not depend entirely on whether the residential program has been productive. The rationale for the allowance is the need to factor into the sentencing exercise the restriction on the offender's liberty during the period of the

program: *Truss v R* [2008] NSWCCA 325 at [22]; *R v Marschall* [2002] NSWCCA 197 at [30]; see also *Hughes v R* [2008] NSWCCA 48 at [38]; *Kelly v R* at [4], [11], [46]. Nor is the offender's motive for undertaking the program a relevant consideration when determining entitlement to some credit as a result of being subjected to quasi-custody: *R v Delaney* at [23]. As it is invariably the offender who moves the court for an order to enable attendance at a program, such attempts at rehabilitation are to their credit: *Reddy v R* at [33].

To qualify for a discount on sentence the conditions on the program must closely resemble imprisonment and thus impose a form of punishment on the defendant. Whether the conditions imposed amount to quasi-custody is a question of fact: *Kelly v R* at [10], [50]; *Bonett v R* at [50].

Factors relevant to that determination include:

- whether the course was residential: *R v Eastway*; *Kelly v R* at [11]
- whether the environment is a disciplined one, and how strict that discipline is: *R v Delaney* at [22]; *Kelly v R* at [11]
- whether the person is subject to restrictions and if so, the nature and extent of those restrictions: *R v Campbell* at [24]; *Kelly v R* at [3], [11]
- whether the time spent in rehabilitation has been productive: *Hughes v R*; *Kelly v R* at [11].

If conditions amounting to quasi-custody are established, the extent to which the sentence should be adjusted is a matter of discretion for the sentencing judge: *Kelly v R* at [50]; *Bonett v R* at [50]. The discount given for time spent in a residential program does not need to be quantified: *R v Sullivan* [2004] NSWCCA 99 at [67]. However, a figure of between 50–75% of the period spent on the program has been allowed in a number of cases: *R v Cartwright* (1989) 17 NSWLR 243; *R v Eastway*; *R v Douglas* (unrep, 4/3/97, NSWCCA); *Kelly v R* at [51], [53]; *Hughes v R* at [38]. This figure may be reduced as the conditions in the program become less strict: *R v Psaroudis* (unrep, 1/4/96, NSWCCA).

MERIT — Magistrates Early Referral Into Treatment program

The completion of a MERIT program should not be equated with a period of quasi-custody: *R v Brown* [2006] NSWCCA 144. James J said at [59] that if any allowance was made "it would, in my opinion, only be a very small allowance".

Hodgson JA said at [4] that completion of the program was a powerful consideration in the applicant's favour. He went on to say:

> I think there is public interest in having successful completion of such a program explicitly adverted to as a factor favourable to a defendant in the sentencing process, in order to encourage others to successfully complete such programs.

Drug Court

The approach to participation in the Drug Court program prior to being sentenced should be the same as when an offender has been on bail for a lengthy period with strict conditions: *R v Bushara* [2006] NSWCCA 8 at [28]. Participation in the Drug Court is not equivalent to imprisonment. It is not a form of pre-sentence custody that would require a sentence to be backdated. The fact of participation is simply another

matter the court takes into account when considering the appropriate sentence without attributing to it "any mathematical equivalence that would have a direct bearing on the length of the sentence".

See **Diversionary programs** on JIRS for further information on diversionary and intervention programs.

Other onerous bail conditions

Onerous bail conditions may be taken into account at sentence but there is no obligation to do so. It is a discretionary matter which depends on the circumstances of the individual case: *R v Fowler* [2003] NSWCCA 321 at [242]; *R v Webb* [2004] NSWCCA 330 at [18]; *Hoskins v R* [2016] NSWCCA 157 at [36]; *Frlanov v R* [2018] NSWCCA 267 at [24]; *Banat v R* [2020] NSWCCA 321 at [18].

The test of what is "onerous" or "stringent" seems difficult to satisfy. Delay combined with onerous bail conditions may constitute a form of punishment to be taken into account on sentence: see, for example, *R v Khamas* [1999] NSWCCA 436; see also **Relevance of onerous bail conditions during delay** at **[10-530] Delay**. Under the *Bail Act 2013*, bail conditions imposed for the purpose of mitigating an unacceptable risk may require the defendant to report or reside at a particular residence, or may include financial requirements (such as giving security) and non-association and place restriction conditions. Restrictive accommodation requirements will not necessarily amount to a form of quasi-custody: *Bland v R* [2014] NSWCCA 82 at [128]. In *Banat v R* the imposition of a curfew condition and the requirement for electronic monitoring were appropriately taken into account on sentence: at [25]–[27]. By comparison, in *Frlanov v R* the sentencing judge did not err by not taking into account the applicant's daily reporting condition as that was not particularly onerous: at [26].

The nature of the offence and the purposes of punishment may determine whether bail conditions are taken into account upon sentence: *R v Fowler* at [242]. In *R v Fowler* the applicant argued that the sentencing judge had failed to take into account the lengthy period during which the applicant was subject to bail conditions (including reporting). However, the court held at [242] that while in an appropriate case the length and terms of an offender's period on bail awaiting trial or sentence is relevant to determining the proper sentence, the weight given to such a matter will vary, depending upon other factors to be considered and what sentence is required in the particular case to address the purpose of punishment.

There is no specific formula for taking into account onerous bail conditions and delay. Nor is there a principle that dictates a reduction in sentence as a direct equivalent of a period of time spent subject to strict conditions on bail: *Hoskins v R* at [36]. It is enough for a sentencing court to make clear in its remarks that those factors have been recognised and taken into account. While in *R v Cartwright* the court gave the appellant credit for 75% of the time spent on bail, this figure has not been applied more generally.

Delay in proceedings

The length of time spent on bail due to delay in the proceedings may, similarly, be seen as a form of punishment sometimes referred to as a "penal consequence" already suffered by an offender that may be taken into account: *R v Yeo* [2005] NSWCCA 49 at [109]; *R v Fowler* [2003] NSWCCA 321 at [242]–[243].

[The next page is 6021]

Victims and victim impact statements

Note: Different statutory provisions apply to victim impact statements (VIS) depending on whether the particular proceedings commenced before or on and from 27 May 2019.

[12-790] Introduction

Chief Justice Spigelman, in his "Address to Parole Authorities Conference 2006" (2006) 8(1) *TJR* 11, noted the historical importance of a crime being regarded as a breach of the "King's Peace" and an offence against the whole community. The victim was a witness and played "virtually no role in criminal proceedings". However, the role of victims in criminal proceedings has significantly evolved.

In *Munda v Western Australia* (2013) 249 CLR 600, the High Court, at [54], referred to the role of the criminal law as including:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

In his Honour's article, "Civil or criminal — what is the difference?" (2006) 8(1) *TJR* 1 at 7, former Chief Justice Gleeson observed that:

> One of the most notable changes in the administration of criminal justice in recent years has been a growing awareness of a need to take account of the impact of offences on victims; in some jurisdictions provision is made for evidence of victim impact to play a formal role in sentencing proceedings.

[12-800] Common law

The common law requires sentencers to have regard to the effect of the crime on the victim: *Porter v R* [2008] NSWCCA 145 at [54], Gleeson CJ, Gummow, Hayne and Callinan JJ in *Siganto v The Queen* (1998) 194 CLR 656 at [29] referred to:

> the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law.

A sentencer is entitled to consider all the conduct of the offender, such as damage, harm or loss occasioned to the victim, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383 at 389. The common law rule is that a court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen: *Josefski v R* [2010] NSWCCA 41 at [3]–[4], [38]–[39]. The offender takes the victim as they find them.

[12-810] Sections 3A(g), 21A and the common law

Section 3A(g) *Crimes (Sentencing Procedure) Act 1999* provides that one of the purposes for which a court may impose a sentence on an offender is "to recognise the harm done to the victim of the crime and the community".

The application of s 3A(g) and s 21A(2)(g) ("the injury, emotional harm, loss or damage caused by the offence was substantial") in a given case are limited by the common law rule cited in *Josefski v R* [2010] NSWCCA 41 at [38] (see above, at [12-800]). Neither s 3A nor s 21A was intended to alter the common law principles of sentencing: *Muldrock v The Queen* (2011) 244 CLR 120 at [15], [18], [20].

As to the use of victim impact statements (VIS) of third parties see **Victim impact statements of family victims** at **[12-838]** below.

In addition to s 3A(g), s 21A refers to victims in several contexts: see **Section 21A factors** at **[11-000]**ff. The factors listed in s 21A(2) and (3) were not intended to operate as an exhaustive code and the text of the section itself makes it clear that existing statutory and common law factors may still be taken into account in determining a sentence, even though they are not listed: *Green v The Queen* (2011) 244 CLR 462 at [19].

[12-820] The statutory scheme for victim impact statements

Definitions and applications

Part 3, Div 2 *Crimes (Sentencing Procedure) Act 1999* contains provisions regulating the preparation and receipt of victim impact statements (VIS). The Division was substantially amended by the *Crimes Legislation Amendment (Victims) Act 2018*, which commenced on 27 May 2019 and applies to proceedings commenced on or after that date. The discussion below draws distinctions between the current and former legislative regimes as appropriate. Any reference to a former or repealed provision is to one which was in force as at 26 May 2019.

The requirements for the content of a "victim impact statement" prepared by a primary victim or a family victim are summarised as follows:

Statement by	Proceedings commenced before 27 May 2019	Proceedings commenced on or after 27 May 2019
Primary victim	Particulars of any personal harm suffered by victim as a direct result of offence: former s 26	Particulars of: (a) any personal harm (b) any emotional suffering or distress (c) any harm to relationships with other persons (d) any economic loss or harm that arises from any matter referred to in (a)–(c) suffered by primary victim or by members of primary victim's immediate family, as a direct result of offence: ss 26, 28(1)
Family victim	Particulars of impact of primary victim's death on members of their immediate family: former s 26	Particulars of impact of primary victim's death on family victim and other members of primary victim's immediate family: ss 26, 28(2)

The statutory scheme applies to the following offences being dealt with on indictment in the Supreme or District Courts or summarily in the District Court (s 27(2)):

(a) offences resulting in the death of, or actual physical bodily harm to, any person, or

(b) offences involving actual or threatened violence, or

(c) offences attracting a higher maximum penalty (if the offence results in the death of, or actual physical bodily harm to, any person) than may be imposed if the offence does not have that result, or

(d) prescribed sexual offences (see s 3 *Criminal Procedure Act 1986*), or

(e) (when proceedings commenced on and from 27 May 2019) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act 1900*.

The scheme applies to the following offences when dealt with in the Local Court (s 27(4), former s 27(3)):

(a) offences resulting in the death of any person, or

(b) an offence where a higher maximum penalty may be imposed if the offence results in the death of any person than if it does not, or

(c) indictable offences dealt with summarily in the Local Court pursuant to Table 1 of Sch 1 *Criminal Procedure Act* resulting in actual physical bodily harm, or involving an act of actual or threatened violence, or

(d) prescribed sexual offences referred to in Table 1 of Sch 1 *Criminal Procedure Act*, or

(e) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act*.

The scheme only applies to the following offences when dealt with in the Children's Court (s 27(4A)):

(a) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act*, or

(b) an offence that is not one referred to in Table 2 of Sch 1, *Criminal Procedure Act* and the offence

  (i) results in the death of, or actual physical bodily harm to, any person, or

  (ii) involves an act of actual or threatened violence, or

  (iii) is one for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result, or

  (iv) is a prescribed sexual offence.

For proceedings commenced on or after 27 May 2019, victims of the above offences may make a VIS if the offence is dealt with on a Form 1: s 27(6).

Consideration of victim impact statements

Proceedings commenced at any time

It is not mandatory for a victim to prepare a VIS: s 29(4) (former s 29(1)). If the victim/s to whom the statement relates objects, the statement may not be received or considered by a court: s 30C(2) (former s 29(2)).

The absence of a VIS does not give rise to any inference an offence had little or no impact on a victim: s 30E(5) (former s 29(3)). (See also **The relevance of the attitude of the victim — vengeance or forgiveness** below at **[12-850]**).

Nor does the absence of a VIS by a family victim give rise to an inference an offence had little or no impact on the primary victim's immediate family: s 30E(6) (former s 29(4)).

Proceedings commenced from 27 May 2019

When a VIS has been tendered, the court *must* consider it at any after time after conviction, but before sentence, and may make any comment on the statement considered appropriate: s 30E(1). Section 30E is intended to ensure the same requirements to receive, consider and comment on a VIS apply to statements from both primary victims and family victims: Second Reading Speech, Crimes Legislation Amendment (Victims) Bill 2018, NSW, Legislative Assembly, *Debates*, 24 October 2018, p 74.

The prosecution may provide a copy of a VIS to an offender's Australian legal practitioner (s 30G(1) who may copy, disseminate or transmit images of it to the extent reasonably necessary to provide it to another practitioner for legitimate purposes related to the proceedings: s 30G(2).) Offenders cannot retain, copy, disseminate or transmit images of the VIS: s 30G(5).

Proceedings commenced before 27 May 2019

A VIS may be received and considered by the court at any time after conviction, but before an offender is sentenced: former s 28(1). If the primary victim dies as a direct result of the offence the relevant court must receive, acknowledge and appropriately comment on a VIS given by a family victim: former s 28(3).

Former s 28(5) provided that the court may make a VIS available to the prosecutor, offender or to any other person it considers appropriate, subject to certain conditions (including that the offender could not retain a copy).

Form and requirements of victim impact statements

A VIS must be in writing and comply with any other requirements prescribed by the regulations: s 29(1) (former s 30(1)). These include that it be legible (either typed or handwritten), on A4 size paper, and (except with the court's leave) no longer than 20 pages including annexures: cl 10 *Crimes (Sentencing Procedure) Regulation 2017*.

A specific form was previously prescribed, however, the note to cl 10 currently states:

> **Note.** Victims Services provides information about victim impact statements, including the suggested form of such a statement, on its website at https://www.victimsservices.justice.nsw.gov.au/Documents/guide_victim-impact-statements.pdf, accessed 22 June 2021.

A VIS may include photographs, drawings and other images: s 29(2) (former s 30(1A)). Other requirements and restrictions relating to content are prescribed in cl 11 *Crimes (Sentencing Procedure) Regulation*.

If a primary victim is incapable of providing information for, or objecting to, the tender of a VIS, a representative may do so on their behalf: s 30(1) (former s 30(2)).

A victim to whom the statement relates, or their representative, is entitled to read out the whole or any part of the statement to the court: ss 30(2), 30D(1) (former s 30A(1)).

Special provisions related to reading victim impact statements

The following table summarises the provisions related to reading a VIS in court depending on when the proceedings commenced.

	Proceedings commenced before 27 May 2019	**Proceedings commenced on or after 27 May 2019**
Persons entitled to read out VIS in closed court	Victims in proceedings for prescribed sexual offences (unless victim consents or court satisfied that special reasons for statement being read in open court): former s 30A(3A)	Victims in proceedings for prescribed sexual offences (unless victim consents or court satisfied that special reasons for statement being read in open court): s 30I Any other victim, with the court's leave: s 30K(1)
Persons entitled to read out VIS via CCTV	Victims entitled to give evidence via CCTV during trial: former ss 30A(3), (4)	Victims entitled to give evidence via CCTV during trial: s 30J Any other victim, with the court's leave: s 30K(1)
Persons entitled to support person when reading out VIS	Victims in proceedings for prescribed sexual offences: former s 30A(3C)	Any victim: s 30H

Reading out victim impact statements in closed courts and via CCTV

In proceedings that commenced from 27 May 2019, when determining whether victims of offences that are not prescribed sexual offences should be given leave to read their VIS in closed court or via CCTV, the court must consider:

- whether it is reasonably practicable to exclude the public
- whether special reasons in the interests of justice require the statement to be read in open court, and
- any other relevant matter: s 30K(2).

The principle of open justice does not of itself constitute special reasons for requiring the statement to be read in open court: s 30K(3).

In determining whether to grant leave to read the VIS via CCTV the court must also consider whether the necessary facilities are available, or could reasonably be made available, and any other matter the court considers relevant: s 30K(4).

Entitlement to support persons

In proceedings commencing from 27 May 2019, any victim to whom a VIS relates is entitled to have a support person of their choice present near them, and within their sight, when the VIS is read out: s 30H(1). For proceedings that commenced before then, this *only* applies to victims of prescribed sexual offences: former s 30A(3C).

A support person includes a parent, guardian, friend, relative or person assisting the victim in a professional capacity who can be present whether the statement is read out in open court, closed court or via CCTV: s 30H(2)–(3) (former s 30A(3C)).

Non-compliance with statutory scheme

In proceedings commenced before 27 May 2019, a VIS may only be received and considered if it complies with the prescribed statutory requirements: former s 30(3).

However, the sentencing judge in *McCartney v R* [2009] NSWCCA 244 at [18]–[21] was entitled to have regard to an undated document inaccurately entitled "Witness Impact Statement" despite the fact it did not comply with the requirements of the regulations (see now cl 11 *Crimes (Sentencing Procedure) Regulation 2017*).

In proceedings that commence from 27 May 2019, a court must not consider or take into account a VIS unless it was prepared by the victim to whom it relates and is tendered by the prosecutor: s 30F(1). Further, a court must not consider or take into account any material not specifically authorised to be included by Pt 3, Div 2: s 30F(2). This is said to give courts greater discretion to receive a VIS that does not strictly comply with the Act, while still ensuring fairness to the offender: Second Reading Speech, Crimes Legislation Amendment (Victims) Bill 2018, NSW, Legislative Assembly, *Debates*, 24 October 2018, p 74.

[12-825] The statutory scheme does not cover the field

When the statutory scheme does not apply to particular offences, statements by victims may still be considered relevant and admissible to the sentencing process: *Porter v R* [2008] NSWCCA 145 at [53]. In that case, statements by victims of the offences of break, enter and steal and maliciously damage property by fire, were tendered without objection. The court held that the material was admissible whether as a VIS or in another form. Justice Johnson stated at [53] that:

> The fact that the statements were entitled "victim impact statements", and were prepared on forms which were not appropriate technically to the offences, does not mean that the content of the statements was inadmissible. This is especially so as no objection was taken to the material tendered. It is not uncommon for material concerning loss and harm to victims of burglary and arson offences to be included in statements taken by police from victims, or in statements of facts used on sentence.

See also *Miller v R* [2014] NSWCCA 34 at [155]–[156] where the court said evidence of harm occasioned to a victim by an offence has always been relevant and admissible whether or not given by way of VIS or under former s 28.

[12-830] Evidentiary status and use of victim impact statements at sentence

In proceedings that commenced from 27 May 2019, a court *must* consider a VIS when tendered and *may* make any comment on it that the court considers appropriate: s 30E(1). In proceedings commenced before then, a court has a discretion to receive and consider a VIS "if it considers it appropriate to do so": former s 28.

In relation to the latter, Basten JA in *R v Thomas* [2007] NSWCCA 269 stated at [36] that the "Act does not provide how an impact statement is to be taken into account" later observing, at [37] that it was "unfortunate" the Act gave "no greater guidance as to the appropriate use of [such statements] especially where untested, for the purposes of determining sentence".

The weight to be given to the statement is a matter for the court. In *R v Thomas*, Basten JA stated at [37] "… it will often be appropriate to give weight to a victim impact statement where the conduct of the offender is otherwise established beyond reasonable doubt and the statement is restricted to subsequent effects on the victim".

The court observed in *SBF v R* [2009] NSWCCA 231 at [88] that there was no statutory or other restriction on the extent to which a sentencing judge may set out the contents of a VIS.

Cross-examination and a victim impact statement

Former s 30A, which is in the same terms as s 30D, was found not to envisage that the author of a VIS would be cross-examined: *R v Wilson* [2005] NSWCCA 219 at [27]–[28]. The position might be different if the author is an expert who gives an opinion concerning the harm suffered by the victim, that is, a "qualified person" within the meaning of cl 8(3) *Crimes (Sentencing Procedure) Regulation 2010* (rep): *Muggleton v R* [2015] NSWCCA 62 at [44]; cl 9(4) *Crimes (Sentencing Procedure) Regulation 2017*, which is in identical terms to cl 9(3)(rep).

Using a victim impact statement to establish aggravating factors

Aggravating factors under s 21A(2) *Crimes (Sentencing Procedure) Act 1999* must be proved beyond reasonable doubt: *R v Tuala* [2015] NSWCCA 8 at [77]; *Culbert v R* [2021] NSWCCA 38 at [113]. Although a degree of caution is necessary before doing so, a VIS may be used to identify and establish that a victim has suffered substantial harm under s 21A(2)(g): see, for example, *Culbert v R* [2021] NSWCCA 38 at [119]–[120] To be "substantial" the harm must be shown to be greater or more deleterious than may ordinarily be expected for the offence in question: *R v Youkhana* [2004] NSWCCA 412 at [26]; *R v Tuala* at [64].

The case for accepting a VIS as evidence of substantial harm is strengthened where no objection is taken to the VIS, no question raised as to the weight to be attributed to it and no attempt made to limit its use: *R v Tuala* at [77] (after reference to several cases); *Culbert v R* at [116], [118]. A VIS can be used to establish whether the emotional harm suffered by the victim amounts to "substantial emotional harm" within the meaning of s 21A(2)(g) where no submissions were made on sentence that the use of, or evidentiary weight given to, the VIS should be limited: *Aguirre v R* [2010] NSWCCA 115 at [77]; *Muggleton v R* [2015] NSWCCA 62 at [43]; *Culbert v R* at [120].

Given that a VIS is admissible under s 28 it may be unfair to take a lack of objection to its admission into account but this does not prevent the defence putting arguments as to the weight that should be attributed to it: *R v Tuala* at [78].

There is little difficulty with accepting the contents of a VIS where it confirms other evidence or attests to harm of the kind that could reasonably be expected to arise from the offence in question: *R v Tuala* at [79]; see for example *Bajouri v R* [2016] NSWCCA 20 at [33]–[39].

Considerable caution must be exercised before a VIS can be used to establish an aggravating factor where any of the following arise (*R v Tuala* at [77], [80]–[81]):

1. the facts to which the VIS attests are in question
2. the victim's credibility is in question (as was the case in *R v Tuala*)
3. the harm asserted goes well beyond that which may be expected (see eg *RP v R* [2013] NSWCCA 192), or
4. the contents of the statement are the only evidence of harm.

In *R v Tuala*, the VIS could not be used to prove beyond reasonable doubt that the injury, loss and damage caused by the offences was more substantial than could

ordinarily be expected of three offences of discharging a firearm with intent to cause grievous bodily harm under s 33A(1)(a) *Crimes Act 1900*. Substantial physical injury was proved at trial and taken into account by the judge: *R v Tuala* at [84]. The judge's considerable doubt regarding the victim's credibility could be used to assess the victim's claim of financial loss and ongoing disability: *R v Tuala* at [83]. The VIS could not be used to extend the assessment of emotional harm and financial loss beyond that which could ordinarily be expected or that which was proved by other evidence: *R v Tuala* at [84].

In *RO v R* [2013] NSWCCA 162, it was held there was no evidence to establish the complainant "suffered significant psychological damage as a result of the [sexual] offences" or an aggravating factor under s 21A(2)(g) that "substantial" harm had been caused. Given her family life and drug abuse, the cause of the complainant's psychological damage was multifactorial and, in the absence of medical evidence to distinguish the effects of the offences, the finding made by the judge was not open: at [90], [91]. However, the judge was entitled to find that some psychological damage was caused but could not, on the evidence before him, make a qualitative or quantitative assessment of the extent of the harm: at [92].

Although courts are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences (see further below) care must be taken to avoid double counting by adding the aggravating feature of substantial emotional harm in s 21A(2)(g): *Stewart v R* [2012] NSWCCA 183 at [61].

[12-832] Victim impact statements and harm caused by sexual assault

Harm caused to the victim as a consequence of the crime is not necessarily a matter in aggravation. It may simply be an ingredient of the crime admitted by a guilty plea or a finding of guilt following a trial. Nor is harm to the victim necessarily a matter that the Crown must specifically identify and prove beyond reasonable doubt in every case. The Crown may call the victim if there is a factual dispute but the statutory scheme makes clear that a court can make findings about harm caused by the crime that do not depend upon whether the victim is a willing participant in sentencing proceedings.

Where it is asserted the offences caused injury, loss or damage beyond that ordinarily expected of the offence charged, that must be proved beyond reasonable doubt: *R v Youkhana* [2004] NSWCCA 412 at [26]; *R v Tuala* [2015] NSWCCA 8 at [57].

However, the deleterious effect on a child of sexual abuse *per se* is not a matter the Crown is required to prove beyond reasonable doubt. It can be inferred: *Culbert v R* at [113]. The position as to harm caused by the sexual abuse of a child was summarised in *R v Gavel* [2014] NSWCCA 56 at [110]:

> This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long term and serious harm, both physical and psychological, which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364[3], 368–372 [26]–[39].

The high maximum penalty and standard non-parole period for some sexual offences such as s 66A(2) *Crimes Act 1900* reflects the harm caused by this kind of offending: *R v Gavel* at [111]. Basten JA in *R v Nelson* [2016] NSWCCA 130 at [17]–[22] reviewed the case law and said:

> There may be a risk in overstating the principle in that not every abused child will be profoundly harmed [The Hon P McClellan and A Doyle, "Legislative facts and section 144 — a contemporary problem?" (2016) 12(4) TJR 421 at 447]. However, the sentencing judge should be prepared to have regard to a victim impact statement which may either confirm or contradict the presumption.

Ultimately the question is one of the weight to be given to the content of the statement. The judge erred in *RP v R* [2013] NSWCCA 192 at [27] by attributing excessive weight to a VIS. The judge "uncritically accepted" the victim impact statement, finding "the victim has suffered profoundly as a result of what happened to her and has experienced psychological problems throughout her entire life as a result of it" quoted at [26]. While the victim undoubtedly suffered harm the statement went well beyond what might be regarded as the type of harm expected from the circumstances of the offending: *RP v R* at [29]. Unlike the case of *Ollis v R* [2011] NSWCCA 155, the defence had submitted that reduced weight should be attributed to the statement. See also *EG v R* [2015] NSWCCA 21 and *RL v R* [2015] NSWCCA 106.

The judge in *R v Nelson* omitted any reference to the VIS which confirmed the psychological research and the common experience of the courts. In the absence of any challenge to the VIS, it should have been accepted and relied upon to support the presumptive position that the offending had caused the victim significant harm: at [22].

In *AC v R* [2016] NSWCCA 107, the Crown tendered an unsigned and undated document from the victim entitled "victim impact statement". The victim did not disclose that she had suffered any harm as a result of the sexual assaults but expressed support for the applicant and asked he be returned to her (at [43]). The court held that, as a VIS is defined in (former) s 26 as "a statement containing particulars of … any personal harm suffered by the victim as a direct result of the offence", the statement in question did not meet the statutory definition. A court is only entitled to receive and consider a VIS under the Act if it is given in compliance with it: at [45]; former s 30(3).

Further, the statement could not be used to provide evidence that the offence was mitigated under s 21A(3)(a), because "the injury, emotional harm, loss or damage caused by the offence was not substantial": *AC v R* at [47], [54]. While evidence may be called from a victim as to the matters specified in s 21A(3)(a), it is a matter for the court whether it is accepted and what weight it is attributed: *AC v R* at [49]. The statement in question came from a child who was the victim of extraordinary sexual abuse which exposed her to risks of physical and psychological injury — some of which materialised: *AC v R* at [50], [67].

[12-836] Victim impact statements and De Simoni

If a VIS is received and considered by the court it should refer only to the impact on the victim of the offence before the court: *R v H* [2005] NSWCCA 282 at [56] (for proceedings that commenced on/after 27 May 2019, this may include the impact of Form 1 offences: s 27(6)). Details of the conduct of the offender contained in a VIS

which would denote a more serious offence cannot be taken into account, even where no objection is taken to the material, as this would breach the principle contained in *The Queen v De Simoni* (1981) 147 CLR 383. See also **De Simoni principle** at **[1-500]**.

Chief Justice Gleeson cautioned in *R v Bakewell* (unrep, 27/6/1996, NSWCCA) that:

> particular care may need to be exercised where a sentencing judge is invited by the Crown to receive a victim impact statement, and take that victim impact statement into account for the purpose of the sentencing process. As the facts of the present case illustrate, the victim impact statement may well be based upon an account of the facts which includes circumstances of aggravation of the kind referred to in *De Simoni*.
>
> When that occurs, it will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial.

The court cited this comment with approval in *FV v R* [2006] NSWCCA 237, where a VIS (admitted without objection) was inconsistent with the agreed statement of facts. The sentencing judge did not err in considering the statement, as he repeatedly made it clear that the offence for which the applicant was being sentenced was the one which he had been charged with: *FV v R* at [42].

In *R v H* at [57], the Crown's tender of a brief to support the VIS was "misconceived". It risked breaching the *De Simoni* principle. Although the victim impact statement itself was not objected to, the sentencing judge erred in making findings of fact on some of the supporting material provided by the Crown which went outside the agreed facts. The judge is not bound by the facts as the parties have agreed to them (*Chow v DPP (NSW)* (1992) 28 NSWLR 593 at 606), but according to *R v H* at [59]:

> the requirements of procedural fairness commend that when a judge intends to go outside the agreed statement of facts … he or she should inform the parties of that intention in order to give them an opportunity to deal with it: *R v Uzabeaga* (2000) 119 A Crim R 452 at 458–459, [34]–[38].

Offences not charged

In *PWB v R* [2011] NSWCCA 84, RS Hulme J, with whom Harrison J agreed, found at [52]–[54] that the sentencing judge erred in her use of the victim impact statements. The statement referred to alleged offences other than those charged. It was only the impact of the charged offence that the judge was entitled to take into account.

[12-838] Victim impact statements of family victims

The impact of offences on family members of victims can be taken into account under s 30E(3) (formerly s 28(4)) as an aspect of s 3A(g) *Crimes (Sentencing Procedure) Act 1999* only on the application of the prosecution and if the court considers it appropriate (for proceedings that commenced before 27 May 2019, see former s 28(4)). A "family victim" is defined in s 26.

The text in s 30E(3) (former s 28(4)) — "an aspect of harm done to the community" — refers to s 3A(g). Harm done to the deceased's family is an aspect of harm done to the community and it is appropriate to take that harm into account in determining the sentence: *Sumpton v R* [2016] NSWCCA 162 at [153]–[155] citing *R v Halloun*

[2014] NSWSC 1705 at [46]; *R v Do (No 4)* [2015] NSWSC 512 at [50]; *R v Pluis* [2015] NSWSC 320 at [102]–[104]. In *R v Halloun*, McCallum J observed at [46] with reference to the former s 28(4):

> I would construe [this] provision as an important mechanism for ensuring that the evidence of family victims is placed before the court to give texture to the undoubted proposition that every unlawful taking of a human life harms the community in some way. In that way, the provision serves the purposes of sentencing stated in s 3A of the Act, one of which is to recognise the harm done to the victim of the crime and the community.

Section 30E(4) (former s 28(4A)) does not affect the application of the law of evidence in sentence proceedings: s 30E(4).

The absence of a VIS given by a family victim does not give rise to an inference an offence had little or no impact on the members of the primary victim's immediate family: s 30E(6).

Scope of "impact" on immediate family

Section 28(2) (former s 26) *Crimes (Sentencing Procedure) Act* defines a VIS to mean, in the case of a family victim, a statement containing particulars of the impact of the primary victim's death on the family victim and other members of the primary victim's immediate family.

"Immediate family" is defined broadly in s 26 to include the victim's spouse or de facto partner, a person to whom the victim is engaged to be married, a parent, grandparent, step-parent, child, grandchild, step-child, sibling, half-sibling or step-sibling. For proceedings that commenced on or after 27 May 2019, the definition extends to step-grandchildren, aunts, uncles, nieces and nephews, persons who are close family or kin according to Indigenous kinship systems, or other persons the prosecutor is satisfied is a member of extended or culturally recognised family, or who the victim considered to be family.

Of the term "impact" (see now s 28(2); former s 26), Johnson J said in *R v Turnbull (No 24)* [2016] NSWSC 830 at [8] that it should not be construed narrowly:

> The impact of the death of a person on the members of that person's immediate family extends to the influence or effect of the death. It is not confined to the immediate impact. It is not confined to immediate issues of grief, but to the devastation that can be caused to the family of a murder victim. It can extend, in my view, to the thought processes of the victims which, at times, may involve strong feelings with respect to the perpetrator, and what (in their view) may have motivated the perpetrator. To exclude matters of that sort, in my view, would narrowly and artificially confine the very process by which victim impact statements are made.

Scope of the concept of "harm"

There is a broader issue as to whether s 3A(g) alters the common law. The High Court said in *Muldrock v The Queen* (2011) 244 CLR 120 at [20] that the purposes of sentencing listed in s 3A were "familiar" and that there is "nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* [(1988) 164 CLR 465 at 476] in applying them". It was held in *Josefski v R* [2010] NSWCCA 41 at [4], [38]–[39] that s 3A(g) was not intended

to alter the law that existed and, further, when s 3A(g) is applied, it is limited by the common law rule that a court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen.

[12-839] Victim impact statements when offenders are forensic patients

Part 3, Div 2, Subdiv 5 *Crimes (Sentencing Procedure) Act 1999*, applies to proceedings which commenced from 27 May 2019, and permits a court to receive a VIS when there has been a special verdict of act proven but not criminally responsible or a verdict after a special hearing that a person has committed an offence: s 30L(1). The VIS must be prepared by the victim to whom it relates and tendered by the prosecution: s 30L(5). In such circumstances the court:

- must acknowledge receipt of the VIS: s 30L(2)
- may take it into account when considering what conditions to impose on the release of the accused: s 30L(3)
- must not consider a VIS when determining the limiting term to be imposed: s 30L(4).

A court may seek submissions by the designated carer or principal care provider: s 30M. Submissions may be written or oral: cl 12E *Crimes (Sentencing Procedure) Regulation 2017*.

A VIS under s 30L(1) or submissions under s 30M may refer to, pursuant to cll 11A(2), 12E *Crimes (Sentencing Procedure) Regulation*:

- the risk the offender's release would pose to the victim
- conditions that should be imposed on the offender's release and
- any other matter the victim/designated carer or principal care provider thinks should be considered in deciding the offender's conditions of release.

A victim may request that a court not disclose a VIS received under s 30L to the accused or that the statement not be read out to the court: s 30N(1). The court must agree unless it considers it is not in the interests of justice: s 30N(2). The court is not prevented from disclosing a VIS to the accused's legal representative, if it is in the interests of justice to do so, provided it is not disclosed to any other person: s 30N(3). If the court makes a decision resulting in the accused becoming a forensic patient, it must give a copy of the VIS to the Mental Health Review Tribunal as soon as practicable: s 30N(4); cl 12C.

Clause 12D relates to the consideration and disclosure of a VIS by the Tribunal.

[12-840] Robbery offences

Chief Justice Spigelman considered the impact upon victims of armed robbery in *R v Henry* (1999) 46 NSWLR 346 at [94]–[99]. See further **Robbery** at **[20-250]**.

[12-850] The relevance of the attitude of the victim — vengeance or forgiveness

In *R v Palu* [2002] NSWCCA 381 Howie J, with whom Levine and Hidden JJ agreed, said at [37]:

> The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness: *R v Glen* (NSWCCA, unreported, 19 December 1994). Sentencing

> proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences: *Henderson* (NSWCCA, unreported, 5 November 1997). Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.

Justice Johnson said with reference to authority in *R v Burton* [2008] NSWCCA 128 at [102]: "The victim's attitude towards sentencing of the Respondent ought to have played no part on sentence".

Domestic violence

In *R v Glen* (unrep, 19/12/94, NSWCCA), Simpson J stressed the importance, particularly in domestic violence cases, of general deterrence. Her Honour emphasised that:

> It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.
>
> For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.

R v Glen was quoted at length and with approval in *R v Burton* [2008] NSWCCA 128 at [103]. Justice Johnson affirmed the need for "… caution where a victim of a domestic violence offence expresses forgiveness and urges imposition of a lenient sentence for the offender" at [105].

In *R v Newman* [2004] NSWCCA 102, Howie J, citing *R v Bradford* (unrep, 6/5/88, NSWCCA), noted at [83]:

> that there may be the comparatively rare cases where forgiveness of the accused by the victim may be a relevant fact. Most cases, where this issue has been considered, have been in the context of domestic violence.

In *R v Kershaw* [2005] NSWCCA 56, Bryson JA said at [24]:

> In cases involving domestic violence it happens from time to time that a complainant is shown to have a forgiving and optimistic attitude about violence in the relationship which it is difficult for others to understand or share. The sentencing process is not and of course should not be in the hands of complainants, and the merciful or relenting attitude of a complainant does not reduce the gravity of the offence and does not have much effect on the interest of justice in imposing an appropriate sentence.

In *Shaw v R* [2008] NSWCCA 58, the court at [27] held that the judge did not err in being cautious about giving any weight to those aspects of the victim's statutory

declaration where she addressed her own responsibility for the deterioration in the relationship, her desire to withdraw her statement to police and her desire for her family to be reunited. This was an approach open to his Honour since it is the experience of sentencing courts that victims of domestic violence may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them.

See also discussion of *AC v R* [2016] NSWCCA 107 at **[12-832]**.

Attitude of victim's relatives

In *R v Dawes* [2004] NSWCCA 363, a case where a mother, suffering a major depressive illness, killed her autistic son, Dunford J noted at [30]:

> In his Victim Impact Statement read to the District Court, the respondent's husband referred to what a good mother she had been to Jason over the years, he asked for leniency for her and said that he could see no gain to the community or personal satisfaction in her being sent to prison. It would appear that his Honour took his attitude into account when sentencing the respondent, and in so far as he did so, he was in error, as the attitude of the victim: *R v Palu* (2002) 134 A Crim R 174 at [37], or in the case of homicide, the victim's family: *R v Previtera* (1997) 94 A Crim R 76, is not relevant to the proper exercise of the sentencing discretion for the reasons explained in those cases. For the same reasons, the apparent change of attitude of the respondent's husband is not a matter which this court can take into account in considering the appeal: see also *R v Newman* [2004] NSWCCA 102 at [79] to [86] and cases there cited.

The forgiveness of the offender by the victim's relatives should not be a factor taken into account in determining the sentence to be imposed: *R v Begbie* [2001] NSWCCA 206 per Sully J at [57]–[59]. The victim's attitude cannot over-reach the need for strong denunciation and general deterrence in a case involving serious objective circumstances: per Mason P at [43].

[12-860] Statutory scheme for directions to pay compensation

The *Victims Rights and Support Act 2013* provides for compensation by a court for injury and loss for an "aggrieved person". The object of a compensation direction is to compensate a victim, reflecting a civil liability which is distinct from an offender's criminal liability: *Upadhyaya v R* [2017] NSWCCA 162 at [9]. The relevant parts of the Act are extracted below.

Compensation for injury

Part 6, Div 2 sets out a statutory scheme for compensation for injury.

Section 93 Definition

"*aggrieved person*", in relation to an offence:

(a) other than an offence in respect of the death of a person — means a person who has sustained injury through or by reason of:

  (i) an offence for which the offender has been convicted, or

  (ii) an offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*) when sentence was passed on the offender for that offence, or

(b) in respect of the death of a person — means a member of the immediate family of the person.

Section 94 Directions for compensation for injury

(1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a sum not exceeding $50,000 be paid out of the property of the offender to any:

(a) aggrieved person, or

(b) aggrieved persons in such proportions as may be specified in the direction,

by way of compensation for any injury sustained through, or by reason of, the offence or any other offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*) when sentence was passed on the offender for that offence.

(2) A direction for compensation may be given by a court on its own initiative or on application made to it by or on behalf of an aggrieved person.

Section 99 Factors to be taken into consideration

In determining whether or not to give a direction for compensation and in determining the sum to be paid under such a direction, the court must have regard to the following:

(a) any behaviour (including past criminal activity), condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person,

(b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted,

(c) such other matters as it considers relevant.

Other important sections include:

- s 95: Restrictions on court's power to give directions for compensation for injury
- s 100: Payment of sum directed
- s 101: Enforcement of directions for compensation.

Compensation for loss

Part 6, Div 3 sets out a statutory scheme for compensation for loss:

- s 96: Definitions
- s 97: Directions for compensation for loss
- s 98: Restrictions on court's power to give directions for compensation for loss.

Part 6, Div 4 sets out some general matters:

- s 99: Factors to be taken into consideration
- s 100: Payment of sum directed
- s 101: Enforcement of directions for compensation
- s 102: Effect of directions for compensation on subsequent civil proceedings
- s 103: Directions for compensation not appealable on certain grounds.

Section 97(1) provides:

> (1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a specified sum be paid out of the property of the offender to any:
>
> (a) aggrieved person, or
>
> (b) aggrieved persons in such proportions as may be specified in the direction,
>
> by way of compensation for any loss sustained through, or by reason of, the offence or, if applicable, any further offence that the court has taken into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999* in imposing a penalty for an offence for which the offender has been convicted.

[12-863] Directions to pay compensation — further considerations

In *Connor v R* [2005] NSWCCA 431 at [41]–[42], Studdert J, McClellan CJ at CL and James J agreeing, outlined the following "relevant considerations" in applying the provisions in s 77B (repealed; see s 97 of the *Victims Rights and Support Act 2013*):

> (i) the purpose of the statutory scheme is to compensate victims;
>
> (ii) where co-offenders engaged in a joint enterprise cause damage to a victim's property, each has a liability as a tort feasor for the whole of the damage suffered. A tort feasor liable in respect of that damage may, however, recover contribution from any other tort feasor liable in respect of the same damage: see *Law Reform (Miscellaneous Provisions) Act 1946*, s 5(1)(c). See also *R v Van Hoang* (2002) 135 A Crim R 244 and the judgment of Smart AJ at [38];
>
> (iii) the asserted impecuniosity of an offender against whom a direction is sought pursuant to s 77B of the *Victims Act* ought not ordinarily be regarded as a reason for declining to make a direction under the section. An offender's impecuniosity may be temporary. His financial position may change through rehabilitation and hard work or by good fortune. Asserted impecuniosity may, in any event, be later demonstrated to be false;
>
> (iv) s 77D(a) and (b) direct attention to important considerations on an application under s 77B.
>
> In the present case, of course, the applicant's criminal conduct directly contributed to the losses sustained by the parties for whose benefit the sentencing judge made the direction under consideration.
>
> It is proper, of course, for a judge entertaining an application under s 77B to have regard to all the circumstances of the case.

A causal nexus between the loss and the crime must exist before an order can be made: *R v Skaf* [2001] NSWCCA 199 at [35] cited in *R v Wills* [2013] NSWDC 1 at [10].

[12-865] A direction to pay compensation not a mitigating factor

A direction to pay compensation under s 97(1) *Victims Rights and Support Act 2013* is not a mitigating factor at sentence: *Upadhyaya v R* [2017] NSWCCA 162 at [9], [68]. Section 97(1) requires a "specified sum be paid out of the property of the offender … by way of compensation *for any loss sustained through or by reason of the offence*" [emphasis added]: *Upadhyaya v R* at [65]. The making of such a direction reflects a civil liability, as distinct from an offender's criminal liability: *Upadhyaya v R*

at [9]. It is clearly in the nature of a claw-back or disgorgement of the "ill-gotten gains" the offender derived from the offence and therefore by definition cannot operate in mitigation: *Upadhyaya v R* at [65]–[66]. It does not matter that directions under s 97(1) do not fall within the ambit of s 24B(2) *Crimes (Sentencing Procedure) Act 1999* — the provision which prohibits a court taking into account as a mitigating factor orders imposed under "confiscation or forfeiture legislation". It would be a peculiar result if a court were precluded from having regard to orders made under confiscation or forfeiture legislation when imposing sentence, but were required to have regard to orders reflecting an offender's civil liability: *Upadhyaya v R* at [14].

Compensation can be appealed

Section 2(1)(f) *Criminal Appeal Act 1912* defines "sentence" to include "any direction for compensation made by the court of trial in respect of a person under section 94 (Directions for compensation for injury) or 97 (Directions for compensation for loss) of the *Victims Rights and Support Act 2013*".

Section 9 *Criminal Appeal Act* gives the court power to annul or vary any order for the restitution of property or payment of compensation. The power to do so exists even if the conviction(s) for the offence(s) is not quashed on appeal: s 9(5).

Although s 9(5) *Criminal Appeal Act* refers to the repealed *Victims Compensation Act 1996*, the reference extends to the *Victims Rights and Support Act* as a re-enacted Act: s 68(3)(a) *Interpretation Act 1987*.

Restrictions on power to make compensation directions

Section 98 *Victims Rights and Support Act 2013* provides a court may not give a direction for compensation: (a) for economic loss for which financial support is payable under this Act or compensation is payable under Pt 6, Div 2, or (b) for an amount in excess of the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for the recovery of a debt.

The maximum compensation order that the District Court can direct an offender to pay is $750,000: s 98(b) *Victims Rights and Support Act*; *Upadhyaya v R* at [4]. In *Upadhyaya v R*, the maximum amount was directed. It has been said that fairness and justice require that the maximum apply to the total compensation awarded for all offences where the court is sentencing for a number of offences as part of a course of conduct: *R v Wills* [2013] NSWDC 1 at [7].

Voluntary compensation as evidence of remorse

The significance of the voluntary payment of compensation was considered by the court in *R v Burgess* [2005] NSWCCA 52. The appellants were convicted of maliciously damaging property by painting the words "No War" on one of the white-tiled sails of the Opera House. The sentencing judge ordered that the appellants pay compensation of $111,000. They had already paid compensation of $40,000. Adams J said at [49]:

> It is, I think, undoubted that compensation that has been paid by an offender is often cogent evidence of remorse and, where it is accompanied by actual hardship in the sense of a real cost, is appropriately reflected in some amelioration of penalty, to a greater or lesser extent. In this case it appears that Dr Saunders has undertaken the greater burden of payment that has not been covered by contributions from supporters, since Mr

> Burgess has, it appears, little means. Of course, the compensation payments cannot be regarded, in the somewhat unusual circumstances of this case, as evidence of remorse. His Honour said that he took into account, as a favourable subjective feature of both cases, the payment and offer of compensation.

In *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96, the appellate court accepted the sentencing judge's finding that the offending company's payments to the victim over and above the statutory rate paid by its workers compensation insurer was evidence of remorse: *Nash v Silver City Drilling* at [26], [61].

See also **Restitution** at **[10-540]**, **Fraud offences** at **[19-930]**ff and *Remorse demonstrated by making reparation of loss under s 21A(3)(i)* in **Mitigating factors** at **[20-000]**.

[12-867] Victims support levies

Part 7 *Victims Rights and Support Act 2013* sets out a statutory scheme for the payment of a victims support levy. Part 7 applies to all offences dealt with by the Local, District and Supreme Courts other than any offences of a class prescribed by the regulations. Part 7 does not apply to the following classes of offences: (a) offences relating to engaging in offensive conduct, (b) offences relating to the use of offensive language, (c) offences relating to travelling on public transport without paying the fare or without a ticket, (d) offences relating to the parking, standing or waiting of a vehicle: s 105(2) *Victims Rights and Support Act 2013*.

A person who is convicted of an offence to which the Part applies is, by virtue of the conviction, liable to pay to the State a levy: s 106(1). Conviction for the purposes of s 106 does not include an order made under s 10(1)(a) *Crimes (Sentencing Procedure) Act* in relation to an offence that is not punishable by imprisonment: s 105(4) *Victims Rights and Support Act 2013*.

The amount of the levy is calculated under s 107 (CPI adjustments of victims support levy). The Minister publishes a notice on the NSW legislation website of the amounts that are to apply for the purposes of s 106 for a particular financial year: s 107(3).

For the 2020–21 financial year, the levy under s 106(1)(a) for a person convicted on indictment or pursuant to a committal for sentence is $188 and, under s 106(1)(b), the levy for a person convicted otherwise is $85: cl 2, Table, Victims Rights and Support (Victims Support Levy) Notice 2020.

A levy is in addition to, and does not form part of, any pecuniary penalty or order for payment of compensation imposed in respect of the same offence: s 106(2). A person who is under the age of 18 years is not liable to pay such a levy if the court directs that the person is exempt from liability to pay the levy: s 106(3). If a compensation levy has been imposed on a person and they appeal, the appeal stays the liability of the person to pay the levy: s 108(1).

[12-869] Corporation as victim

It is not a mitigating factor that the victim is a large corporation. It may be more accurate to say that, in that circumstance, it is not an aggravating factor that the victim was some individual who suffered great personal hardship as a result of the offences: *R v Machtas* (unrep, 7/8/92, NSWCCA).

[12-870] Federal offences

Section 16A(2)(ea) *Crimes Act 1914* (Cth) requires a court to take into account any victim impact statement for any individual who is a victim of the offence and has suffered harm as a result of it. The term "victim" should be construed broadly and may include a person recruited and manipulated by an offender to commit an offence: *Kabir v R* [2020] NSWCCA 139 at [61]–[62]. In that case, the court concluded it was open to find an unwitting friend used by the offender to facilitate the commission of tax fraud was a victim: at [65].

"Victim impact statement" is defined as an oral or written statement describing the impact of the offence on an individual victim, including details of the harm suffered: s 16AAAA(1). "Harm" is broadly defined in s 16(1) to include physical, psychological and emotional suffering, economic and other loss, and damage. The statement must be made by the individual victim or, if the court gives leave, a member of their family (defined in s 16A(4)), or a person appointed by the court: s 16AAAA(1)(a). The statement must describe the impact of the offence on the victim, including harm suffered as a result of the offence: s 16AAAA(1)(b). Where the statement is written, it must be given to the offender or their representative a reasonable time before the sentencing hearing: s 16AAAA(1)(c).

Section 16AB is headed "Matters relating to victim impact statements". It provides:

- only one VIS may be made per victim, unless the court grants leave: s 16AB(2)
- no implication is to be drawn from the absence of a VIS for a victim: s 16AB(3)
- all or part of a VIS for a victim may be read to the court by or on behalf of the victim: s 16AB(4)
- a VIS is not to be read to the court, or otherwise taken into account, to the extent that:
  - it expresses an opinion about an appropriate sentence
  - it is offensive, threatening, intimidating or harassing, or
  - admitting it into evidence would otherwise not be in the interests of justice: s 16AB(5)
- the person convicted of the offence may only test the facts in a victim impact statement:
  - by way of cross-examining the maker of the statement, and
  - if the court gives leave to do so: s 16AB(6)
- the protections for vulnerable witnesses in Pt IAD will be available for the reading of, or cross-examination about, the VIS: s 16AB(7).

The offender who took her child out of the jurisdiction against a Family Court order was not permitted to cross-examine the child's father on his VIS in *B v R* [2015] NSWCCA 103. It was held there was no denial of natural justice where the scope of cross-examination bore the hallmarks of cross-examination for collateral purposes, namely, to establish the father had committed criminal offences against his son: *B v R* at [206]. Section 16AB(6) did not apply to the proceedings.

[The next page is 6081]

Taking further offences into account (Form 1 offences)

Unless otherwise specified, references to sections below are references to sections of the *Crimes (Sentencing Procedure) Act 1999*.

[13-100] Introduction

When sentencing an offender for an offence (the principal offence), a court may take into account additional charges with which the offender has been charged but not convicted (further offences). The offender must want the further offences to be taken into account and a court may only take the criminality of those further offences into account if certain criteria and formalities have been met: ss 32, 33 and 35A.

The offender is only convicted of the principal offence and generally no proceedings can be taken or continued in relation to the further offences.

This is known as the Form 1 procedure.

The Form 1 procedure does not apply to Commonwealth offences. Section 16BA *Crimes Act 1914* (Cth) provides a similar procedure for federal offences (and only federal offences). See **Taking other offences into account: ss 16A(2)(b) and 16BA** in [16-010]. Where there is mixed State and federal offending, a federal offence cannot be taken into account on the sentence of a State offence: *Ilic v R* [2020] NSWCCA 300 at [44].

A failure to comply with the terms of s 32 does not invalidate a sentence imposed for "the principal offence": s 32(6). However, a sentencing court must be mindful of the need to comply with the various mandatory statutory requirements: *Woodward v R* [2017] NSWCCA 44 at [26]; *Ghalbouni v R* [2020] NSWCCA 21 at [29].

The Form 1 procedure cannot be conflated with the procedures for back-up and related offences in ss 165–167 *Criminal Procedure Act 1986*: *CH v R* [2019] NSWCCA 68 at [7]–[18].

[13-200] The statutory requirements

The provisions governing the authority and procedure for taking additional charges into account are found in Pt 3 Div 3 (ss 31–35) *Crimes (Sentencing Procedure) Act 1999*.

In proceedings for the principal offence (defined in s 31 as an offence the subject of proceedings under s 32(1)), the prosecutor may file in court a list of further offences in an approved form (Form 1) for which the offender has been charged but not convicted and which the offender wants taken into account on sentence for the principal offence: s 32(1); *Crimes (Sentencing Procedure) Regulation 2017*, cl 4. The Form 1 should clearly identify the principal offence, for example, by including, where necessary, the count, sequence or charge number if there are multiple counts of the same offence: *LS v R* [2020] NSWCCA 27 at [90].

A Form 1 may be filed at any time after the court finds the offender guilty and before dealing with them for the principal offence: s 32(2).

A copy of the Form 1, as filed, must be given to the offender and signed both by the offender and by, or on behalf of, the Director of Public Prosecutions: s 32(3), (4).

The Form 1 should not include further offences for which the sentencing court does not have jurisdiction to impose a penalty or offences punishable by life imprisonment: s 33(4)(a), (b). *R v JH* [2021] NSWCCA 299 is an example of a case where error was established because an offence in the latter category was placed on a Form 1. However, the Court of Criminal Appeal, the Supreme Court and the District Court may take summary offences into account: s 33(6).

The procedure the court must follow — s 33

The court must ask the offender "whether the offender wants the court to take any further offences into account in dealing with [them] for the principal offence": s 33(1). The obligation imposed by s 33(1) should not be disregarded because its purpose is to demonstrate whether there is any doubt about an offender's intention with respect to the procedure to be adopted with respect to the offences on the Form 1: *Dale v R* [2021] NSWCCA 320 at [38]–[40]. See *Pham v R* [2021] NSWCCA 234 as an example of where the judge's failure to personally confirm with the offender the charge the offender wanted to be taken into account was an error: at [30]; cf *Dale v R* where the offender's intention could be discerned from the actions of her counsel during the sentence proceedings: at [20].

The court may only take a further offence into account if the offender:

1. admits guilt to the further offence: s 33(2)(a)(i),
2. the offender indicates they want the court to take the further offence into account in dealing with them for the principal offence: s 33(2)(a)(ii), and
3. in all of the circumstances, the court considers it appropriate to do so: s 33(2)(b).

If a Form 1 is taken into account, the court must certify this on the Form 1: s 35(1)(a).

The formal requirements in s 33(2)(a) to ask whether the offender admits guilt and consents to having the further offences taken into account should not be dispensed with because they are important safeguards to ensure the offender is aware of what is taking place and consents to procedures that may significantly "impact upon his freedom or the period during which he will remain in custody": *R v Felton* [2002] NSWCCA 443 per Howie J at [3], cited with approval in *R v Brandt* [2004] NSWCCA 3 at [8]; *Woodward v R* at [26].

A court can only take offences on a single Form 1 into account on a single principal offence not across multiple offences: *LS v R* at [27]. Care should also be taken to ensure the Form 1 offences are taken into account in relation to the correct principal offence: *Ghalbouni v R* [2020] NSWCCA 21 at [49].

There are limits to an offender's capacity to withdraw their consent to the Form 1 procedure. For example, it is unlikely a Form 1 can be withdrawn after the evidence has been presented and both cases closed in the sentence proceedings: *Abel v R* [2020] NSWCCA 82 at [82].

See **[13-270] Effects of Form 1 procedure** and **Charge negotiations: prosecutor to consult with victim and police** at [13-275] for formal requirements where there are charge negotiations involving victims.

Restrictions on Form 1 procedure

Any penalty imposed on the offender for the principal offence must not exceed the maximum penalty the court could have imposed for that offence had the further offence not been taken into account: s 33(3).

Section 31 provides that the full range of penalties for the principal offence can be imposed, including a non-association or place restriction order.

Ancillary orders and penalties

While a court cannot impose a separate penalty for Form 1 offences, certain ancillary orders or directions (restitution, compensation, costs, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege) relating to them may be made: s 34. The offender retains the same right of appeal as if the order had been made on conviction of the further offence: s 34(2). In *Gardner v R* [2003] NSWCCA 199 it was held that by operation of s 34, it was open to the sentencing judge to consider whether, as an ancillary order, a prescribed licence disqualification period (now in ss 205 and 205A *Road Transport Act 2013*) should be reduced or extended.

If the decision in respect of which the offence was taken into account is quashed, or set aside, then any ancillary order lapses: s 34(3).

[13-210] Guideline judgment for Form 1 sentencing

The Attorney General (NSW) applied for a guideline judgment in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 (the Guideline) on the basis there was a need for a guideline setting out the proper approach to be taken by sentencing courts when Form 1 matters were under consideration. Chief Justice Spigelman delivered the judgment of the court with Wood CJ at CL, Grove, Sully and James JJ agreeing.

The rationale for the Form 1 procedure

Chief Justice Spigelman at [62]–[65] noted the following two distinct but consistent rationales for the procedure of taking matters into account on a Form 1.

1. It promotes the objective of rehabilitation by providing an opportunity for an offender to emerge with a "clean slate" following sentencing for the principal offence.
2. There is utilitarian value in the admission of guilt which saves resources utilised in further investigation by law enforcement agencies.

Including offences on a Form 1 gives them a significantly lower prominence in the sentencing process, affording an obvious advantage and a greater incentive to admit guilt: at [66].

Focus throughout is on the principal offence

It is important that Form 1 matters should be taken into account only in relation to the principal offence. At [39]–[42] Spigelman CJ said:

> [39]The sentencing court is sentencing *only* for the "principal offence". It is no part of the task of the sentencing court to determine appropriate sentences for offences listed

> on a Form 1 or to determine the overall sentence that would be appropriate for all the offences and then apply a "discount" for the use of the procedure. This is not sentencing for the principal offence.
>
> [40] In my opinion, it is pertinent to identify the elements to be considered in determining the sentence for the primary offence upon which the commission of other offences, for which no conviction is being recorded, may impinge. The case law has identified a number of distinct and sometimes overlapping purposes to be served by sentencing. In my opinion, not all these purposes are relevant to the process of taking other offences into account, when sentencing for a particular offence, that is, the primary offence.
>
> …
>
> [42] The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences … These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s 33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another.

Chief Justice Spigelman indicated at [43]–[44] that personal deterrence and retribution are not the only relevant factors to the Form 1 procedure:

> I did not intend these observations to be exhaustive of the elements upon which the fact of other offences may impinge. However, no additional elements for which that could be so have been identified in submissions to this Court. The important point is that the focus throughout must be on sentencing for the primary offence.
>
> The manner and degree to which the Form 1 offences can impinge upon elements relevant to sentencing for the principal offence will depend on a range of other factors pertinent to those elements and the weight to be given to them in the overall sentencing task. For that reason it will rarely be appropriate for a sentencing judge to attempt to quantify the effect on the sentence of taking into account Form 1 offences. (See *R v Kay* at [69]).

"Bottom up" approach appropriate

Chief Justice Spigelman observed at [18] that there were a number of propositions that were well established and uncontroversial. First, the essence of the process is to impose a longer sentence, or to alter the nature of the sentence, that would have been imposed if the primary sentence had stood alone. Secondly, the additional penalty may sometimes be substantial; it is incorrect to suggest that it should be small. However, Spigelman CJ said there was a divergence of approaches, characterised as either a "bottom up" or "top down" approach, raised an important issue of principle which had been the subject of uncertain and sometimes conflicting guidance in previous decisions of the court. The "bottom up" approach focuses on the appropriate sentence for the principal offence, which is increased by reason of the Form 1 offences . In contrast, a "top down" approach considers the sentence that would have been imposed by the application of sentencing principles if the court had been sentencing for the full range of offences.

The starting point of any analysis is the terms of the statutory power, with its emphasis that the court is concerned only with imposing a sentence for the "principal offence". Such a power was held to be inconsistent with the "top down" approach advocated by the Attorney General in his submissions: at [35].

The court endorsed the "bottom up" approach in *R v Timmis* [2003] NSWCCA 158. See also *Abbas v R* [2013] NSWCCA 115 at [15].

[13-212] Should the "utilitarian" benefits of admitting guilt be taken into account?

Although the offender admits guilt to further offences on a Form 1, it is erroneous to confer a further benefit on them because they co-operated in settling the Form 1 and "clear[ed] the slate": *R v Van Ryn* [2016] NSWCCA 1 at [214]–[215] citing *R v Hinchliffe* [2013] NSWCCA 327 at [219]. An offender already obtains an advantage from the Form 1 procedure as there is a cap upon the available sentence confined to the principal offence. It is an erroneous form of double counting to seek to confer a further benefit: *R v Hinchliffe* at [219].

In *Gordon v R* [2018] NSWCCA 54 at [95], RA Hulme J noted there is no statutory or common law requirement to take into account that an offender pleaded guilty to an offence if it is being taken into account on a Form 1 and identified, at [96]–[100], some of the potential difficulties associated with considering the procedural history of Form 1 offences when assessing the discount for the utilitarian value of the guilty plea for the principal offence. However, his Honour observed, at [101], that the procedural history should not be completely disregarded in assessing the sentence for the principal offence as it may have a bearing on other relevant matters including personal deterrence, remorse and prospects of rehabilitation.

See **Whether guilty plea discount given for Form 1 offences** at [11-525].

[13-215] Should the effect of Form 1 matters be quantified?

In the Guideline, Spigelman CJ said, "it will rarely be appropriate for a sentencing judge to attempt to quantify the effect … of Form 1 offences": at [44]. This approach was confirmed in *Abbas v R* [2013] NSWCCA 115 at [14] where Bathurst CJ held that the object of s 33 was not to impose a distinct penalty for the offences to be taken into account.

However, the plurality of the High Court decision in *Markarian v The Queen* (2005) 228 CLR 357 considered that occasionally "it may be useful and certainly not erroneous" to specify the amount by which the penalty for the principal offence has been increased for Form 1 matters. Chief Justice Gleeson, Gummow, Hayne and Callinan JJ said at [43]:

> Just as on occasions, albeit that they may be rare ones, it may not be inappropriate for a sentencing court to adopt an arithmetical approach, it may be useful and certainly not erroneous for a sentencing court to make clear the extent to which the penalty for the principal offence has been increased on account of further offences to which an offender has admitted guilt. Here Hulme J sought to, and in our opinion did make it clear, that the additional period of imprisonment was imposed not as a separate penalty for the further offences but by way of increase of penalty for the principal offence.

[13-217] Deterrence and retribution

A court can take into account the criminality of the Form 1 offences. The Form 1 offence may also demonstrate a greater need for personal deterrence and retribution for the principal offence. That approach is consistent with the terms of s 33 and the Guideline for Form 1 offences: *Abbas v R* at [22], [23]; the Guideline at [42]. When the Form 1 offence is taken into account, the principle of proportionality is assessed by reference to those additional factors. The court takes the Form 1 offence into account within the terms of s 32 as part of the instinctive synthesis process of sentencing: *Abbas v R* at [22], [23].

This does not mean, however, that the Form 1 offences should be taken into account to elevate the objective seriousness of the principal offence. In *RO v R* [2019] NSWCCA 183 the sentencing judge erred by doing so: at [54]–[57].

[13-240] Serious, numerous and unrelated offences on a Form 1

The statutory scheme contemplates that serious offences can be included on a Form 1: the Guideline at [49]–[50]. The statement in *R v Vougdis* (unrep, 19/4/89, NSWCCA) at 132 that serious offences must be separately charged has to be understood in light of s 33(4) which provides that only offences with a maximum of life imprisonment may not be included on a Form 1: at [50]. Nevertheless Spigelman CJ said in the Guideline at [50]:

> It would normally be inappropriate to include more serious offences on a Form 1, where the maximum sentence available for the offence on an indictment would be insufficient to allow for the total criminality revealed by the whole course of the offender's conduct to be appropriately reflected in the sentence.

There is also a difficulty of taking into account further offences which may appear to be disproportionate, not comparable, or not of the same kind and order of gravity as the principal offence under consideration: the Guideline at [51], [56].

A particular difficulty also confronts a court where there are numerous offences, or the number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of criminal conduct revealed by the indictment and the Form 1: the Guideline at [57].

[13-250] Obligation on the Crown to strike a balance

It is predominantly a matter for the Crown as to what offences are included on the Form 1, so as to strike a balance between overloading an indictment and ensuring it adequately reflects the totality of the admitted criminality: the Guideline at [68]. However, it is also necessary for the Crown to have regard to the difficulties faced by a court in undertaking the statutory task if the number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of conduct revealed by the indictment and the Form 1: at [57].

[13-260] The statutory power to reject a Form 1 under s 33(2)(b)

By the terms of s 33(2)(b), "if, in all of the circumstances, the court considers it appropriate to do so", the court must assess whether it is appropriate to proceed to sentence on a basis where no separate penalty is to be imposed for admitted offences: the Guideline at [67].

The court should recognise the many considerations which may inform a prosecutor's decision to include matters on a Form 1: at [68]. Chief Justice Spigelman said of the exercise of the discretion at [67]:

> There will be cases in which, for example, the administration of justice could be brought into disrepute by the court proceeding to sentence a person guilty of a course of criminal conduct on a manifestly inadequate, unduly narrow or artificial basis. I do not intend the previous sentence to constitute a comprehensive statement of the circumstances in which the broad discretion vested in the sentencing judge by s 33(1)(b) [sic] can be exercised. Nevertheless, the role of the Court must be constrained, to ensure that the independence of the judicial office in an adversary system is protected. (Cf *Maxwell v The Queen* (1995) 184 CLR 501 esp at 513-514 and 534-535.)

In *CP v R* [2009] NSWCCA 291, McClellan CJ at CL at [8] said:

> … when an entirely inappropriate arrangement is proffered and because of it a court would be denied the opportunity to impose a proper sentence, the discretion provided by s 33(2)(b) should be invoked and the court should decline to accept the Form 1.

The applicant in *CP v R* had pleaded guilty to two counts of armed robbery and one count of being an accessory to an aggravated car-jacking. Eight further offences were taken into account on a Form 1, including a charge of armed robbery. According to McClellan CJ at CL, including both the armed robbery offence and the concealing robbery offence on the Form 1 was inappropriate: at [9]. Justice McCallum (with whom Fullerton J agreed) noted at [36] that it would have been open to the sentencing judge to decline to take the armed robbery on the Form 1 into account.

Similarly, in *El-Youssef v R* [2010] NSWCCA 4 at [15], the court held that an armed robbery was inappropriately placed onto a Form 1 with the result the judge could not impose a sentence to reflect the seriousness of that offence.

In *R v Eedens* [2009] NSWCCA 254, the principal offence was sexual intercourse with a child under 10 years on indictment under s 66A *Crimes Act 1900*. Two further offences under ss 66A and 66C(1) were placed on a Form 1. The court held this was inappropriate because the sentence imposed could not sufficiently reflect the seriousness of the totality of applicant's conduct. Generally, it is inappropriate to have a matter that carries a standard non-parole period taken into account on a Form 1, except in a situation which can be justified, such as when the offender is sentenced for numerous similar offences: *R v Eedens* at [19]. Similarly, in *JL v R* [2014] NSWCCA 130, after referring to the power to reject a Form 1 under s 33(2)(b), the court cited *CP v R* and held, at [7], that a charge of anal intercourse committed against an eight-year old girl was not an appropriate one for inclusion on a Form 1.

In *Abbas v R* [2013] NSWCCA 115, Bathurst CJ said at [26] that where the gravity of the Form 1 offences far exceed those for which the offender is being sentenced, or where the magnitude of the offences on the Form 1 make it impossible to take them into account in sentencing for the convicted offence, the court should give consideration to declining to take the Form 1 offences into account.

Hoeben CJ at CL (Garling and Bellew JJ agreeing) in *DG v R* [2017] NSWCCA 139 observed that charging three aggravated indecent assaults contrary to s 61M(1) *Crimes Act* and including sexual offences under subss 66C(2) and 66C(4) *Crimes Act*

on a Form 1 involved "a distortion of the intention behind the Form 1 procedure … [and] … made the sentencing task to be performed by his Honour considerably more difficult than it should have been": at [44]. Similarly, in *Croxon v R* [2017] NSWCCA 213, the inclusion of an aggravated sexual assault offence under s 61J(1) *Crimes Act* was considered by Bellew J at [12] to be "an entirely inappropriate use of the [Form 1] procedure" given the other charges faced by the offender (Hoeben CJ at CL and Davies J agreeing).

It should be noted, however, that there is no reported case (first instance or on appeal) where a court has exercised its power under s 33(2)(b) upon finding that it was inappropriate for a particular charge to be included on a Form 1. Further, the words in s 33(2)(b) have to be read in light of the common law principle that the selection of the charge is within the "absolute discretion" of the prosecutor: *Elias v The Queen* (2013) 248 CLR 483 at [33]. The scope for judicial intervention is thus limited to rare cases.

In *Elias v The Queen*, the High Court criticised a Victorian sentencing practice of sentencing an offender for a lesser charge if the facts could accommodate such an outcome. While the selection and structure of charges may have a bearing on the sentence, the separation of Executive and judicial functions does not permit the court to canvas the exercise of the prosecutor's discretion in a case where it considers a less serious offence to be more appropriate any more than when the court considers a more serious charge to be more appropriate: *Elias v The Queen* at [34]. In expressing such a view, the court is attempting to influence the exercise of a discretion which is not any part of its own function: *Maxwell v The Queen* (1996) 184 CLR 501 at 514. The same reasoning could be applied to the exercise of power under s 33(2)(b).

[13-270] Effects of the Form 1 procedure

The offender is not convicted of Form 1 offences: s 35(4).

If a further offence is taken into account, the court is required to certify on the list of additional charges that the further offence has been taken into account, and no proceedings may be taken or continued in respect of the further offence unless the conviction for the principal offence is quashed or set aside: s 35(1)(a) and (b).

A court is not prevented from taking the further offence into account when sentencing or re-sentencing the offender for the principal offence if it subsequently imposes a penalty when sentencing or re-sentencing the offender for the principal offence: s 35(2).

An admission of guilt for the purposes of Pt 3 Div 3 *Crimes (Sentencing Procedure) Act* (ss 31–35) is not admissible in evidence in further criminal proceedings in relation to any such offence, or any other offence specified in the list of additional charges: s 35(3).

In any criminal proceedings, where reference may be made to, or evidence given about, the fact that the offender was convicted of the principal offence, reference may also lawfully be made to, or evidence given about, the fact that a further offence was taken into account in imposing a penalty for the principal offence: s 35(5).

The fact an offence was taken into account under Pt 3 Div 3 may be proved in the same manner as the conviction for the principal offence: s 35(6).

[13-275] Charge negotiations: prosecutor to consult with victim and police

Section 35A requires the prosecutor to file a certificate verifying consultation with victim and police in relation to charge negotiations before a Form 1 offence or any agreed statement of facts the subject of charge negotiations can be taken into account by the court. Section 35A(2) provides:

> A court must not take into account offences other than the principal offence, or any statement of agreed facts, that was the subject of charge negotiations unless the prosecutor has filed a certificate with the court verifying that—
>
> (a) the requisite consultation has taken place or, if consultation has not taken place, the reasons why it has not occurred, and
>
> (b) any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines.

The reference in s 35A(2)(b) to "prosecution guidelines" is a reference to, inter alia, the Office of the Director of Public Prosecutions (NSW), Prosecution Guidelines [March 2021], Chapter 4, *Charge Resolution*, where it is stated:

> A matter may only be dealt with by way of charge resolution if it is in the public interest to do so. In determining whether a charge resolution is in the public interest, the following factors are to be considered, in addition to the public interest factors outlined in Chapter 1, the decision to prosecute:
>
> 1. the charge or charges to proceed appropriately reflect the essential criminality of the criminal conduct capable of being proven beyond a reasonable doubt and provide an adequate basis for sentencing
> 2. the evidence available to support the prosecution case is weak in a material way, even though it cannot be said that there is no reasonable prospect of conviction, and the public interest will be satisfied with an acknowledgment of guilt to certain lesser criminal conduct
> 3. the cost saving to the community is significant when weighed against the likely outcome of the matter if it went to trial
> 4. charge resolution will save a witness from having to give evidence in court proceedings, where the desirability of this is a particularly compelling factor in the case

See also Chapter 5, *Victims and witnesses*, in particular, at 5.4 "Information to be provided" and 5.6 "Consultation resolving charges and discontinuing prosecutions".

Section 35A(3) provides the certificate must be signed by or on behalf of the DPP or by a person or class of persons prescribed by the regulations. The court may require the prosecution to explain the reason for a failure to file a certificate when it is required to do so: s 35A(5).

Section 35A is not limited to matters dealt with on indictment. It is intended to apply to Local Court matters where a Form 1 is taken into account. Clause 8(a) *Crimes (Sentencing Procedure) Regulation 2017* provides that s 35A(3) applies to "proceedings being prosecuted by a police prosecutor — police officers".

[The next page is 6141]

Sentencing guidelines

[13-600] Introduction

Gleeson CJ explained the concept and purpose of guidelines in *Wong v The Queen* (2001) 207 CLR 584 at [5]–[6]:

> The idea of guidelines
>
> The expressions "guidelines" and "guidelines judgments" have no precise connotation. They cover a variety of methods adopted by appellate courts for the purpose of giving guidance to primary judges charged with the exercise of judicial discretion. Those methods range from statements of general principle, to more specific indications of particular factors to be taken into account or given particular weight, and sometimes to indications of the kind of outcome that might be expected in a certain kind of case, other than in exceptional circumstances.
>
> One of the legitimate objectives of such guidance is to reduce the incidence of unnecessary and inappropriate inconsistency. All discretionary decision-making carries with it the probability of some degree of inconsistency. But there are limits beyond which such inconsistency itself constitutes a form of injustice. The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

[13-610] The statutory scheme

The *Criminal Procedure Amendment (Sentencing Guidelines) Act 1998* was passed in response to the first guideline judgment of *R v Jurisic* (1998) 45 NSWLR 209, and gave statutory recognition to the issuing of guideline judgments in NSW. However, guideline judgments came under criticism in the case of *Wong v The Queen*, which questioned whether the Crown appeal jurisdiction under s 5D of the *Criminal Appeal Act 1912* permitted the court to promulgate guideline judgments on its own motion. In response to *Wong*, in 2001 s 37A was inserted into the *Crimes (Sentencing Procedure) Act 1999* which gave the Court of Criminal Appeal power to issue guidelines on its own motion wherever it considered it appropriate, and retrospectively validated the previously issued State guidelines.

Guideline judgments have statutory force and sentencing judges are obliged to take them into account: *Moodie v R* [2020] NSWCCA 160 at [24]; *R v Whyte* (2002) 55 NSWLR 252 at [65].

Div 4 of Pt 3 of the *Crimes (Sentencing Procedure) Act 1999* contains the statutory scheme for sentencing guidelines.

Section 36 provides definitions, which include the following:

> "*guideline judgment*" means a judgment that is expressed to contain guidelines to be taken into account by courts sentencing offenders, being:
>
> (a) guidelines that apply generally, or
>
> (b) guidelines that apply to particular courts or classes of courts, to particular offences or classes of offences, to particular penalties or classes of penalties or to particular classes of offenders (but not to particular offenders).

Section 37 provides:

> **Guideline judgments on application of Attorney General**
>
> (1) The Court may give a guideline judgment on the application of the Attorney General.
>
> (2) An application for a guideline judgment may include submissions with respect to the framing of the proposed guidelines.
>
> (3) An application is not to be made in any proceedings before the Court with respect to a particular offender.
>
> (4) The powers and jurisdiction of the Court to give a guideline judgment in proceedings under this section in relation to an indictable or summary offence are the same as the powers and jurisdiction that the Court has, under section 37A, to give a guideline judgment in a pending proceeding in relation to an indictable offence.
>
> (5) A guideline judgment under this section may be given separately or may be included in any judgment of the Court that it considers appropriate.
>
> (6) (Repealed)

Section 37A provides:

> **Guideline judgments on own motion**
>
> (1) The Court may give a guideline judgment on its own motion in any proceedings considered appropriate by the Court, and whether or not it is necessary for the purpose of determining the proceedings.
>
> (2) The Court is to give the Senior Public Defender, Director of Public Prosecutions and Attorney General an opportunity to appear as referred to in sections 38, 39 and 39A before giving a guideline judgment.

Section 42A provides:

> **Relationship of guidelines and other sentencing matters**
>
> A guideline that is expressed to be contained in a guideline judgment:
>
> (a) is in addition to any other matter that is required to be taken into account under Division 1 of Part 3, and
>
> (b) does not limit or derogate from any such requirement.

[13-620] Guideline judgments promulgated

The Court of Criminal Appeal has delivered the following guideline judgments:

High Range PCA (*Road Transport (Safety and Traffic Management) Act 1999*, s 9(4)): *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Content of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [146].

Form 1: (*Crimes (Sentencing Procedure) Act 1999*, Pt 3, Div 3): *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 at [9].

Guilty plea (*Crimes (Sentencing Procedure) Act 1999*, s 22): *R v Thomson & Houlton* (2000) 49 NSWLR 383 at [160].

Break, enter and steal (*Crimes Act 1900*, s 112(1)): *R v Ponfield* (1999) 48 NSWLR 327 at [48].

Armed robbery (*Crimes Act 1900*, s 97): *R v Henry* (1999) 46 NSWLR 346.

Dangerous driving (*Crimes Act 1900*, s 52A): *R v Jurisic* (1998) 45 NSWLR 209 was reformulated in *R v Whyte* (2002) 55 NSWLR 252 at [252].

The Court of Criminal Appeal declined to promulgate a guideline for:

Assault police (*Crimes Act 1900*, s 60(1)): *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 2 of 2002* (2002) 137 A Crim R 196.

The High Court overruled the guideline judgment for:

Drug importation (*Customs Act 1901* (Cth), s 233B): *Wong v The Queen* (2001) 207 CLR 584 overruled *R v Wong & Leung* (1999) 48 NSWLR 340.

Wong v The Queen (2001) 207 CLR 584

In *Wong v The Queen* (2001) 207 CLR 584 the High Court held that the formulation of the drug importation guideline was flawed because it unduly elevated the weight of the drug as the crucial factor to be taken into account when sentencing: joint judgment at [34]–[88]; Kirby J at [89]–[150]. The court allowed the appeal and remitted the case to the Court of Criminal Appeal (see *R v Wong & Leung* (2002) 127 A Crim R 243).

Although Gleeson CJ and Callinan J dismissed the appeal, the High Court was unanimous in its criticism of the particular sentencing guideline (see Gleeson CJ at [31] and Callinan J at [165]). Callinan J questioned the prescriptive nature of the guideline and the significance attached to the quantity of drug as the chief determinative factor in sentencing: at [165]. Gleeson CJ at [31] described the guideline as a "risky undertaking" given the text and structure of s 16A of the *Crimes Act 1914* (Cth). The joint judgment also cast doubt on the use of numerical guidelines generally and saw this as restricting the proper exercise of sentencing discretion (see [72] and [76]–[78]). On the other hand, the break, enter and steal guideline, which listed relevant factors without a numerical guideline, was approved: at [60]. For a further discussion of the case see H Donnelly, "Wong and Leung: The Kable guy and numerical guidelines" (2001) 8 *Criminal Law News* 101.

R v Whyte (2002) 55 NSWLR 252

The validity of guideline judgments was confirmed by the Court of Criminal Appeal in the five-judge bench case of *R v Whyte* (2002) 55 NSWLR 252. In the course of its reasons, the court effectively dealt with the matter as a test case for guideline judgments. The issues discussed included: the effect of *Wong v The Queen* (2001) 207 CLR 584 on the guidelines promulgated in *R v Jurisic* (1998) 45 NSWLR 209 and *R v Henry* (1999) 46 NSWLR 346; the effect of the (retrospective) statutory power conferred on the CCA to issue guideline judgments; the obligation of sentencing judges to take into account guideline judgments; whether by issuing guidelines the CCA is exercising a function which is incompatible with its exercise of Commonwealth judicial power; the role that numerical guidelines play in terms of sentencing consistency; and, finally, whether the *Jurisic* driving guideline should be reformulated.

The court (Spigelman CJ, Mason P, Barr, Bell and McClellan JJ agreeing, with additional observations by Mason P and McClellan J) held that *Wong v The Queen* did not require the CCA to overrule the numerical guideline judgments of *Jurisic* and

Henry. The new retrospective statutory power conferred on the CCA under s 37A of the *Crimes (Sentencing Procedure) Act 1999* overcomes at least some of the jurisdictional limitations of the Crown appeal power referred to in the joint judgment of *Wong v The Queen*. Significantly, the court held that the new statutory power should not be read down to exclude guidelines which contain a quantitative element: see [46].

Sentencing judges are obliged to "take into account" a guideline judgment given by the CCA, by the operation of ss 21A(4), 42A and 37A of the *Crimes (Sentencing Procedure) Act 1999*. The fact a guideline judgment is given this statutory force is of significance. It specifies the effect which a guideline judgment ought to have on sentencing judges by force of statute: *Whyte* at [65], [67]; *Moodie v R* [2020] NSWCCA 160 at [24].

Numerical guidelines have a role to play in achieving equality of justice where, as a matter of practical reality, there is tension between the principle of individualised justice and the principle of consistency. The court in *Whyte* emphasised that the numerical guideline for dangerous driving has been significant in ensuring the adequacy and consistency of sentences. If it were removed, the pattern of inadequacy and inconsistency would quickly reemerge.

[13-630] Use of guideline judgments as a "check" or "sounding board"

R v Whyte (2002) 55 NSWLR 252 is the last authoritative statement on the use of guideline judgments. Spigelman CJ said at [113]:

> this court should take particular care when expressing a guideline judgment to ensure that it does not, as a matter of practical effect, impermissibly confine the exercise of discretion. This involves, in my opinion, ensuring that the observations in the original guideline judgment of *Jurisic* — that a guideline was only an "indicator" — must be emphasised, albeit reiterated in the language of the 2001 Act as a matter to be "taken into account". A guideline is to be taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption". I see this as a reaffirmation of the reasoning in *Jurisic*.

While formal reference to a guideline judgment is not necessary, if this is not done, whether or not it was in fact taken into account will principally be assessed by comparing the factors identified in the guideline with the reasons for sentence: *Moodie v R* [2020] NSWCCA 160 at [47]–[48].

Reasons required for departure from guideline judgment

Notwithstanding the fact that guidelines are not binding in a formal sense, where a trial judge does not apply a guideline, reasons for that decision should be articulated. Spigelman CJ explained the rationale in *R v Whyte* at [114]–[116]:

> As mentioned above, in *Henry* at [31], after stating that guidelines are only an indicator, I added:
>
> > "Nevertheless, where a guideline is not to be applied by a trial judge, this Court would expect that the reasons for that decision be articulated, so that the public interest in the perception of consistency in sentencing decisions can be served and this Court can be properly informed in the exercise of its appellate jurisdiction."
>
> As Simpson J pointed out in *R v Khatter* [2000] NSWCCA 32 at [26], it did not follow that a failure to articulate reasons necessarily amounted to legal error. Under the new

s 37A, the obligation on a sentencing judge is to take a guideline into account. The obligation to give reasons is now the same as that applicable in the case of any other matter required to be taken into account.

The element of prescriptiveness, if that be appropriate terminology, of a guideline judgment given under s 37A, is now provided for in the statute.

[13-640] Sentencing guidelines and standard non-parole period offences

Offences for which guideline judgments have been promulgated by the Court of Criminal Appeal are not included in the standard non-parole period offence Table in Div 1A of Pt 4 of the *Crimes (Sentencing Procedure) Act 1999* (reproduced at [8-000]), apparently for the reason that Parliament took the view that judges have sufficient guidance. In the Second Reading speech for the Bill that introduced standard non-parole period offences, the Attorney General proposed "that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences": The Honourable RJ Debus, Attorney General, Second Reading Speech, "*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*", *NSW Parliamentary Debates* (*Hansard*), Legislative Assembly, 23/10/02, 5815. In *R v Way* (2004) 60 NSWLR 168, the court affirmed the importance of guideline judgments notwithstanding the importance of standard non-parole periods: see at [122]–[131].

[The next page is 6201]

Correction and adjustment of sentences

[13-900] Correcting a sentence via an implied power or the slip rule

Last reviewed: March 2024

At common law a court may review, correct or alter its judgment any time until its orders have been perfected: *Achurch v The Queen* (2014) 253 CLR 141 at [17]. The power is inherent in superior courts and implied in statutory courts including inferior courts and may be extended by statutory provisions: *Achurch v The Queen* at [17].

The slip rule allows for a limited correction of an order after its final entry: *Achurch v The Queen* at [18]. Under Pt 53, Div 1, r 12 District Court Rules 1973, entry of the sentence on the court file, signed by the judge, constitutes a formal record of the sentence: *Rickard v R* [2007] NSWCCA 332 at [7].

The Court of Criminal Appeal has a power to set aside or vary an order under r 50C Criminal Appeal Rules within 14 days after the order is entered. The power to correct mistakes falling within the "slip rule" exists independently of r 50C. The rule does not limit the operation of the slip rule: *R v Green* [2011] NSWCCA 71 at [24], [27].

[13-910] Re-opening proceedings under s 43

Last reviewed: March 2024

Section 43 *Crimes (Sentencing Procedure) Act 1999* makes provision for a court to reopen proceedings to correct sentencing errors either on its own initiative or on the application of a party to the proceedings. It provides:

> (1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
>
> (a) imposed a penalty that is contrary to law, or
>
> (b) failed to impose a penalty that is required to be imposed by law,
>
> and so applies whether or not a person has been convicted of an offence in those proceedings.
>
> (2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
>
> (a) may impose a penalty that is in accordance with the law,
>
> …

Section 43 provides a conditional statutory power to correct a penalty beyond the limits of the inherent and implied powers of the courts and the slip rule: *Achurch v The Queen* (2014) 253 CLR 141 at [19]. It is to be distinguished from the implied or inherent power to correct accidental "slips" or omissions to ensure that orders reflect the intention of the court: *R v Green* [2011] NSWCCA 71 at [21], [27].

Section 43 applies to criminal proceedings (including proceedings on appeal) in which a court has: (a) imposed a penalty that is contrary to law, or (b) failed to impose

a penalty that is required to be imposed by law: s 43(1). Upon reopening the court may impose a penalty that is in accordance with the law, and if necessary, may amend any relevant conviction or order: s 43(2).

The section only applies to criminal proceedings in which one of two conditions [in ss 43(1)(a) and 43(1)(b)] is fulfilled. For the purposes of s 43(1)(b) what must be contrary to law is the "penalty". Merely by demonstrating that the court has erred in law or fact does not meet the condition in s 43(1)(a).

The High Court in *Achurch v The Queen* at [32] set out examples of circumstances in which a penalty may be said to be contrary to law:

- a penalty which exceeds the maximum penalty prescribed for the offence
- a penalty which is beyond the power of the court to impose because some precondition for its imposition is not satisfied eg the existence of an aggravating factor or the existence of prior convictions for the same kind of offence.

The section does not extend to a general re-opening of proceedings. It does not permit sentenced offenders to re-litigate what has already been litigated, or seek a different outcome on new or different evidence: *Bungie v R* [2015] NSWCCA 9 at [40], [41].

[13-920] The limits of the power under s 43

Last reviewed: March 2024

The principle of finality — that resolved controversies are not to be reopened except in a few, narrowly defined circumstances — informs the construction of s 43 *Crimes (Sentencing Procedure) Act 1999* and the limit of its purpose: *Achurch v The Queen* (2014) 253 CLR 141 at [16]. The power cannot be applied to any penalty where the court was influenced by an error of law or fact because such an approach does not fit with the text of s 43, or its limited purpose: *Achurch v The Queen* at [32], [36].

The principle of finality can only be qualified by clear statutory language. The broad construction given by earlier Court of Criminal Appeal decisions (*Erceg v The District Court (NSW)* (2003) 143 A Crim R 455, *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393, *Meakin v Director of Public Prosecutions* (2011) 216 A Crim R 128 and *R v Finnie (No 2)* [2004] NSWCCA 150 at [31]–[32]) "leaves the boundaries between correction and appeal porous and protected only by the exercise of the sentencing court's discretion": *Achurch v The Queen* at [36].

Further, in *Taylor v R* [2013] NSWCCA 157, it was held s 43 can be utilised to remedy the miscalculation of commencement dates or parole periods: [7]. In *Achurch v R (No 2)* (2013) 84 NSWLR 328, the court said s 43 can be used where the court has made an "error of computation or the like": [66]. Computation errors or errors in relation to commencement dates (after the High Court decision of *Achurch v The Queen*) have to be corrected using the courts inherent or implied power or under the slip rule referred to above.

Section 43 cannot be used by first instance courts to review *Muldrock v The Queen* (2011) 244 CLR 120 appeals because a penalty is not "contrary to law" within the terms of the section only because it is reached by a process of erroneous legal reasoning or factual error: *Achurch v The Queen* at [37]. Section 43 cannot be used to alter a driving

disqualification period after a s 10A order (under the *Crimes (Sentencing Procedure) Act*) has been imposed: *Davis v Director of Public Prosecutions (NSW)* [2011] NSWSC 153 at [43].

[The next page is 7001]

Children (Criminal Proceedings) Act 1987

para

Children (Criminal Proceedings) Act 1987

[The next page is 7051]

Children (Criminal Proceedings) Act 1987

The *Children (Criminal Proceedings) Act 1987* governs the jurisdiction of the Children's Court and sets out the main provisions relating to criminal proceedings against children. See also *Local Court Bench Book* **[38-000] Children's Court — Criminal Jurisdiction**, and the *Children's Court of NSW Resource Handbook*. Unless otherwise specified, references to sections below are references to sections of the *Children (Criminal Proceedings) Act*. It is a fundamental principle that children who commit offences should be dealt with differently and separately to adult offenders: *Campbell v R* [2018] NSWCCA 87 at [20]. The common law also provides for the modification of sentencing factors in relation to both young offenders and young adult offenders: *KT v R* [2008] NSWCCA 51 at [22]ff; see also **[10-440] Youth**.

[15-000] Jurisdiction of the Children's Court

Subject to some exceptions, the Children's Court has jurisdiction to deal with offences alleged to have been committed by a person who was a child when the offence was committed and was under the age of 21 years when charged before the Children's Court: s 28(1). A child is a person under the age of 18 years: s 3(1). There is a conclusive presumption that no child under the age of 10 years can be guilty of an offence (s 5) and a rebuttable presumption that a child between the ages of 10 and 14 years does not bear criminal responsibility: *C (A Minor) v Director of Public Prosecutions* [1996] 1 AC 1; *R v CRH* (unrep, 18/12/96, NSWCCA); *BP v R* [2006] NSWCCA 172 at [27].

The court may, if it is satisfied that no other evidence of the person's age is readily available, rely on the apparent age of the person: s 7A.

The Children's Court has jurisdiction to hear and determine:

- all summary offences, except certain traffic offences, as described in s 28(2),
- indictable offences other than:
  - "serious children's indictable offences" as defined in s 3, and
  - indictable offences dealt with "according to law" following exercise of the residual discretion under s 31(3) of the Act.

There is no such discretion for "serious children's indictable offences" and these must be dealt with according to law in the higher courts: s 17.

A "serious children's indictable offence" is defined in s 3 and includes indictable offences prescribed by the regulations as such an offence for the purposes of the Act. Clause 4 *Children (Criminal Proceedings) Regulation 2016* prescribes as a serious children's indictable offence, an offence against s 80A of the *Crimes Act 1900* (sexual assault by forced manipulation), if the victim was under 10 years old when the offence occurred.

A principal in the second degree to a serious children's indictable offence is dealt with in the same way as the principal in the first degree: *R v PJP* (unrep, 8/6/94, NSWCCA).

For indictable offences other than "serious children's indictable offences", the discretion under s 31(3) enables the Children's Court to choose between committing

a child charged with an indictable offence to a higher court to be dealt with according to law, or to deal with the matter itself under the less harsh regime of Div 4 of Pt 3 of the Act. See **Div 4, Pt 2, Penalties**, below at **[15-040]**.

[15-010] Guiding principles

Last reviewed: November 2023

Section 6 sets out the following principles to which regard must be had in the exercise of criminal jurisdiction with respect to children:

(a) Children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.

(b) Children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.

(c) It is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.

(d) It is desirable, wherever possible, to allow a child to reside in his or her own home.

(e) The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

(f) It is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties.

(g) It is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparations for their actions.

(h) Subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Part of the rationale behind s 6 reflects common law authorities which recognise youth as a mitigating factor on sentence. For example, the emotional immaturity and a less developed capacity to control impulsive behaviour of a young offender (and a young adult offender) may reduce their moral culpability and the relevance of retribution: *TM v R* [2023] NSWCCA 185; *Campbell v R* [2018] NSWCCA 87 at [30]–[31]; *KT v R* [2008] NSWCCA 51 at [22]ff; see **[10-440] Youth**.

Where these principles conflict with the general purposes of sentencing (expressed in s 3A *Crimes (Sentencing Procedure) Act 1999*), any tension should be resolved through an "intuitive synthesis" based on "a judgment of experience and discernment": *R v AS* [2006] NSWCCA 309 at [25]–[26].

A failure to refer to the section or its terms in the sentencing remarks does not of itself constitute error: *R v MHH* [2001] NSWCCA 161; *R v AD* [2005] NSWCCA 208; *SS v R* [2009] NSWCCA 114 at [64]. It is preferable the statement of principles is referred to in sentencing remarks: *SS v R* at [64]; *SBF v R* [2009] NSWCCA 231 at [141]; *SJ v R* [2011] NSWCCA 160 at [31]. However, it should not be readily assumed that well-known sentencing principles have been overlooked simply because no specific reference has been made to them: *R v AN* [2005] NSWCCA 239; *R v Sanoussi* [2005] NSWCCA 323. But a failure to refer to s 6 might also indicate that a proper consideration has not been given to the principles which apply: *DB v The Queen* [2007] NSWCCA 27 .

Due regard must be paid to ss 6(c) and (d) which are aimed at allowing a child's education to continue without interruption and the desirability of a child residing in their own home: *R v JDB* [2005] NSWCCA 102.

Generally, the relevance of the principles in s 6 to each individual case depends on the seriousness of the offence and the offender's age and circumstances: *SBF v R* at [142].

Further, applying s 6 may not address all matters relevant to an offender's youth. For example, in *TM v R* [2023] NSWCCA 185, it was held the sentencing judge erred in assessing the offender's moral culpability for aggravated robbery causing grievous bodily harm as high, when the remarks on sentence did not reveal whether the offender's youth was considered. While the judge referred to the offender's age (15 years 3 months) and s 6, none of the s 6 principles "directly address the concept of moral culpability": at [57].

[15-020] Hearings

The protective purposes of the Act are reflected in those provisions applying to the conduct of hearings. Section 10(1) excludes the general public from criminal proceedings to which children are a party, subject to specified exceptions. See also "Children in criminal proceedings" in **Closed courts** at [1-358] in the Criminal Trial Courts Bench Book.

Section 15A prohibits publishing or broadcasting the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings subject to exceptions set out in ss 15B–15F.

Section 12(1) provides that a court hearing proceedings against a child must take such measures as are reasonably practicable to ensure the child understands the proceedings. The court is required to give the child the fullest opportunity practicable to be heard and to participate in the proceedings: s 12(3).

Recording a conviction

Section 14 restricts the circumstances in which a conviction can be recorded so as to, as far as possible, avoid stigmatising the child. Section 14(1) provides that a court shall not record a conviction against a child under the age of 16 years and has a discretion to record a conviction against a child who is of or above 16 years of age.

Section 14(1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily: s 14(2). In *R v JP* [2014] NSWSC 698 at [163], the court recorded a conviction for manslaughter notwithstanding that the offender was 15 years old at the time of the offence and 18 at sentence.

A finding of guilt by the Children's Court is taken to be a conviction for the purposes of any provision of the "road transport legislation" (defined in s 6 *Road Transport Act 2013*): s 33(6).

Admissibility of evidence of prior offences

Offences for which a conviction is recorded are not admissible as prior convictions in subsequent proceedings, including proceedings as an adult, unless the requirements of s 15 are met. This does not apply to criminal proceedings in the Children's Court: s 15(2).

Section 15(1) limits the admission of evidence of prior offences, as to guilt or penalty imposed, in subsequent criminal proceedings if:

(a) a conviction was not recorded against the person, and

(b) the person has not, within the period of two years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.

In *R v Tapueluelu* [2006] NSWCCA 113, Simpson J (Grove and Howie JJ agreeing) considered the purpose of s 15 observing, at [30], that the only logical way to read it was as:

> intended to protect a person who has remained crime free for a period of two years from suffering the admission of evidence of offences committed outside of that period, but once it is established that the crime-free period has not existed, then evidence of any other offences, whenever committed, … become[s] admissible, or at least they are not subject to the prohibition otherwise contained in s 15.

In *Siddiqi v R* [2015] NSWCCA 169, a 19-year-old offender was sentenced for a drug offence. He had been before the Children's Court seven years prior, where three offences were found proven but no convictions were recorded. The sentencing judge contravened s 15(1) by considering those prior offences and concluding they did not entitle the offender to much leniency: at [60], [63].

However, evidence of prior offences may be admissible when tendered for a purpose other than establishing guilt or the penalty imposed. For example, in *Dungay v R* [2020] NSWCCA 209, evidence of the offender's criminal history as a child, which would have otherwise been excluded by s 15(1), was tendered to demonstrate his disadvantaged childhood but the court concluded the sentencing judge erred by failing to limit the circumstances in which his Children's Court matters were taken into account, by treating them as a "record" of offences: at [88].

Section 15(3) prohibits the admission into evidence in any subsequent criminal proceedings the fact a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* in respect of an alleged offence committed when the person was a child. Any record of a warning given under s 17 *Young Offenders Act 1997* is to be destroyed as soon as reasonably practicable after the person reaches 21 years: s 17(3).

[15-040] Pt 2 Div 4 Penalties

This Division deals with the disposition of criminal proceedings against children in the higher courts. While serious children's indictable offences must be dealt with at law (s 17), there is a discretion to deal with other indictable offences either at law or according to the more lenient provisions of Pt 3 Div 4 of the Act.

Part 2 Div 4 of the Act encompasses ss 16–21, inclusive. It applies to a person described in s 16 as one:

(a) who has pleaded guilty to an indictable offence in, or has been found guilty or convicted of an indictable offence by, a court other than the Children's Court,

(b) who was a child when the offence was committed, and

(c) who was under the age of 21 years when charged before the court with the offence.

Other indictable offences

Where a child has been committed by the Children's Court in relation to "other indictable offences", the Act gives a court a discretion to deal with them either:

- according to law: s 18(1)(a), or
- in accordance with Pt 3 Div 4: s 18(1)(b).

While s 18 does not expressly impose an obligation to consider and determine which course to adopt, it may be inferred that a court is obliged to make a determination as to which way to proceed: *BT v R* [2012] NSWCCA 276 at [18]. In *BT v R*, the applicant argued the proceedings had miscarried because the judge had failed to explicitly consider the alternatives under s 18: at [19]. The court acknowledged that a failure to exercise the discretion under s 18 could constitute an error but, in the circumstances of that case, held that the provision was clearly in the judge's mind although, given the nature of the offence, there was no choice other than to proceed according to law: at [21].

Criteria for exercise of discretion

In exercising this discretion a court must have regard to the following matters set out in s 18(1A):

(a) the seriousness of the indictable offence concerned,

(b) the nature of the indictable offence concerned,

(c) the age and maturity of the person at the time of the offence and at the time of sentencing,

(d) the seriousness, nature and number of any prior offences committed by the person,

(e) such other matters as the court considers relevant.

Section 18(2) provides that a court, in dealing with a person in accordance with Pt 3 Div 4, has and may exercise the functions of the Children's Court as if:

(a) the court was the Children's Court, and

(b) the offence was an offence to which that Div applies.

When such a court makes an order of a good behaviour bond or probation it may vary the order in the same way as the Children's Court under s 40.

In the Crown appeal of *R v Bendt* [2003] NSWCCA 78 the respondent was aged 17 years and nine months. While technically a child under the Act, the Court of Criminal Appeal held that the objective criminality of the respondent's offence and his subjective circumstances did not justify the departure from the obvious course of dealing with him according to law: per Meagher JA at [16]–[18].

Care needs to be taken in the exercise of the discretion to ensure irrelevant considerations are not taken into account. In *R v MSS* [2005] NSWCCA 227 the sentencing judge's sentencing discretion miscarried when he took into account the issue of parity of sentencing regimes between the applicant and a co-offender when deciding to deal with the applicant at law. Howie J, (Spigelman CJ and Hunt AJA agreeing), said at [18]:

> Although s 18(1A)(e) requires the court to take into account "any other matters as the court considers relevant" it was, in my view, not a relevant matter that the applicant's

> co-offender was to be sentenced at law because the offence committed by him was a "serious children's indictable offence" and, therefore, the judge had no discretion as to the manner in which he was to be sentenced. The applicant was entitled to have the judge apply his mind to the question of whether the applicant should be dealt with at law or not without having regard to the situation of the co-offender in light particularly of the marked difference between the offences for which they were to be sentenced.

In *PD v R* [2012] NSWCCA 242, the Court of Criminal Appeal held that when addressing the exercise of the discretion conferred by s 18(1) in relation to a particular offence or offences, it was open to a judge to consider the entirety of the juvenile offender's criminal conduct. This is particularly so when one of the offences is a "serious children's indictable offence" which must be dealt with according to law, since determining to deal with the other offences under Pt 3, Div 4 would involve the simultaneous application of two different sentencing regimes: at [62].

[15-070] A court may direct imprisonment to be served as a juvenile offender

Last reviewed: August 2023

If a court sentences a person under 21 years of age to imprisonment for an indictable offence the court may direct that the whole or any part of the term of sentence be served as a juvenile offender: s 19(1). However, the court may not make such a direction in relation to a person who is 18 years or over and who is currently serving, or who has previously served, the whole or any part of a term of imprisonment in a correctional centre, unless a finding of special circumstances is made: s 19(1A). A finding of special circumstances may only be made on one or more of the grounds set out in s 19(4). These are described below.

In certain circumstances such a person may subsequently be transferred to a juvenile correctional centre pursuant to an order under s 28 *Children (Detention Centres) Act 1987*.

A person is not eligible to serve a sentence of imprisonment as a juvenile offender after the person has attained the age of 21 years (s 19(2)) unless:

(a) where a non-parole period has been set, the non-parole period will end within six months after the person has attained that age; or

(b) where a non-parole period has not been set, the term of the sentence of imprisonment will end within six months after the person has attained that age: *R v WM* [2004] NSWCCA 53.

Section 19(3) provides that a person who is sentenced to imprisonment in respect of a serious children's indictable offence is not eligible to serve a sentence of imprisonment as a juvenile offender after attaining the age of 18 years unless:

(a) the sentencing court is satisfied that there are special circumstances justifying detention of the person as a juvenile offender after that age, or

(b) in the case of a sentence for which a non-parole period has been set, the non-parole period will end within six months after the person has attained that age, or

(c) in the case of a sentence for which a non-parole period has not been set, the term of the sentence of imprisonment will end within six months after the person has attained that age.

In determining whether there are special circumstances, the court may rely on one or more of the following grounds listed in s 19(4) and not otherwise:

(a) that the person is vulnerable on account of illness or disability (within the meaning of the *Anti-Discrimination Act 1977*),

(b) that the only available educational, vocational training or therapeutic programs that are suitable to the person's needs are those available in detention centres, or

(c) that, if the person were committed to a correctional centre, there would be an unacceptable risk of the person suffering physical or psychological harm, whether due to the nature of the person's offence, any assistance given by the person in the prosecution of other persons or otherwise.

Special circumstances may not be found solely on the ground of an offender's youth or because the non-parole period of their sentence will expire while they are still eligible to serve the sentence as a juvenile: s 19(4A). If a finding of special circumstances is made, reasons must be recorded: s 19(4B).

A person who is subject to an order under this section that ceases or ceased to apply upon them attaining the age of 18 years may apply to the sentencing court for a further order under this section: s 19(5).

The statutory scheme was discussed at length in *JM v R* [2012] NSWCCA 83. The court (Whealy JA, Hoeben J agreeing, Simpson J dissenting) held that it is contrary to principle to select a shorter non-parole period for the purpose of avoiding the operation of the statute to ensure that an offender remains in a juvenile detention centre: *JM v R* at [22], [156]. This is so whether the offender's conditions of custody are taken into account as one factor or whether it is the sole reason for adjusting the non-parole period: *JM v R* at [22], citing *R v Zamagias* [2002] NSWCCA 17 and *TG v R* [2010] NSWCCA 28 at [24]–[25]. Simpson J (in dissent at [131]) held that some limited weight could be attributed to the factor, but acknowledged that a sentence cannot be framed solely for the purpose of avoiding a period in adult custody.

In *R v YS* [2014] NSWCCA 226, the Crown argued that specific error could be inferred from the fact the sentencing judge fixed a non-parole period to expire two months prior to the offender's 21st birthday. The court held there was no error in the structure of the sentence. The judge had taken the correct approach of determining the appropriate sentence before turning to consider the options as to how the sentence was to be served: at [86]; see also *TG v R* [2010] NSWCCA 28 at [24]–[25].

The judge's findings relating to s 19(4)(a) were challenged in *JM*. It was not open to the judge to make a finding under s 19(4)(a) that the applicant was vulnerable on account of illness or disability to support the finding of special circumstances under s 19(3): at [18], [154]. The diagnosis of attention deficit disorder did not fit the definition of disability in the *Anti-Discrimination Act 1977*. Nor was there evidence of vulnerability on account of the applicant's attention deficit disorder: at [18].

There have been cases where the Crown has (in the court's view) erroneously agreed to give an offender the advantage of an order under s 19(3): *R v MD* [2005] NSWCCA 342 at [55]–[56].

Nothing in s 19 prevents a person subject to a limiting term under the *Mental Health (Forensic Provisions) Act 1990* (now *Mental Health and Cognitive Impairment*

Forensic Provisions Act 2020) from serving their term in a juvenile detention centre: *AN (No 2) v R* (2006) 66 NSWLR 523 at [73]. Section 19 only applies to sentences of imprisonment.

Remission of persons to the Children's Court for punishment

A court may remit a person dealt with under this Division to the Children's Court, in respect of any indictable offence other than a serious children's indictable offence, so as to enable the Children's Court to impose a penalty on the person with respect to the offence, but only in respect of a person who is under 21 years old: s 20. While there is no right of appeal against an order for remittal under s 20, any right of appeal a person may have against any finding of guilt or conviction pursuant to which an order of remittal under that section has been made is not affected: s 21.

Where a District Court has erroneously failed to deal with a person under the *Children (Criminal Proceedings) Act 1987*, the person should be remitted to that court for re-sentencing. It would be inappropriate for a court of appeal to act as a primary sentencing court under such circumstances: *DPN v R* [2006] NSWCCA 301.

Subject to some qualifications, the Supreme Court and District Courts may direct that any sentence of imprisonment, or part thereof, be served in a detention centre: s 19.

[15-080] Background reports

An important mandatory requirement when a court is considering the imposition of a control order under s 33(1), or a term of imprisonment on a person who was a child when the offence was committed and who was under the age of 21 years when charged before the court with the offence, is the preparation of a background or juvenile justice report: s 25. A failure to comply with s 25 invalidates the sentence: *CTM v R* [2007] NSWCCA 131 at [153]; *CO v DPP* [2020] NSWSC 1123 at [28]–[31]. A background report is not a sentence assessment report by another name. It is a report that deals with such matters "as are relevant to the circumstances surrounding the commission of the offence" which do not alter with time. Section 25 confers an implied power on any court sentencing a juvenile to order the preparation of a further background report: *MG v R* [2007] NSWCCA 260 at [15].

Clause 6 *Children (Criminal Proceedings) Regulation 2016* provides that, for the purposes of s 25(2)(a) of the Act, a background report must be in such form as the Attorney General approves and must deal with such of the following matters, as are relevant to the circumstances surrounding the commission of the offence concerned:

(a) the child's family background,

(b) the child's employment,

(c) the child's education,

(d) the child's friends and associates,

(e) the nature and extent of the child's participation in the life of the community,

(f) the child's disabilities (if any),

(g) the child's antecedents,

(h) any other matters that the Children's Court may require, and

(i) any other matters that the prosecutor considers appropriate to include in the report.

When addressing the child's antecedents, a report must only deal with offences for which the person has pleaded guilty, been found guilty or has been convicted: *MG v R* at [14]. Any other offences will be outside of the scope of the Act and Regulation.

Dealing with matters that may change over time

Matters that are not in existence at the time of the offence must not be taken into account in the preparation of a background report. While cl 6 *Children (Criminal Proceedings) Regulation 2016* stipulates that a background report must deal with matters that may change over time, such as the person's family background, employment, education, and friends and associates, if the regulation required the report to deal with matters that were not in existence at the time of the commission of the offence it would be beyond power. Section 32 *Interpretation Act 1987* requires it to be read down so as not to exceed the regulation-making power: *Roos v DPP* (1994) 34 NSWLR 254 at 260.

In *R v CVH* [2003] NSWCCA 237 the court, in dealing with an appeal where a pre-sentence report only was prepared in relation to a juvenile offender convicted of manslaughter, noted that an examination of the report showed that there had not been strict compliance with what are now cl 6(d)–(f) in the 2016 regulation. The report was not prepared by a juvenile justice officer but by the then Probation and Parole Service.

Although many of the aspects required by the regulation were complied with, there was not adequate coverage of the matters required by the mandatory provisions of the Act and therefore there was error in failing to comply with s 25: at [17].

Disputed reports

In *R v MD* [2005] NSWCCA 342, the Crown submitted that the sentencing exercise miscarried because the reports prepared by the Department of Juvenile Justice pursuant to s 25 and tendered in the proceedings contained errors. The court said at [77]:

> It is important to appreciate that it was the Crown that tendered the reports and at the sentencing hearing the Crown did not indicate that there was to be any dispute with regard to their contents and made no submission that they should not be given full weight.

The court drew a parallel with *R v Elfar* [2003] NSWCCA 358 and said at [79]:

> In our opinion, the same approach should be taken in the present case. It is important to appreciate that s 25 of the *Children (Criminal Proceedings) Act 1987* (NSW) makes it mandatory that a background report covering the circumstances of the commission of the offence be tendered (s 25(2)(a)). It is also mandatory that the report address a number of subjective matters (reg 6). Accordingly, without the tender of the report in evidence sentencing error would occur. It could hardly be the case that a report which was mandatory could not be relied upon in the sentencing process. Of course, if errors are identified, this may suggest that the report should carry little weight.

[15-090] Sentencing principles applicable to children dealt with at law

The principle of giving special consideration to an offender's youth has been long accepted. In *R v C* (unrep, 12/10/89, NSWCCA), Gleeson CJ accepted a submission that "in sentencing young people … the consideration of general deterrence is not as important as it would be in the case of sentencing an adult and considerations of rehabilitation should always be regarded as very important indeed."

When a child is dealt with at law, rather than under the more lenient provisions of Pt 3 Div 4 *Children (Criminal Proceedings) Act*, the special principles applicable to children under s 6 of the Act still have to be taken into account: *R v SDM* (2001) 51 NSWLR 530. However their application depends upon the nature of the offence charged as well as upon the age, circumstances and conduct of the offender: *R v Voss* [2003] NSWCCA 182; *R v AEM* [2002] NSWCCA 58.

While it is accepted that considerations of punishment and general deterrence should be regarded as subordinate to affording the opportunity and encouragement for rehabilitation, the significance of this factor diminishes as an offender approaches adulthood: *R v Hearne* [2001] NSWCCA 37. Notwithstanding the specific provisions of the Act, relative youth remains a factor to be taken into account in sentencing: *MW v R* [2010] NSWCCA 324.

In *R v Pham* (unrep, 17/7/91, NSWCCA), Lee CJ at CL, with whom Gleeson CJ and Hunt J agreed, said in the context of one offender who was 17 and another who was 19, at 135:

> It is true that courts must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime and the fact that it is a crime of violence frequently committed by persons even in their teens must be kept steadfastly in mind otherwise the protective aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes, particularly crimes involving physical violence to persons in their own homes.

The principle in *R v Zamagias* [2002] NSWCCA 17 applies when a juvenile offender is being sentenced at law. A judge must determine the sentence and then consider whether it is necessary and appropriate to make an order under s 19: *TG v R* [2010] NSWCCA 28 at [25].

Applicability of guideline judgments to children

In *R v SDM* (2001) 51 NSWLR 530, it was held that the guideline judgment in *R v Henry* (1999) 46 NSWLR 346 applied to juvenile offenders dealt with according to the law. It was a "sounding board" and could be taken into account (making allowances for the age of the child) along with the principles of s 6 *Children (Criminal Proceedings) Act 1987* and general sentencing principles: at [19]–[20]. *R v SDM* has been applied in *JT v R* [2011] NSWCCA 128 at [38] and *R v Mawson* [2004] NSWSC 561 at [52].

Parity

See **Parity** at **[10-800]**ff and "Juvenile and adult co-offenders" at **[10-820]**.

[15-100] Pt 3 — Criminal proceedings in the Children's Court

Part 3 *Children (Criminal Proceedings) Act 1987* applies to the disposition of criminal proceedings against children in the Children's Court. It also applies in the higher courts when the discretion under s 18 is exercised to deal with a child under this more lenient regime.

Section 27 stipulates the basis on which the *Criminal Procedure Act 1986* and other Acts relating to the functions of the Local Courts or magistrates, or to criminal proceedings before them, apply to the Children's Court.

Jurisdiction of the Children's Court

Section 28(1) provides that the Children's Court has jurisdiction to hear and determine:

(a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and

(b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence),

if the offence is alleged to have been committed by a person:

(c) who was a child when the offence was committed, and

(d) who was under the age of 21 years when charged before the Children's Court with the offence.

Section 28(2) provides that the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence that is alleged to have been committed by a person unless:

(a) the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court, or

(b) the person was not, when the offence was allegedly committed, old enough to obtain a licence or permit under the *Road Transport Act 2013* or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.

Section 29 sets out the circumstances under which the jurisdiction of the Children's Court is exercised in respect of two or more co-defendants who are not all children.

Hearings

There is a rebuttable presumption arising from s 31(1) that charges against children in respect of all but serious children's offences will be dealt with in the Children's Court under Pt 3 Div 4. However, nothing in the Act either expressly or impliedly limits the jurisdiction of the District Court "in respect of all indictable offences": *PM v The Queen* (2007) 232 CLR 370 at [20], [95]. The provisions of s 31 apply only to the Children's Court, and therefore do not affect the jurisdiction of any other court: *PM v The Queen* at [25]. When considering whether proceedings should be dealt with in the Children's Court or at law the court should have regard to the seriousness of the offence and to the age and maturity of the offender: *JIW v DPP (NSW)* [2005] NSWSC 760 at [55]–[57].

The High Court in *PM v The Queen* held that the Act does not displace the broad powers of the Director of Public Prosecutions to file an ex officio indictment — preserved by s 8(2) *Criminal Procedure Act 1986* — against a child in the absence of committal proceedings in the Children's Court: *PM v The Queen* at [42], [92]–[93]. Whilst the issue of a Court Attendance Notice is the recommended mode of commencing proceedings under the Act, it is neither mandatory nor exclusive: *PM v The Queen* per Kirby J at [88].

In *JIW v DPP* (NSW) [2005] NSWSC 760, Kirby J considered whether the list of issues in s 18 of the Act should inform the exercise of the magistrate's discretion under s 31(3). While he concluded at [53] that the catalogue of issues identified in s 18(1A)

provide some guidance in respect to the construction of s 31(3)(b)(ii) the extent to which subjects identified in s 18(1A) may be regarded as material will depend upon the circumstances of the particular case.

While a failure of the court to consider a person's prior criminal record under s 18(1A) would amount to an error of law, a failure to consider that issue in the context of s 31 may or may not amount to an error of law depending upon the nature of the offence. Previous good character will not protect an offender from a custodial sentence if other factors are present: at [54].

[15-110] Penalties

Section 32 provides that the penalties in Pt 3 Div 4 of the Act apply to any proceedings that are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under s 20.

In addition, a higher court, when dealing with a child committed for a serious indictable offence, other than a serious children's indictable offence, has a discretion to apply this more lenient sentencing regime rather than to deal with the child according to law: s 18(1A).

Section 33(1) provides that if the Children's Court finds a person guilty of an offence to which Div 4 applies, it shall make one of the following orders:

(a) either

(i) dismissing the charge (in which case the court may also administer a caution),

(ii) discharging the person on the condition they enter into a good behaviour bond for a period of time, not exceeding 2 years;

(b) directing the person enter into a good behaviour bond for a specified period, not exceeding 2 years;

(c) imposing a fine, not exceeding

(i) the maximum fine prescribed in respect of the offence or

(ii) 10 penalty units, whichever is the lesser;

(c1) releasing the person on condition they comply with an outcome plan determined at a conference held under the *Young Offenders Act 1997*;

(c2) adjourning the proceedings to a specified date (not later than 12 months after finding the person guilty) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*)

(i) assessing the person's capacity and prospects for rehabilitation, or

(ii) allowing them to demonstrate that rehabilitation has taken place, or

(iii) for any other purpose the Children's Court considers appropriate in the circumstances;

(d) to do both things referred to in (b) and (c) above;

(e) releasing the person on probation, on such conditions as it may determine, for such period of time, not exceeding 2 years, as it thinks fit;

(e1) do both things referred to in (c) and (e) above;

(f) subject to the provisions of the *Children (Community Service Orders) Act 1987* (see in particular s 5), order the person to perform community service work;

(f1) do both things referred to in (e) and (f) above; or

(g) subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999*, committing the person for a period of time (not exceeding 2 years)

(i) in the case of a person who is under 21 years of age, to the control of the Minister administering the *Children (Detention Centres) Act 1987*, or

(ii) in the case of a person at or above 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

The execution of an order under s 33(1)(g) may be suspended and the person released if they are not subject to any other order or to any sentence of imprisonment: s 33(1B).

Dismissal

A court may make an order dismissing a charge, with or without administering a caution. Compensation may be ordered under s 24.

The court may also administer a caution under s 31(1) *Young Offenders Act 1997* if the offence is one for which a caution may be given and the child admits the offence. When administering a caution under s 31(1), the court must dismiss the proceedings for the offence in respect of which the caution is given: s 31(1A). A court that gives a caution under s 31(1) must notify, in writing, the Area Commander of the local police area in which the offence occurred of its decision to give the caution and must include the reasons why the caution was given: s 31(4). Section 31(5) provides that a court may not give a caution to a child in relation to an offence if the child has been dealt with by caution on three or more occasions:

(a) whether by or at the request of a police officer or specialist youth officer under s 29 or by a court under this section, and

(b) whether for offences of the same or of a different kind.

When administering a caution, the court may allow any victim to prepare a written statement describing the harm occasioned to the victim by the offence, and where appropriate, may permit all or part of the statement to be read to the child: s 31(1B).

Good behaviour bonds

Section 33(1A) provides that a good behaviour bond imposed under s 33:

(a) must contain a condition to the effect that the person to whom the bond relates (the "person under bond") will appear before the court if called on to do so at any time during the term of the bond, and

(b) must contain a condition to the effect that, during the term of the bond, the person under bond will be of good behaviour, and

(c) may contain such other conditions as are specified in the order by which the bond is imposed, other than conditions requiring the person under bond:

(i) to perform community service work, or

(ii) to make any payment, whether in the nature of a fine, compensation or otherwise.

In *Minister for Community Services v Children's Court of NSW* (2005) 62 NSWLR 419, Hoeben J considered a challenge to the power of the Children's Court to impose a bond condition. The magistrate included in a good behaviour bond a condition that the child in the proceedings "reside as directed by the Department of Community Services — not with the mother unless child and mother consent." It was held that s 33 of the Act and cl 7 (of the then *Children (Criminal Proceedings) Regulation 2005*) empowered

the magistrate to include such a condition. There was no requirement when imposing a good behaviour bond under s 33 for the consent of any person to be obtained before stipulating a condition of the kind envisaged by cl 7. The obligation on the child to comply with the condition would only crystallise if the Department gave a direction.

Clause 7 *Children (Criminal Proceedings) Regulation 2016* sets out the following conditions that may be imposed in relation to an order made in respect of a child under s 33(1) of the Act:

(a) requiring the child to attend school regularly,

(b) relating to the child's employment,

(c) aimed at preventing the child from committing further offences,

(d) relating to the child's place of residence,

(e) requiring the child to undergo counselling or medical treatment,

(f) limiting or prohibiting the child from associating with specified persons,

(g) limiting or prohibiting the child from frequenting specified premises,

(h) requiring the child to comply with the directions of a specified person in relation to any matter referred to in paragraphs (a)–(g), and

(i) relating to such other matters as the court considers appropriate in relation to the child.

Variation of good behaviour bonds or probation and enforcement of conditions

Section 40(1) provides that a good behaviour bond or a probation order may be varied by the Children's Court on application made by or on behalf of the person to whom the order relates or by an authorised officer as follows:

(a) it may terminate the order,

(b) it may reduce the period of the order,

(c) it may vary any condition of the order in any respect, including (where the person has entered into the good behaviour bond, or been released on probation, on condition that the person will remain in the care of some other person named in the order) the substitution of the name of another person for that of the person named in the order.

Section 40(1A) provides that, if the order was made by a court exercising the functions of the Children's Court under s 18(2), the Children's Court may (but is not obliged to) refer the application to the court concerned to be dealt with by that court. Section 40(2) provides that the Children's Court may not extend the period of an order referred to in s 33(1)(b) or (e).

Section 41 provides that any person brought before a court who has failed to comply with the condition of a good behaviour bond or a probation order may be dealt with in any manner the person could have been dealt with in relation to the offence for which the good behaviour bond or probation order was imposed.

Fine

A court may, under s 33(1)(c), make an order imposing a fine not exceeding:

- the maximum fine prescribed by law in respect of the offence, or
- 10 penalty units,

whichever is the lesser.

Before making such an order, the Children's Court is to consider the age of the child, and, where information is available, the child's ability to pay and the potential impact of the fine on the rehabilitation of the child: s 33(1AA).

A fine may be imposed with a good behaviour bond or with a probationary order: ss 33(1)(d), (e1).

Adjournment

A court may make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*):

- for the purpose of assessing the person's capacity and prospects for rehabilitation,
- for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
- for any other purpose the Children's Court considers appropriate in the circumstances: s 33(1)(c2).

Probation

A court may make an order releasing the person on probation, on such conditions as it may determine, for a period of time, not exceeding two years. Clause 7 *Children (Criminal Proceedings) Regulation 2016* sets out the conditions that may be imposed in relation to such an order.

Community service orders

A community service order was conceived as an alternative to imprisonment that was by its nature rehabilitative, giving a young person the opportunity to make amends to the community for the offending conduct. The relevant sections of the *Children (Community Service Orders) Act* governing the making of community service orders are:

- s 5: Making of children's community service orders
- s 6: Explanation of nature and effect of proposed children's community service orders
- s 9: Children's community service orders not to be made by court unless work is available
- s 10: Children's community service orders may run concurrently
- s 11: Conditions that may be attached to children's community service order
- s 12: Preparation and service of copies of children's community service order
- s 13: Number of hours of community service work
- s 14: Place etc and time for presentation for work.

Control orders

Before imposing a control order under s 33(1), a background or juvenile justice report must be obtained: s 25. A failure to do so renders the sentence invalid: *CTM v R* [2007] NSWCCA 131 at [153]–[154].

The principle of parsimony is embodied in s 33(2), which provides that the Children's Court shall not impose a control order unless satisfied it would be wholly inappropriate to deal with the person by imposing any other available penalty under s 33(1)(a)–(f).

A control order made under s 33(1)(g) cannot be imposed unless the penalty provided by law in respect of the offence is imprisonment: s 34(1). Such an order cannot be imposed for a specified period unless the maximum penalty provided by law in respect of the offence is imprisonment for a period no less than that so specified: s 34(3).

In deciding whether to impose a control order the Children's Court shall not have regard to the question of whether the child is a child in need of care and protection under the *Children and Young Persons (Care and Protection) Act 1998*.

Where the Children's Court makes an order under s 33(1)(g) committing a person to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*, the period of control is taken to be a sentence of imprisonment for the purposes of that Act: s 33(1C).

Limits on the imposition of control orders

Section 33A limits the imposition of control orders. Section 33A(4) precludes the Children's Court from imposing a new control order or from giving a direction if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than three years, taking into account any other control order relating to the person.

Sections 33AA(2) and (3) provide the following limitations on the imposition of concurrent control orders:

- if a control order is made in relation to an offence involving an assault or an offence against the person, on a juvenile justice officer, committed by a person while the person was a person subject to control, and the person is subject to an existing control order at the time the new control order is made,
- the period for which the person is required to be detained under the new control order commences when the period for which the person is required to be detained under an existing control order, or if there is more than one, the last of them, expires, unless the Children's Court directs that the period is to commence sooner.

There must be special circumstances justifying such a direction: s 33AA(4).

The Children's Court must not make a new control order, or give such a direction, if the order or direction would have the effect of requiring a person to be detained for a continuous period of more than 3 years (taking into account any other control orders relating to them): s 33AA(5).

Other orders

The Children's Court has power under s 33(5) to:

(a) impose any disqualification under the road transport legislation on a person whom it has found guilty of an offence,

(b) order the forfeiture of any property that relates to the commission of an offence of which it has found a person guilty,

(c) make an order for restitution of property under s 43 *Criminal Procedure Act 1986*, or

(d) make a community clean up order in respect of a fine imposed for an offence under the *Graffiti Control Act 2008*.

For the purposes of any provision of the road transport legislation (see definition in s 6 *Road Transport Act 2013*) that confers on the court a power in respect of a person who has been convicted of an offence, a finding of guilt by the Children's Court is taken to be a conviction for that offence: s 33(6).

Guilty plea

When imposing a penalty under s 33 for which the person has pleaded guilty, the Children's Court must take into account the plea of guilty and may, accordingly, reduce any order that it would otherwise have made: s 33B(1).

Application of the Crimes (Sentencing Procedure) Act 1999

Subject to the Act and to s 27(4A) *Crimes (Sentencing Procedure) Act 1999*, Pts 3 and 4 *Crimes (Sentencing Procedure) Act 1999* apply to the Children's Court in the same way as they apply to a Local Court: s 33C. They apply as if a reference in those provisions to the sentencing of an offender to imprisonment were a reference to the making of a control order: s 33C(1)(a). A reference in those provisions to:

- a conviction is a reference to a finding of guilt: s 33C(1)(b)
- an escape from lawful custody committed by the offender while an inmate of a correctional centre includes a reference to an escape from lawful custody committed by the offender while a detainee of a detention centre: s 33C(1)(c)
- a good behaviour bond, community correction order or conditional release order is a reference to a good behaviour bond imposed under s 33: s 33C(1)(d).

Part 3 Div 2 *Crimes (Sentencing Procedure) Act 1999* (which relates to victim impact statements) applies to the Children's Court when the offence being dealt with is one of those identified in s 27(4A) of that Act. See **The statutory scheme for victim impact statements** at [12-820]ff.

Power to make non-association or place restriction order

Section 33D empowers a court to make either or both a non-association or a place restriction order not exceeding 12 months when it has made an order under s 33 (except s 33(1)(a)(i), (c1) and (c2)) and it is sentencing a person for an offence punishable by imprisonment for six months or more, whether or not the offence is also punishable by fine.

Restrictions on the imposition of control orders

Section 34 provides:

> (1) An order shall not be made under section 33(1)(f), (f1) or (g) in respect of an offence unless the penalty provided by law in respect of the offence is imprisonment.
>
> (2) (repealed)
>
> (3) An order shall not be made under section 33(1)(g) whereby a person is committed to the control of the Minister administering the *Children (Detention Centres) Act 1987* for a specified period unless the maximum penalty provided by law in respect of the offence is imprisonment for a period no less than that so specified.

Reasons for decision to be given

Section 35 provides that when the Children's Court deals with a person under s 33(1)(g), it shall record:

(a) the reason for which it has dealt with the person under that paragraph, and

(b) the reason for which it considered that it would have been wholly inappropriate to deal with the person under s 33(1)(a)–(f1).

Compensation

If the Children's Court imposes a penalty under s 33(1) it may direct the payment of compensation by the person upon whom the penalty was imposed: s 36(1). In making this determination the Children's Court shall have regard to the person's means and income: s 36(2). The maximum amount of compensation that may be awarded is the amount equivalent to 10 penalty units (in the case of a person who is under the age of 16 years at the time of the order), or 20 penalty units (in any other case): s 36(3).

[15-120] Intervention orders

There are some intervention orders available under the Act: see Diversionary Programs on JIRS. Note that some programs listed are only available for adults and not young offenders.

Referrals for conferences by DPP and courts

The Director of Public Prosecutions or a court may refer a child alleged to have committed an offence for a conference under s 40(1) *Young Offenders Act 1997* if:

(a) the offence is one for which a conference may be held,

(b) the child admits the offence,

(c) in the case of a referral by the Director of Public Prosecutions, the child consents to the holding of the conference, and

(d) the Director or court is of the opinion that a conference should be held under this part.

Section 40(3) *Young Offenders Act* gives the court power to refer a matter at any stage in proceedings, including after a finding that a child is guilty of an offence.

Section 40(5) *Young Offenders Act* provides that, in determining whether to refer a matter for a conference, the Director of Public Prosecutions or the court is to take into account the following matters:

(a) the seriousness of the offence,

(b) the degree of violence involved in the offence,

(c) the harm caused to any victim,

(d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under the Act, and

(e) any other matter the Director or court thinks appropriate in the circumstances.

Youth conduct orders

The youth conduct orders scheme, set out in Pt 4A of the Act, operated between 1 July 2009 and 1 September 2014: s 48Y; *Children's (Criminal Procedure) Regulation 2011*, cl 30A (rep).

[15-130] The Criminal Records Act 1991 and the Children (Criminal Proceedings) Act 1987

The object of the *Criminal Records Act 1991* (CRA), pursuant to s 3(1), is:

> to implement a scheme to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history.

The CRA uses the word "conviction" as a term of art. It is not easy to discern how the Act applies to some of the orders made under s 33 *Children (Criminal Proceedings) Act 1987* (CCPA). In order to achieve the objectives of the CRA, Parliament has cast the net wide by characterising each order under s 33 as a "conviction" except for the express exception in s 5(c) CRA of a dismissal without caution under s 33(1)(a)(i) CCPA.

Section 4(1) CRA provides that conviction "means a conviction, whether summary or on indictment, for an offence and includes a finding or order which, under section 5, is treated as a conviction for the purposes of this Act". Section 5 provides:

> The following *findings or orders of a court are treated as convictions for the purposes of this Act*:
>
> …
>
> (c) … *an order under section 33* of the *Children (Criminal Proceedings) Act 1987*, other than an order dismissing a charge. [Emphasis added.]

Convictions which are not capable of being spent

Section 7(1) CRA provides that some convictions are not capable of becoming spent. They include convictions for sexual offences (see definition under s 7(4)) and certain convictions prescribed by the regulations (see cl 4 *Criminal Records Regulation 2019*). Offences for which a prison sentence of more than 6 months is imposed are not capable of becoming spent: s 7(1)(a). However, "prison sentence" does not include "the detaining of a person under a control order": s 7(4).

Interaction between ss 8 and 10 Criminal Records Act and s 14

It is important to note the relationship between ss 8 and 10 CRA. Section 8 has primacy over s 10 on the basis of s 8(1), which provides: "A conviction is spent on completion of the relevant crime-free period, *except as provided by this section*" [emphasis added].

The pertinent subsections of s 8 provide:

(1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.

(2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made, except as provided by this section.

(3) An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered.

(4) A finding that an offence has been proved, or that a person is guilty of an offence, and:

  (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or

(b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit, or

(c) the making of a conditional release order, without conviction, under section 9 of the *Crimes (Sentencing Procedure) Act 1999*, for a specified term and with 1 or more additional or further conditions imposed under that Act,

is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.

Section 10(1) provides:

The crime-free period in the case of an order of the Children's Court under section 33 of the *Children (Criminal Proceedings) Act 1987* (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:

(a) the person has not been subject to a control order, and

(b) the person has not been convicted of an offence punishable by imprisonment, and

(c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

Given the interaction between ss 8 and 10, the following question emerges: apart from a s 33(1) dismissal without caution (referred to in s 5(c)) which orders imposed under s 33 fall within the terms of s 8 and are not subject to a crime-free period of 3 years in s 10(1)?

Table: Children's Court orders and application of Criminal Records Act

The following table sets out the orders available to the Children's Court under s 33 and attempts to ascertain when that order is spent under the applicable provision of the *Criminal Records Act* (CRA). It is obvious the text of the CRA could be clearer.

Order under s 33 Children (Criminal Proceedings) Act 1987 (CCPA)	**Section of CCPA**	**When conviction is spent under Criminal Records Act 1991 (CRA)**
Dismissal without caution	33(1)(a)(i)	Section 5(c) CRA specifically excludes this order. It defines conviction as "an order under section 33 of the [CCPA], other than an order dismissing a charge".
Dismissal with caution	33(1)(a)(i)	An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered: s 8(3) CRA.
Discharge on condition of entering into good behaviour bond	33(1)(a)(ii)	Spent upon satisfactory completion of the bond period: s 8(4)(a) CRA. Although there is no reference to s 8(4) within the parenthesis in s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period [as set out in s 10], except as provided by this section".
Good behaviour bond	33(1)(b)	This is ambiguous but is arguably caught by s 8(4) CRA on the basis s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4) which requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).

Order under s 33 Children (Criminal Proceedings) Act 1987 (CCPA)	**Section of CCPA**	**When conviction is spent under Criminal Records Act 1991 (CRA)**
Fine	33(1)(c)	This is difficult to discern from the text of the CRA. It may be a long bow to argue that where the Children's Court imposes a fine without proceeding to conviction, the finding of guilt is "spent immediately after the finding is made": s 8(2) CRA. The argument rests on a proposition that s 8(2) can be utilised for orders in addition to s 10 *Crimes (Sentencing Procedure) Act 1999*. The parenthesis in s 10(1) CRA suggests s 8(2) applies to s 33 orders. Note, though s 8(2) may apply even if a fine is only part of the court's order under s 33(1)(d), (e1) CCPA. If the Children's Court proceeds to conviction, the order is not caught by s 8(2) or s 8(3) and the crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Release subject to compliance with outcome plan	33(1)(c1)	It is arguable that a conviction under s 33(1)(c1) CCPA is spent upon satisfactory completion of outcome plan: s 8(4)(a) CRA. The terms within s 8(4)(a) "the making of an order releasing, the offender … on other conditions" appears to include orders under s 33(1)(c1).
Adjournment	33(1)(c2)	Not a final sentencing order (akin to s 11 *Crimes (Sentencing Procedure) Act 1999* with regard to the deferral of sentencing for rehabilitation, participation in an intervention program or other purposes).
Good behaviour bond and fine	33(1)(d)	As to the fine, see above. Otherwise, this is ambiguous. Arguably this order is caught by s 8(4) CRA on the basis that s 33(1)(b) CCPA previously stated "it may make an order releasing the person on condition that the person enters into a good behaviour bond … as it thinks fit". This conforms with the text in s 8(4). It requires the words "or the making of an order releasing" to be read disjunctively. Therefore, the conviction is spent upon satisfactory completion of the bond period: s 8(4)(a).
Probation	33(1)(e)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Probation and fine	33(1)(e1)	As for s 33(1)(e) above.
Community service order	33(1)(f)	The order is not caught by s 8(2), 8(3) or 8(4) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA.
Probation and community service order	33(1)(f1)	Spent upon satisfactory completion of the probation period: s 8(4)(b) CRA. Although there is no reference to s 8(4) within s 10(1) CRA, s 8(1) provides that a "conviction is spent on completion of the relevant crime-free period, except as provided by this section".
Control order	33(1)(g)	The order is not caught by s 8(2), 8(3) or 8(4) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA. Section 7(4) CRA provides that "prison sentence" for the purposes of the exceptions (where convictions cannot be spent) does not include "detaining of a person under a control order".
Suspended control order	33(1B)	The order is not caught by s 8(2), 8(3) CRA. Therefore, crime-free period of 3 years applies: ss 8(1), 10(1) CRA.

Applying ss 8(2) and 8(4) Criminal Records Act

It is to be noted that s 8(2) CRA uses the expression "without proceeding to conviction". When s 8(2) was enacted no consideration was given to s 14 CCPA, which limits the circumstances in which the Children's Court can record a conviction (Second Reading Speech, Criminal Records Bill, NSW, Legislative Assembly, *Debates*, 27 February 1991, p 392). The Second Reading Speech refers only to the difference in the crime-free periods — 3 years for children, 10 years for adults. It does not inform the current issue or remove ambiguity. The history of the amendments to s 8(2) appear to indicate that it was intended to only cover s 10 dismissals under the *Crimes (Sentencing) Procedure Act 1999* (Explanatory note to Sch 2.13 of the Statute Law (Miscellaneous Provisions) Bill (No 2) 2000):

> The proposed amendment updates references to a charge being proved to reflect the language used in section 10 of the *Crimes (Sentencing Procedure) Act 1999*, which refers to a finding of guilt.

Apart from the terms of s 8(2), there is no other textual indication that cases where the Children's Court proceeds to conviction under s 14 are to be distinguished from cases where it does not.

Section 8(4) also applies to orders under s 33(1)(a)(ii), discharging the offender on condition of entering into a good behaviour bond. It would be incongruous that Parliament intended adult offenders to receive the benefit of s 8(4) but not children. This is so notwithstanding the absence of a reference to s 8(4) in the parenthesis in s 10(1) CRA. It must be an oversight because s 8(4)(b) provides a conviction is spent upon satisfactory completion of a probation period — an order only available in the Children's Court.

[The next page is 8001]

Crimes Act 1914 (Cth)

para

Sentencing Commonwealth offenders

[The next page is 8051]

Sentencing Commonwealth offenders

[16-000] Summary of relevant considerations

Last reviewed: August 2024

- Part IB of the *Crimes Act 1914* (Cth) is not a code and NSW sentencing provisions may be picked up and applied. See **[16-005]**.
- In determining a sentence or order in respect of a federal offence, it must be of a severity appropriate in all the circumstances of the offence: s 16A(1). See **[16-010]**.
- Section 16A(2) provides a non-exhaustive list of factors the court must take into account in determining a sentence. The aggravating and mitigating factors contained in s 21A of the *Crimes (Sentencing Procedure) Act 1999* do not apply. See **[16-025]**.
- Penalties that may be imposed on federal offenders include:
  - Discharge without conviction (s 19B)
  - Fine (as provided)
  - Conditional release without passing sentence (s 20(1)(a))
  - Imprisonment, with immediate release, or release after a specified time, on recognizance for sentences of 3 years or less, with or without conditions (ss 19AC, 20(1)(b)). Generally, for sentences over 3 years, a non-parole period is imposed (ss 19AB, 20(1)(b))
  - Sentencing options available under NSW law may include intensive correction orders (s 7 *Crimes (Sentencing Procedure) Act*) and community correction orders (s 8 *Crimes (Sentencing Procedure) Act*).

  See **[16-030]**. Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.
- The court must have regard to the sentences imposed in all States and Territories: *The Queen v Pham* (2015) 256 CLR 550 at [23], [41]. See **[16-035]**.
- When imposing aggregate sentences for a mix of State and Commonwealth offences, separate aggregate sentences must be imposed in relation to the State and Commonwealth offences. See **[16-040]**.
- The totality principle applies when sentencing for Commonwealth offences. See **[16-030]** and **[16-040]**.
- The function of directing release on parole or licence resides with the Attorney-General (Cth), as do decision-making powers such as revoking parole and amending conditions attached to it. See **[16-050]** and **[16-055]**.

See also *Sentencing of federal offenders in Australia: a guide for practitioners*, Commonwealth Director of Public Prosecutions, 7th edn, July 2024.

All references to provisions in this chapter are to the *Crimes Act 1914* (Cth) unless otherwise stated.

[16-005] Introduction

Last reviewed: November 2023

Part IB *Crimes Act 1914* deals with the sentencing, imprisonment and release of federal offenders. It sets out the sentencing factors, procedural requirements and penalty options when sentencing a person for a "federal offence" (defined as an "offence against the law of the Commonwealth": s 16 *Crimes Act 1914* (Cth)). However, Pt IB is not a code. The High Court rejected the "proposition that Pt IB 'covered a field' as an exhaustive statement of the will of the Parliament with respect to sentencing for federal offences": *Putland v The Queen* (2004) 218 CLR 174, at [53] (Gummow and Heydon JJ; see also Gleeson CJ at [12]).

As Part IB is not a code, State or Territory sentencing provisions can be picked up and applied to the sentencing of federal offenders; so long as that law is not inconsistent with a law of the Commonwealth (see s 109 of the *Commonwealth of Australia Constitution Act*; and ss 68(1) and 79(2) of the *Judiciary Act 1903* (Cth)) (endorsed in *Putland v R* at [4] (Gleeson CJ); see also [34] (Gummow and Heydon JJ); *Williams v The King [No 2]* (1934) 50 CLR 551 at 560 per Dixon J; *Ilic v R* [2020] NSWCCA 300 at [24] (McCallum J) and *Chan v R* [2023] NSWCCA 206 at [4] (Kirk JA). For example, a federal offender sentenced in NSW can receive an intensive correction order (ICO) and, where an ICO is considered, NSW sentencing procedures and provisions apply (see **Additional sentencing alternatives: s 20AB** at **[16-030] Penalties that may be imposed** and **[3-600] Intensive Correction Orders**.

The purpose of applying State laws to federal offenders is to ensure that offenders charged with federal offences are dealt with consistently with offenders in the state where they are prosecuted: *Hildebrand v R* [2021] NSWCCA 9 at [10]. Some key instances in which Part IB applies, to the exclusion of NSW sentencing laws, are:

- Consideration of the factors in s 16A(2) when determining what is a sentence commensurate with the criminality. The aggravating and mitigating factors in s 21A of the *Crimes (Sentencing Procedure) Act 1999* do not apply to the sentencing of federal offenders
- Div 4 Pt IB is exhaustive regarding the fixing of a non-parole period and the making of a recognizance release order: *Hili v The Queen* (2010) 242 CLR 520 at [22]
- There is no statutory ratio for the setting of a minimum period of full-time imprisonment or non-parole period (s 44 *Crimes (Sentencing Procedure) Act* does not apply and accordingly there is no need for a finding of "special circumstances" to warrant a ratio outside of that prescribed): *Hili v The Queen* (2010) 242 CLR 520; *Power v The Queen* (1974) 131 CLR 623 and *Deakin v The Queen* [1984] HCA 31
- Div 8 Pt IB *Crimes Act 1914*, containing ss 20BQ, 20BR is exhaustive of the summary disposition for dealing with federal offenders suffering from mental illness or intellectual disability: *Kelly v Saadat-Taleb* (2008) 72 NSWLR 305
- Section 16BA is exhaustive of the procedure for the Court to take into account additional offences when sentencing for an offence. A federal offence cannot be

taken into account or included on a Form 1 list of additional charges filed pursuant to s 32 of the *Crimes (Sentencing Procedure) Act*): *Hildebrand v R* [2021] NSWCCA 9; *Ilic v R* [2020] NSWCCA 300. See also **Taking other offences into account: s 16A(2)(b) and s 16BA** at **[16-025] Section 16A(2) factors**.

[16-010] General sentencing principles applicable

Last reviewed: November 2023

Section 16A provides the approach to be taken when sentencing federal offenders:

> In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

Section 16A(2) provides the factors that must be taken into account on sentence: see **[16-025] Section 16A(2) factors**.

[16-015] Restrictions on sentences of imprisonment and commencement date

Last reviewed: August 2024

Section 17A(1) of the *Crimes Act 1914* (Cth) provides the court can only sentence a federal offender to imprisonment if it is satisfied that "no other sentence is appropriate in all the circumstances of the case". It requires consideration of all other available sentences and all the circumstances of the case rather than focusing exclusively on a comparison between imprisonment and one or more types of sentences not involving imprisonment: *Atanackovic v The Queen* (2015) 45 VR 179; *Woods v R* [2023] NSWCCA 37.

The High Court and other appellate courts have discouraged principles that seek to dictate that a sentence of imprisonment is required for certain classes of cases: *Sabbah v R (Cth)* [2020] NSWCCA 89; *Kovacevic v Mills* [2000] SASC 106 at [43]; *Totaan v R* [2022] NSWCCA 75 at [90]–[100]; *Hili v The Queen* (2010) 242 CLR 520 at [36]–[38], [41]. In *Sabbah v R*, McCallum J commented that such principles do not give proper regard to the requirement of proportionality in s 16A(1), subvert the instinctive synthesis exercise of sentencing and are inconsistent with the principle in s 17A that a sentence of imprisonment should not be imposed unless no other sentence is appropriate in all the circumstance of the case: [4]–[10].

However, since 23 June 2020, for a Commonwealth child sex offence (as defined in s 3), s 20(1)(b)(iii), inserted by the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), provides that immediate release on recognizance is not available unless there are "exceptional circumstances". This suggests a minimum term of imprisonment is required, noting that, pursuant to s 67(1), (2) *Crimes (Sentencing Procedure) Act 1999*, an intensive correction order is also not available when sentencing offenders for certain child sexual offences in the Criminal Code. See also ss 16AAA, 16AAB, 16AAC in relation to mandatory minimum penalties, and exclusions and reductions to those penalties. These provisions are discussed further at **[17-790] Mandatory minimum penalties**.

If a federal offender is sentenced to imprisonment, the laws of the State or Territory relating to its commencement date, including consideration of (and backdating for)

any pre-sentence custody, apply: s 16E. In *Marai v R* [2023] NSWCCA 224, the Court of Criminal Appeal found no error in backdating the commencement of a sentence of imprisonment to account for the federal offender's immigration detention while on bail, noting that the Commonwealth Director of Public Prosecution's (CDPP's) request was a factor in that detention: [95] (Sweeney J, with Kirk JA agreeing); s 16E *Crimes Act 1914* (Cth); s 47(2) *Crimes (Sentencing Procedure) Act* . For further discussion of NSW law, see **Court to take other matters into account (including pre-sentence custody)** at **[12-500]**. A court is restricted from imposing imprisonment for certain minor offences unless satisfied there are exceptional circumstances that warrant it: s 17B(1), (3).

[16-020] Maximum penalties

Last reviewed: November 2023

The maximum penalty must be considered when determining an "appropriate" sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31]; *Elias v The Queen* (2013) 248 CLR 483 at [27]. It is Parliament's expression to sentencing judges (and the community) of the seriousness of the offence: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; see also *R v Taylor* [2022] NSWCCA 256 at [60]. It also enables the sentencing judge to compare the case under consideration with the worst possible case (the latter attracting the maximum penalty): *Markarian v The Queen* at [39].

[16-025] Section 16A(2) factors

Last reviewed: August 2024

Section 16A(2) provides:

> (2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
>
> (a) the nature and circumstances of the offence;
>
> (b) other offences (if any) that are required or permitted to be taken into account;
>
> (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character — that course of conduct;
>
> (d) the personal circumstances of any victim of the offence;
>
> (e) any injury, loss or damage resulting from the offence;
>
> (ea) if an individual who is a victim of the offence has suffered harm as a result of the offence — any victim impact statement for the victim;
>
> (f) the degree to which the person has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (fa) the extent to which the person has failed to comply with:
>
> (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*; or
>
> (ii) any obligation under a law of the Commonwealth; or

(iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;

about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;

(g) if the person has pleaded guilty to the charge in respect of the offence:

(i) that fact; and

(ii) the timing of the plea; and

(iii) the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence;

(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

(j) the deterrent effect that any sentence or order under consideration may have on the person;

(ja) the deterrent effect that any sentence or order under consideration may have on other persons;

(k) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(ma) if the person's standing in the community was used by the person to aid in the commission of the offence — that fact as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates;

(n) the prospect of rehabilitation of the person;

(p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

In determining the appropriate sentence, the Court "must" have regard to the factors in s 16A(2) so far as they are "relevant and known". Section 16A(2) is not an exhaustive list as the factors are "[i]n addition to any other matters".

There is nothing in s 16A(2) which "as a whole suggests any hierarchy of considerations or that varying degrees of importance should be placed upon each of the matters set out in subsection (2)": *Totaan v R* (2022) 108 NSWLR 17 at [83] (Bell CJ).

The plurality (Gaudron, Gummow and Hayne JJ) in *Wong v The Queen* (2001) 207 CLR 584 when considering the s 16A(2) factors stated at [75]:

> Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say "may be" quite wrong because the task of the sentencer is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an "instinctive synthesis". This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which … balances many different and conflicting features.

This does not deny the application of statute and principles governing the exercise of the sentencing discretion that have been developed by the High Court and appellate

courts for particular offences. See for example, *Kovacevic v Mills* [2000] 76 SASC 106 where the court stated that, for the more serious cases of sustained and deliberate fraud, deterrence is very important: [43]. This description of the role of deterrence was approved in *Totaan v R* at [99]. However, the Court stated, s 16A does not fetter the sentencing discretion by creating any hierarchy of matters so as to result in one or more factors being described as "pre-eminent": [99]; see also [81]–[83], [90]–[91].

There is no requirement for a sentencing judge to refer to every factor under s 16A(2). The Court of Criminal Appeal in *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 237–238 stated s 16A:

> only requires the sentencing judge to take those matters into account; it does not require judges always to refer to each of them when explaining the sentence imposed. Indeed, the act of sentencing is to a large extent incapable of being fitted into such a straightjacket, and in most cases it is unnecessary for the judge to expose the precise reasoning by which the ultimate sentence has been reached: *R v Gallagher* (1991) 23 NSWLR 220. It is only where the judge has formed a particular view in relation to one or more of these items which would not otherwise be apparent in the circumstances of the case that reference should be made to the particular items in the judge's remarks on sentence, so that no erroneous conclusion would otherwise be drawn in relation to those matters.

As the list of factors in s 16A(2) is not exhaustive, common law principles apply to sentencing federal offenders irrespective of whether such principles are referred to, or located in, Pt IB of the *Crimes Act 1914*: *Johnson v The Queen* [2004] HCA 15 per Gummow, Callinan and Heydon JJ at [15]; *Xiao v R* [2018] NSWCCA 4 at [94]; *Aboud v R* [2021] NSWCCA 77 at [87]. For example, delay and proportionality are not factors listed in s 16A(2) but may be relevant when sentencing a federal offender: *Aboud v R* at [91]; *Sabra v R* [2015] NSWCCA 38 at [41]–[45]; *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at [18]; cf *Director of Public Prosecutions (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194 at [100] (For a detailed discussion of delay, see also **Delay** at **[10-530]** and for the application of delay in federal fraud sentences see **Delay** at **[20-000] Mitigating factors**).

Likewise, the "totality" of the offending in fixing sentences for separate offences is relevant to federal offences, with the question of totality arising only after the individual sentences are determined: *Sigalla v R* [2021] NSWCCA 22 at [118]; *Pearce v The Queen* (1998) 194 CLR 610; *Mill v The Queen* (1988) 166 CLR 59. See also **[16-030]** and **[16-040]**.

Nature and circumstances of the offence: s 16A(2)(a)

This factor relates to consideration of matters relevant to assessing the objective seriousness of the offending. There are a wide variety of matters that can be considered. Broadly, it can involve considering the conduct, the degree of intention, knowledge or recklessness, motive and other factors that may impinge on the intentional aspects of the conduct.

The fact-finding exercise at sentencing is relevant to this factor. That is, where an offender disputes the facts and seeks to reduce the objective seriousness of the offence, they bear the burden of establishing such matters on the balance of probabilities, with the Crown bearing the burden of establishing facts adverse to offender beyond reasonable doubt: *The Queen v Olbrich* (1999) 199 CLR 270 at [27]–[28]; see also

Onus of proof at **[1-405]**. A court will not resolve all disputed issues by determining the facts are either aggravating or mitigating. See **The aggravating/mitigating binary fallacy** at **[9-720]**. Where there is a lack of evidence about a factor see discussion in **Role of offender and level of participation** at **[19-870] Other factors relevant to objective seriousness**.

The case law assists as to what factors may be relevant to assessing the nature and circumstance of particular classes of offences. For example:

- In relation to possession and transmission of child abuse material offences, see *R v De Leeuw* [2015] NSWCCA 183 at [72]; *R v Aniezue* [2016] ACTSC 82; *R v Asplund* [2010] NSWCCA 316; *Minehan v R* [2010] NSWCCA 140 at [94]; *R v Hutchinson* [2018] NSWCCA 152 at [45]; see also **Commonwealth offences** and **Sentencing principles** at **[17-541]**;
- In relation to importation or possession of unlawfully imported border controlled drugs, see *R v Nguyen; R v Pham* [2010] NSWCCA 238 at [72]; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [210]–[211], [224] (McClellan CJ at CL) and the authorities cited; see also **[65-100] Commonwealth drug offences**; and
- In relation to proceeds of crime offences (Div 400 Criminal Code), see *R v Li* [2010] NSWCCA 125 at [41]; *Majeed v The Queen* [2013] VSCA 40 at [35]; see also **Money laundering** at **[65-200]**.

Purposes of sentencing in s 16A(2): deterrence, punishment, rehabilitation

There is no distinct statement of the purposes of sentencing in the *Crimes Act 1914*, unlike, for example, s 3A *Crimes (Sentencing Procedure) Act 1999*. However, s 16A of the Commonwealth Act includes deterrence, punishment and rehabilitation in the list of matters to which the court is to have regard in passing sentence: ss 16A(2)(j), (ja), (k) and (n).

The *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth) inserted s 16A(2)(ja) into the Act in November 2015 to explicitly provide that "the deterrent effect that any sentence or order under consideration may have on other persons" was a matter required to be taken into account when sentencing a federal offender. The introduction of s 16A(2)(ja) was not an indication that before its commencement the principle of general deterrence was not a relevant factor but to clarify that it *is* a factor: *Aitchison v* R [2015] VSCA 348 at [66], [69]. General deterrence has been a feature of sentencing practice throughout all jurisdictions, not just Australia, and express words would have been necessary to warrant its exclusion: *Aitchison v R* at [66], applying *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370 at 378, where the NSWCCA (shortly after Pt IB commenced) had concluded that the duty imposed on a court by s 16A(1) to ensure the sentence or order "is of a severity appropriate in all the circumstances of the offence" imported general principles of sentencing law including general deterrence.

Taking other offences into account: ss 16A(2)(b) and 16BA

Section 16A(2)(b) allows any other offences (as required or permitted) to be taken into account at sentencing. The offence is listed in a schedule, pursuant to s 16BA which allows the court, when a person is convicted of federal offences, to take into account

other federal offences (including indictable offences where the court has jurisdiction) in respect of which the offender admits guilt. The federal offender does not have to be "convicted" of the additional federal offences for them to be taken into account. This provision, and the process, is similar to s 33(2) *Crimes (Sentencing Procedure) Act 1999* (NSW): see **[13-200] The statutory requirements**. However, federal offences cannot be taken into account on a State Form 1 and may only be taken into account in relation to another federal offence using the s 16BA procedure. Similarly, State offences cannot be listed in a s 16BA schedule: see discussion in *Ilic v R* [2020] NSWCCA 300 and *Hildebrand v R* [2021] NSWCCA 9.

A document, found at Form 1, Sch 3 *Crimes Regulations* 1990 (Cth), listing the additional federal offences the person "is believed to have committed" is filed in court: s 16BA(1)(a)–(b). The Form 1 must be signed by the prosecutor and the offender: s 16BA(1)(c).

Before passing sentence, the court may, if in all the circumstances it is proper to do so, ask the federal offender whether they admit guilt in respect of the additional offences and wish them to be taken into account in passing sentence for the offences of which they have been convicted. If the federal offender admits guilt and wishes to have the additional offences taken into account, the court may do so when passing sentence: s 16BA(2).

The sentencing judge must make the various statutory inquiries and obtain the necessary admissions and indication from the federal offender that they wish to have the additional offences taken into account: *Purves v R* [2019] NSWCCA 227 at [5]. However, where the offender is legally represented, their consent to the use of this procedure can be based on their legal representative's words or conduct: *Kabir v R* [2020] NSWCCA 139 at [49]–[50]. A failure to obtain the necessary consent cannot be remedied on appeal because s 16BA(1) requires that this procedure be undertaken by the court which convicts the offender: *Purves v R* at [6].

An offence taken into account pursuant to s 16BA does not aggravate the objective seriousness of the principle offence but increases what would have otherwise been the penalty because of relevant purposes of sentencing, such as specific deterrence, responsibility and accountability for the offence: *Le v R* [2022] NSWCCA 243 at [36] (R A Hulme J); *Nguyen v R* [2019] NSWCCA 209 at [58]–[64] (Johnson J).

Offence consists of a series of criminal acts of the same or a similar character: s 16A(2)(c)

An offence forming part of a course of conduct consisting of a series of criminal acts of the same or a similar character can be taken into account when determining a sentence that is appropriate in all the circumstances: *R v Donald* [2013] NSWCCA 238 at [79]. It will apply in different ways depending on the facts and circumstances of the case.

Section 16A(2)(c) will be relevant in cases involving "rolled up" charges. This approach is common for federal offences relating to child abuse material and fraud offences: *R v De Leeuw* [2015] NSWCCA 183 at [116]; *R v Donald* [2013] NSWCCA 238. Numerous offences are rolled into one offence on a plea of guilty which advantages an offender by restricting the maximum penalty available to a single offence, rather than the total theoretically available maximum sentence from multiple charges: *R v Jones* [2004] VSCA 68 at [13]; *R v Donald* at [84], [85]. A course of

conduct may constitute an aggravating factor for "rolled up" charges because more than one episode of criminal conduct may magnify the objective seriousness of the offence: *R v De Leeuw* at [116]; *R v Glynatsis* [2013] NSWCCA 131 at [67]–[68]; *Xiao v R* [2018] NSWCCA 4 at [164]. *Fitzgerald v R* at [37].

In sentencing for a rolled-up charge, the court is required to assess the criminality of an offender's conduct as particularised. The more contraventions or episodes of criminality that form part of the rolled-up charge, the more objectively serious the offence is likely to be: *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

Victim of the offence — personal circumstances and victim impacts statements: ss 16A(2)(d), (ea), 16AAAA and 16AB

When sentencing a federal offender the court must take into account:

- the personal circumstances of any victim of an offence: s 16A(2)(d) and
- if an individual who is "a victim of the offence" has suffered "harm" as a result of the offence, the court must consider any victim impact statement: s 16A(2)(ea).

"Victim" is not defined in Part IB. A "victim" has included an unwitting friend who has been manipulated or recruited to enable the offence: *Kabir v R* [2020] NSWCCA 139 at [62]. It has also included witnesses to a terrorist attack on another who suffered psychological and emotional harm as a result: *R v Khan (No 11)* [2019] NSWSC 594. In *R v Zhu* [2013] NSWSC 127 at [203], it was considered the classes of victims for insider trading offences were the market, the offender's employers, and those who traded with the offenders not privy to the inside information. In *R v Nahlous* [2013] NSWCCA 90, the Court considered that, in relation to a child grooming offence, the child who was groomed was a victim, but their mother was not.

Section 16AAAA legislates the procedural requirements for victim impact statements. It provides a victim impact statement can be an oral or written statement made by a victim of the offence, or by a member of the victim's family (with the court's leave), or a person appointed by the Court: s 16AAAA(1). "Family" includes a de facto partner, a child of the victim, or anyone else who would be a member of the person's family if the de facto partner or child is taken to be a member of the person's family: s 16A(4).

Section 16AB sets out other procedural requirements or guidelines for victim impact statements and includes:

- Only one victim impact statement can be made unless the court gives leave (s 16AB(2));
- No implication is to be drawn from the absence of a victim impact statement (s 16AB(3));
- A victim impact statement may be read to the court by or on behalf of the victim (s 16AB(4)); and
- A victim impact statement cannot be read out or taken into account to the extent it expresses an opinion about an appropriate sentence, or is offensive, threatening or harassing, or admitting it would not be in the interests of justice.

The victim impact statement is intended to provide the sentencing judge with an understanding of the harm suffered from the offence. "Harm" is defined broadly in s 16 to include physical, psychological and emotional suffering, economic and other loss, and damage.

Any injury, loss or damage resulting from the offence: s 16A(2)(e)

This provision is not dependent on matters contained within a victim impact statement or particular victims being identified, and the court can take judicial notice of the injury, loss, or damage resulting from particular offences. Examples include:

- Harm arising from transmission of child pornography offences: *R v Jones* (1999) 108 A Crim 50; *DPP v D'Alessandro* (2010) 26 VR 477; *R v Clarkson* (2011) 32 VR 361;
- Damage to the reputation of Australian business persons conducting business in foreign countries and distortion to the market for bribery of foreign official offences: *Elomar v R* [2018] NSWCCA 224;
- Damage to the Australian economy arising from cartel activities: *DPP (Cth) v Nippon Yusen Kabushiki Kaisha* (2017) 254 FCR 235, [250]–[252], [298], [300]; and
- Harm to the community for the importation and possession of border controlled drugs: for example, *Ngo v The Queen* [2017] WASCA 3.

The degree to which contrition is shown: s 16A(2)(f)

Contrition must be "shown" (that is, established on the evidence) by an offender, either by words or conduct. The discount for contrition, like other subjective considerations, is generally not quantified but forms part of the process of instinctive synthesis: *Betka v R* [2020] NSWCCA 191 at [62]. An offender may express contrition in the form of remorse in their oral testimony in court, in a letter, or to family, friends or psychologists/psychiatrists. Ultimately, the weight and cogency to be given to utterances found in third party statements or untested material is a matter for the individual assessment of the judge: *Lloyd v R* [2022] NSWCCA 18 at [45]. A sentencing judge may be cautious of untested statements of contrition and remorse and attribute less weight to them than contrition that is first hand and tested: *Imbornone v R* [2017] NSWCCA 144 at [57], *Singh v R* [2018] NSWCCA 60 at [31]; *Diaz v R* [2019] NSWCCA 216 at [48]; *Weber v R* [2020] NSWCCA 103 at [62]–[63]; *Pritchard v R* [2022] NSWCCA 130 at [101].

Section 16A(2)(f) provides that the degree to which a court can take into account contrition expressed by a federal offender can include instances in which they made reparation for any injury, loss or damage arising from the offence. This includes the repayment of money obtained as a consequence of an offence before pecuniary penalty proceedings under the *Proceeds of Crime Act 2002* have been commenced: *R v Host* [2015] WASCA 23 at [25]; [198]. The effect of s 320 *Proceeds of Crime Act* is that the fact of making a pecuniary penalty order and payments made pursuant to it are irrelevant considerations which cannot be taken into account under s 16A(2)(f): *R v Host* at [25]; [115]; [198]; s 320(d). To the extent s 320 is inconsistent with s 16A(2)(f), s 16A(2)(f) must be read down to give effect to s 320: *R v Host* at [22]–[23]; [115]; [196]–[197].

Contrition within s 16A(2)(f) may also refer to the subjective willingness of an offender to facilitate the course of justice. This is conceptually different from the utilitarian value of a guilty plea in s 16A(2)(g): *Bae v R* [2020] NSWCCA 35 at [55]; *Giles-Adams v R* [2023] NSWCCA 122 at [76].

As to s 16A(2)(f) and (g), in *Betka v R*, Fullerton J said at [62] (Wilson and Ierace JJ agreeing):

> While I accept that in practical terms the factors which inform the sentencing considerations in ss 16A(2)(f) and (g) of the Crimes Act (Cth) might overlap, what must be borne in mind is that it is only in respect of the objective or utilitarian value of a plea of guilty that the Court will apply an arithmetical discount when sentencing for a Commonwealth offence, a discount which is largely, although not exclusively, informed by the timing of the plea. Where a sentencing court is persuaded that the timing of the plea itself reflects a willingness on the part of the offender to facilitate the course of justice, that finding should find expression in the reasons for sentence as one of the factors which informs the value of the plea without it attracting any additional or arithmetical sentencing discount. Importantly, however, where the Court does not make that finding, or where the Court is not otherwise satisfied that the evidence relied upon by an offender allows for a finding of a subjective willingness to facilitate the course of justice as a mitigating factor on the balance of probabilities, the objective or utilitarian value of the plea should not be diminished.

The strength of the prosecution case can be taken into account in assessing contrition which facilitates the course of justice or is indicative of remorse. A guilty plea actuated by an overwhelming Crown case would suggest less weight is given to contrition involving facilitation of the course of justice: *Bae v R* [2020] NSWCCA 35; *Tyler v R* [2007] NSWCCA 247 at [114].

While contrition and remorse are required to be taken into account separately under s 16A(2)(f) in addition to the guilty plea under s 16A(2)(g), those factors can overlap: *Singh v R* at [26]–[28]; *Xiao v R* [2018] NSWCCA 4 at [134]. Care should be taken to avoid double counting the objective and subjective aspects of guilty pleas and contrition: *Bae v R* [2020] NSWCCA 35 at [55], [57]; *Chuang v R* [2020] NSWCCA 60 at [19]. When an offender pleads guilty and expresses contrition and a willingness to cooperate with authorities, those factors form a complex mix of inter-related considerations, and attempts to separate them to attribute specific numerical or proportionate value would be artificial, contrived and illogical: *Singh v R* at [28]–[29]; *R v Gallagher* (1991) 23 NSWLR 220; *Wong v The Queen* (2001) 207 CLR 584. Such an approach is also contrary to the process of instinctive synthesis: *Singh v R* at [30].

Failure to comply with legal obligations relating to pre-trial or ongoing disclosure: s 16A(2)(fa)

There is little appellate case law considering this provision. The provision suggests the court is required to consider the extent to which a federal offender failed to comply with pre-trial and ongoing disclosure obligations, where those laws are provided for by s 23CD(1) of the *Federal Court of Australia Act 1976* (which relates to pre-trial and ongoing disclosure for offences prosecuted in the Federal Court of Australia), or by any obligation under a law of the Commonwealth or a law of the State or Territory. In *Assi v R* [2021] NSWCCA 181, a licensed customs officer was involved in a scheme to avoid the payment of excise duty on imported tobacco. While the judge

was correct to take into account the offender's breach of duties as a customs broker when considering the objective seriousness of the offence, the judge erred in finding the breach fell under s 16A(2)(fa)(ii): *Assi v R* at [46]. The section only applies to breaches of Commonwealth orders or obligations concerning a "pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence": *Assi v R* at [45].

Plea of guilty: s 16A(2)(g)

Section 16A(2)(g) provides the sentencing court must take into account the plea of guilty, its timing, and the degree to which both resulted in any benefit to the community or any victim of, or witness to, the offence. The section gives effect to aspects of the objective utilitarian value of a guilty plea, as described in *Xiao v R* (2018) 96 NSWLR 1; *Bae v R* [2020] NSWCCA 35 and *Small v R* [2020] NSWCCA 216 at [73].

Identifying the utilitarian value of a guilty plea within s 16A(2)(g) involves an objective assessment of the way in which the guilty plea facilitated the course of justice: *Bae v R* [2020] NSWCCA 35 at [55], [57]; *Xiao v R* (2018) 96 NSWLR 1 at [280]; *Giles-Adams v R; Preca v The Queen* [2023] NSWCCA 122 at [70]. A subjective acknowledgement of willingness to facilitate justice is not relevant to the utilitarian value of the plea in s 16A(2)(f): *Bae v R* [2020] NSWCCA 35 at [57]-[58]; see also *R v Borkowski* [2009] NSWCCA 102 at [32] (point 4) (Howie J).

It is desirable to specify the discount given for a guilty plea in the interests of transparency: *Huang aka Liu v R* [2018] NSWCCA 70 at [9]; *Xiao v R* at [279]–[280]; *Markarian v The Queen* (2005) 228 CLR 357 at [24]; *Cahyadi v R* [2007] NSWCCA 1 at [34]. However, a failure to do so would not of itself constitute error: *Huang aka Liu v R* at [9]. It is an error to specify a range of percentage discounts as distinct from a specific percentage: *Huang aka Liu v R* at [9].

The guideline judgment of *R v Thomson and Houlton* (2000) 49 NSWLR 383, and specified discounts stipulated in ss 25D and 25E of the *Crimes (Sentencing Procedure Act)* 1999, do not apply to the sentencing of federal offenders. However, in *Bae v R*, Johnson J (Bell P and Walton J agreeing) concluded that the principles set out in *R v Borkowski* at [32]–[33] in respect of the utilitarian discount for State offences could practically assist for Commonwealth offences: at [52]–[54].

Co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC

For the procedure to adopt when considering an offender's assistance to authorities see **[12-210] Procedure**.

The court must take into account any past co-operation the federal offender has provided to law enforcement agencies under s 16A(2)(h), and any undertaking to cooperate in the future under s 16AC. The rationale for recognising assistance provided to the authorities is set out in *R v Cartwright* (1989) 17 NSWLR 243 at 252–253: see **[12-205] Rationale** for rationale for assistance to authorities.

Discounts for past and future assistance are distinct and should not be confused: *R v Vo* [2006] NSWCCA 165 at [37], citing *R v Gladkowski* (2000) 115 A Crim R 446. It is erroneous to give a combined reduction for past and future co-operation rather than separately addressing future co-operation: *R v Vo* at [33]; *R v Tae* [2005] NSWCCA 29 at [19]. In such a case, the appellate court should itself fix a reduction for future co-operation: *R v Vo* at [43]; *R v Tae* at [20], [32].

Where co-operation also demonstrates contrition, the contrition attracts an unquantified discount as part of instinctive synthesis under s 16A(2)(f) (see above discussion).

Past co-operation

Past co-operation includes co-operation in the investigation of the offence for which the offender is being sentenced as well as any other state, territory or federal offence.

There is no requirement, statutory or otherwise, for a sentencing judge to provide a discrete quantified discount for past assistance, but generally the practice is to do so especially in respect of the utilitarian benefit of the assistance: *Weber v R* [2020] NSWCCA 103 at [34], [68].

A discount will be extended for past assistance that is accepted and used by authorities: *Alchikh v R* [2007] NSWCCA 345 at [25]. The extent of the discount involves a consideration of the effectiveness of the assistance and its value to the authorities: *R v El Hani* [2004] NSWCCA 162 at [73]. However, the absence of evidence does not necessarily mean there should be no discount: *Weber v R* at [67]. For example, where authorities have rejected and not used the assistance, a judge may still give some discount provided they are satisfied the proffered assistance was truthful and to give effect to the rationale for encouraging assistance: *Alchikh v R* [2007] NSWCCA 345 at [25].

In the past, sentencing cases adopted an arithmetic approach to discount for past assistance and a plea of guilty. In *McKinley v R* [2022] NSWCCA 14 (MacFarlan J) the Court of Criminal Appeal criticised the arithmetic approach to assistance stating at [49]:

> The … arithmetic view probably does not withstand later authority criticising an arithmetic approach to sentencing. Consistency in this area, like others, must be determined by the consistent application of sentencing principles. The principles applicable to determining assistance, which it is unnecessary to repeat or summarise, were discussed more fully by this Court in *R v XX*.

Macfarlan J also said in *McKinley* at [56]:

> ultimately the test that must be utilised depends upon the fulfilment of the purpose of the administration of justice. The reduction needs to be sufficiently significant that it will encourage those persons who have committed crimes to come forward and confess the crime, notwithstanding that the police are unaware of either the crime or the perpetrators of the crime.

Where an offender pleads guilty and also co-operates with authorities, a combined discount can be given, or alternatively quantities for the utilitarian value of the plea quantified and quantities for the past cooperation with authorities identified: *Weber v R* [2020] NSWCCA 103 at [68]; cf *R v Sukkar* [2006] NSWCCA 92.

Future assistance

Section 16AC(1)–(2) provides, where a court reduces the sentence imposed because a federal offender has undertaken to provide future assistance, the court must state that the sentence or order is being reduced for that reason, and the sentence or order that would have applied otherwise. This requirement assists an appellate court in resentencing an offender who has failed to comply with the undertaking. Section 21E

was the predecessor to s 16AC and the case law in relation to the former provision remains relevant. Application of the former provision was discussed in *DPP (Cth) v Couper* [2013] VSCA 72 at [141]–[146].

In *Mason (a pseudonym) v R* [2023] VSCA 75, the Court at [44]–[60] considered the approach to discounting a sentence for future cooperation pursuant to s 16AC, stating:

> Where a person has cooperated with law enforcement authorities and given an undertaking of the kind contemplated by s 16AC, that matter must, by force of s 16A, be taken into account by the judge when imposing the sentence. In most cases the effect of doing so will be to reduce the sentence that, hypothetically, would have been imposed had there not been cooperation of that kind. Almost inevitably, where this occurs the non-parole period will be lower than would have been imposed had there not been cooperation. In other words, the cooperation will produce a consequence for both the head sentence and the non-parole period.
>
> There may be cases, although if they exist they surely must be rare, where the cooperation has an effect on the sentence but not the non-parole period. It follows that usually the impact will be on both aspects of the sentence. On the other hand, there may be cases, again we think rare, where the judge reduces the non-parole period but the cooperation has no discernible impact on the head sentence.
>
> Where a sentence has 'been reduced' by reason of cooperation, s 16AC requires the judge to specify what would have been the sentence or non-parole period in the event that there had been no cooperation.
>
> In our view the better construction of s 16AC … is that if there has been an impact on both the head sentence and the non-parole period (which will be the usual case) the judge must specify how each element had been effected. That is the judge should specify what the head sentence would have been and what the non-parole period would have been.
>
> This construction is fortified by s 16AC(4). Where there is a failure to honour the undertaking in whole or in part, an appeal may be brought and the appellate court may have to resentence. In doing so s 16AC(4) contemplates that the appellate court will or may reinstate the sentence that would have been imposed. At the least, these matters would inform the appellate court's task should a ground of appeal succeed and resentencing be required"

In *Dagher v R* [2017] NSWCCA 258, Adamson J (with Leeming JA and Johnson J agreeing) stated that failing to comply with the requirement in s 16AC(2) to identify the sentence that would have been imposed but for the undertaking to co-operate in the future is an error: [8].

Discounts for assistance are intended to foster the interests of law enforcement and recognise the contrition involved as well as the potential risks to an offender. When allowing a discount, it is important the offender is clearly apprised of the fact a benefit is being conferred: *R v A* [2004] NSWCCA 292 at [25].

Failure to comply with undertaking

Section 16AC(3) entitles the CDPP to appeal, at any time, against the sentence when the offender fails, without reasonable excuse, to comply with the undertaking. The CDPP bears the onus of proving, beyond reasonable doubt, that the failure was without reasonable excuse: *R v MI* [2018] NSWCCA 151 at [39].

Under s 16AC(4)(a), where an offender fails entirely to co-operate after receiving a reduced sentence on the basis of promised co-operation, the court on appeal must substitute the sentence or non-parole period that would have been imposed but for

the promised co-operation. Section 16AC(4)(b) provides that, where there is a partial failure to co-operate, the court may substitute such a sentence or non-parole period not exceeding that which could be imposed under s 16AC(4)(a).

Specific deterrence: s 16A(2)(j)

The court is required to consider the deterrent effect the sentence may have on the federal offender: s 16A(2)(j). There can be many reasons why specific deterrence assumes greater relevance in the sentencing exercise or is otherwise of less relevance. It may have greater relevance if the federal offender has committed the offence before: *Veen v The Queen (No 2)* (1988) 164 CLR 465, 477. It may have less relevance because an offender's evidence suggests the process of charging, conviction and/or pre-sentence custody, has deterred them from repeat behaviour. Mental health conditions may also moderate or elevate the weight to be given to specific deterrence: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]. For further discussion of specific deterrence under NSW law, see **[2-240] To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)**. For further discussion of the impact of a mental health or cognitive impairment on specific deterrence under NSW law, see **Protection of society and dangerousness** at **[10-460] Mental health or cognitive impairment**.

General deterrence: s 16A(2)(ja)

Section 16A(2)(ja) legislatively endorses the need to consider general deterrence.

General deterrence may be an important consideration in respect of particular classes of offences, for example, in the more serious cases of sustained and deliberate fraud (*Kovacevic v Mills* [2000] SASC 106 at [43] approved in *Totaan v R* [2022] NSWCCA 75 at [99]), or child sex exploitation offending such as child abuse material offences (*Lazarus v R* [2023] NSWCCA 214 at [76], [78] (Cavanagh J, with Ierace J agreeing)).

General deterrence may assume less weight in a sentencing exercise where a federal offender adduces evidence of a mental condition which was causally related to the offending in a material way, the rationale being that the particular offender is not an appropriate offender of which to make an example, as compared to a highly morally culpable offender: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177].

Need for adequate punishment: s 16A(2)(k)

This factor requires the court to ensure the person is adequately punished for the offence. The word "punishment" in this context has been held to be synonymous with retribution, which is a purpose of sentencing: *Azari v R* [2021] NSWCCA 199 at [57]. Particular regard may be paid to the objective seriousness of the offending and general deterrence when determining whether a person is "adequately punished" for the offence (see for example, *R v Manuel* [2020] WASCA 189; 285 A Crim R 563 at [92]).

Character, antecedents, age, means and physical or mental condition: s 16A(2)(m)

This factor involves consideration of prior convictions, but also character and antecedents generally. "Antecedents" is not solely a reference to convictions but can include all aspects of an offender's background, both favourable and unfavourable. For example, in *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 at [34]–[35], [60]–[61] bankruptcy was considered an antecedent (and a factor of hardship).

The weight to be attached to good character or the lack of a criminal record may vary depending on the type of offence. For example, the lack of a criminal record may have less significance for a drug trafficking offence than for other types of offences: *R v Leroy* [1984] 2 NSWLR 441. In *R v Leroy*, the offender was convicted of being knowingly concerned in the importation of cocaine contrary to s 233B (rep) *Customs Act 1901* (Cth). Chief Justice Street stated at 446–447:

> Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their lifestyles are not such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders.

In white collar offences, such as those against the *Corporations Act 2001* (Cth), "limited weight" is attached to prior good character because it is normally the factor that places the offender in the position that enables them to commit the offence: *R v Gent* [2005] NSWCCA 370 at [47], [52]–[59]; *R v Rivkin* (2004) 59 NSWLR 284 at [410]; *R v Boughen* [2012] NSWCCA 17 at [73]; *Eakin v R* [2020] NSWCCA 294 at [38]. See **Character, antecedents, age, means and physical or mental condition of the person — s 16A(2)(m)** at **[20-065] Types of Commonwealth fraud**.

In *Nguyen v R* [2016] NSWCCA 5 at [29], the Court of Criminal Appeal held the sentencing judge did not err in finding that the offender was not a person of good character because he had deliberately given false evidence, despite his lack of prior convictions.

A federal offender's subjective material provided to address s 16A(2)(m) may overlap with, or inform, the weight to be given to other factors in s 16A(2) such as specific deterrence and general deterrence. For example, a mental condition may make an offender more dangerous to the community suggesting specific deterrence needs to be given greater weight: see *DPP (Cth) v De La Rosa* at [77] and *R v Israil* [2002] NSWCCA 255 at [24].

Sentencing assessment reports or psychological/psychiatric reports may be tendered as evidence of a federal offender's physical or mental condition. A mental condition may be relevant to the moral culpability of the offender and/or the objective seriousness of the offence. The two concepts are separate but related (depending on the condition and factual circumstances): *TM v R* [2023] NSWCCA 185 at [55]; *DS v R* (2022) 109 NSWLR 82 at [77]; *R v Eaton* [2023] NSWCCA 125 at [45]; *Camilleri v R* [2023] NSWCCA 106 at [135]. Care must be taken not to double count for the same factor: *Williams v R* [2022] NSWCCA 15 at [131].

Where a mental condition is relied upon to reduce an offender's moral culpability, it may impact on the weight attached to other sentencing factors (such as specific deterrence, denunciation or adequate punishment for the offending), although it does not of itself necessarily warrant reduction in the sentence: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177] (and the cases cited therein). See further discussion of the case law at **[10-460] Mental health or cognitive impairment**.

Care must be taken not to double count breach of trust as an aggravating factor and to give good character little weight. In *Merhi v R* [2019] NSWCCA 322, the judge found the offending was aggravated because of the abuse of trust formed from his previous employment as a Customs Officer which helped facilitate the offence. It was an error

for the judge to also find the offender's employment limited the weight to be given to prior good character, in effect, by dismissing good character as a relevant mitigating factor: *Merhi v R* at [6], [51], [55], [57].

Youth will ordinarily be a factor of significance in the sentencing exercise, but the circumstances of the case may reduce the weight to be given to it. The relevance of youth to the sentencing exercise was set out in *KT v R* [2008] NSWCCA 51 at [22]–[26]; see also *CW v R* [2022] NSWCCA 50. For further discussion see **[10-440] Youth**.

Customary law or cultural practice: s 16A(2A)

Section 16A(2A) provides that customary law and cultural practice are not to be taken into account in mitigating or aggravating the seriousness of criminal behaviour, except as relevant to s 16A(2)(ma) (see below).

Standing in community used to aid commission of offence: s 16A(2)(ma)

Section 16A(2)(ma) applies to federal offenders charged with, or convicted of, an offence from 20 July 2020: *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth), s 2; Sch 8[6]. The section requires consideration of whether the person's standing in the community was used to aid the commission of the offence and, if so, is taken to aggravate the offence's seriousness.

The prohibition in s 16A(2A) against taking into account any form of customary law or cultural practice as a reason to aggravate the seriousness of the criminal behaviour does not apply if a person's standing in the community aided the commission of the offence.

Prospects of rehabilitation: s 16A(2)(n)

The prospects of rehabilitation are a mandatory consideration for the court: *Sigalla v R* [2021] NSWCCA 22 at [143]. An acknowledgement of wrongdoing may be a significant element in rehabilitation: *Sigalla v R* at [143]. However, while the absence of true remorse may reduce the weight that can be given to prospects of rehabilitation, it does not necessarily nullify them: *Sigalla v R* at [143], [147]–[148]. Remorse is not a prerequisite to an assessment that an offender has some prospect of rehabilitation: *Sigalla v R* at [143], [147]–[148].

Additionally, where an offence is reflective of an offender's character or the offender has an untreated mental condition relating to the offending, or which is causally connected in some way to the offending, the court is not likely to find the offender has good prospects of rehabilitation in the absence of treatment: *Young v R* [2021] SASCA 51 at [31]–[34].

When sentencing for a "Commonwealth child sex offence" (defined in s 3), s 16A(2AAA) provides the court must have regard to rehabilitating the offender by considering treatment options (see **Rehabilitation** at **[17-770] Subjective factors (including relevant s 16A(2) matters)**.

Probable effect of sentence on offender's family or dependants: s 16A(2)(p)

Section 16A(2)(p) requires the court to take into account the probable effect of a sentence on an offender's family or dependants, and the hardship contemplated by the

provision need not be exceptional: *Totaan v R* [2022] NSWCCA 75 (5 judge-bench) at [81]–[83] overruling *R v Sinclair* (1990) 51 A Crim R 418 and the cases which followed, including those of the Court of Criminal Appeal.

"Family" is defined in ss 16(1), 16A(4) and includes a de facto partner, a child of the victim, or anyone else who would be a member of the person's family if the de facto partner or child is taken to be a member of the person's family: s 16A(4).

The meaning under s 16A(2)(p) of the word "probable" was considered by the South Australian Court of Criminal Appeal in *R v Berlinsky* [2005] SASC 316. Justice Bleby stated at [42]:

> in the context of s 16A of the *Crimes Act* I consider that the effect to be considered is that which is more probable than not or more likely to occur than not. If a lesser standard were required, it is likely that the drafter would have used the word "possible" rather than "probable.

Justice Gray seemed to take a broader view at [58]:

> In the context of s 16A(2)(p), a provision obviously intended by the legislature to enable the Court to take into account a wide range of circumstances and eventualities, the term "probable" is correctly interpreted as including events that are possible, in the sense of being credible or having the appearance of truth, that is, events that are plausible outcomes, not merely fanciful postulations. Such an interpretation provides consistency of approach when sentencing.

[16-030] Penalties that may be imposed

Last reviewed: August 2024

There are various options available within the *Crimes Act 1914* (Cth) for the sentencing of federal offenders. Generally, a court can sentence a federal offender as follows:

- Discharge without proceeding to conviction (s 19B);
- Fine (as provided by the offence provision);
- Conditional release forthwith on recognizance without passing sentence (s 20(1)(a)); or
- A term of imprisonment (s 20(1)(b)):
  - With immediate release, or release after a specified time, on recognizance with or without conditions.
  - If the total sentence does not exceed three years, the court must make a recognizance release order (subject to s 19AC(3), (4)) for that sentence (s 19AC(1)).
  - If the total sentence exceeds three years, the court must fix a non-parole period (subject to s 19AB(3)) for the sentence (s 19AB(1)).

Sentencing options from State law may be available: s 20AB (see **Additional sentencing alternatives: s 20AB** below**,** and for a detailed discussion of the NSW sentencing options, see **[3-500] Community-based orders generally**.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Discharge without conviction

Section 19B(1) provides a court can dismiss the charge or discharge the offender without proceeding to conviction (with or without conditions), under paras (c) and (d) respectively, if it is inexpedient to inflict any punishment having regard to the character, antecedents, age, health or mental condition of the person (s 19B(1)(b)(i)), the extent (if any) to which the offence is of a "trivial nature" (s 19B(1)(b)(ii)), or the extent (if any) to which the offence was committed under "extenuating circumstances" (s 19B(1)(b)(iii)).

Any condition that an offender be of good behaviour may not exceed three years: s 19B(1)(d)(i). Reparation may be ordered under s 19B(1)(d)(ii) as can supervision for a period not exceeding two years under s 19B(1)(d)(iii).

The court cannot take into account customary cultural practice as a reason for excusing or justifying the offence, or which aggravates the seriousness of the behaviour: s 19B(1A).

Before making the order, the court is required to explain or cause to be explained to the offender the purpose of the order and the consequences that may follow if the order is breached: s 19B(2).

The application of s 19B(1) involves a two-stage inquiry: *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332 at [10]. The first is the identification of a factor or factors of the character specified in subparas (i), (ii) and (iii) of s 19B(1)(b), and the second is the determination that, having regard to that factor or factors, it is inexpedient to inflict any punishment, or to reach the other conclusions for which s 19B(1) provides: *Commissioner of Taxation v Baffsky* at [10]. The scope of considerations relevant to the exercise of the power in s 19B(1) encompass each of the matters identified in s 16A(2), which arise at the second stage of the inquiry: *Commissioner of Taxation v Baffsky* at [15].

The presence of any "extenuating circumstances" surrounding the commission of the offence, pursuant to s 19B(1)(b)(iii), requires a link between the circumstance said to be extenuating and the commission of the offence: *Commissioner of Taxation v Baffsky* at [47].

The fact that the offender is subject to adverse consequences (for example, legal and social consequences) if a conviction is recorded is a relevant consideration: *Commissioner of Taxation v Baffsky* at [38]; *R v Ingrassia* (1997) 41 NSWLR 447 at 449.

In *Director of Public Prosecutions (Cth) v Ede* [2014] NSWCA 282 at [33]–[37] the Court held a community service order could not be imposed as a condition of an order under s 19B as it would conflict with State laws, noting s 20AB provides no basis for imposing a community service order on any person who has not been convicted.

Fine

The maximum penalty for a federal offence may include the imposition of a fine (ss 20B(5), 20AB(4)) equating to the number of penalty units specified for the offence, or as otherwise provided. Section 4AA defines the amount for one penalty unit. See **[6-160] Fines for Commonwealth offences**.

Section 16C(1) provides that, before imposing a fine, the court is required to consider the financial circumstances of the offender, although, s 16C(2) also

provides that nothing prevents the court from imposing a fine because the offender's financial circumstances cannot be ascertained. The fact that an offender's financial circumstances must be taken into account does not dictate the fine to be imposed: *Mahdi Jahandideh v R* [2014] NSWCCA 178 at [15]. That is, financial capacity to pay is relevant but not decisive: *Darter v Diden* (2006) 94 SASR 505 at [30].

In *Soerensen v The Queen* [2020] WASCA 114 at [127], the Western Australian Court of Appeal held that the fact the corporate offender was in liquidation did not prevent the imposition of a fine which was said to also have a general deterrent effect (even though it could not be recovered).

Conditional release of offender after conviction and without passing sentence: s 20(1)(a)

Section 20(1)(a) provides that, where a court convicts a person of a federal offence, the court may order the conditional release of the person without passing sentence. The person must give security and the conditional release can include conditions such as to be of good behaviour (but for a period not exceeding 5 years) (s 20(1)(a)(i)); to make such reparation or restitution or pay such compensation or costs as the court specifies in the order (s 20(1)(a)(ii)); and/or comply with any other conditions not exceeding 2 years that the court thinks fit to specify (s 20(1)(a)(iv)).

A condition that the person pay to the Commonwealth such pecuniary penalty as the court dictates, not being more than the specific maximum penalty for the offence, may also be imposed: s 20(1)(a)(iii).

If supervision conditions are ordered, the court must, pursuant to s 20(1A), state that the federal offender will not travel interstate or overseas without the written permission of the probation officer. The purpose and effect of the order and consequences of its breach must be explained to the offender: s 20(2).

Section 20 does not set out conditions that may be imposed on a federal offender who is conditionally released, to the same degree of specificity as some of the State and Territory sentencing legislation on recognizances/bonds.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Recognizance release order, forthwith or with a minimum term of imprisonment of 3 years or less: ss 19AC, 20(1)(b)

The court may convict and sentence a federal offender to imprisonment to be released on recognizance with or without conditions pursuant to s 20(1)(b). A recognizance is only available where a person is convicted of a federal offence, or two or more federal offences in the same sitting, and the total sentence does not exceed 3 years imprisonment and when imposed, the offender is not already serving, or subject to, a federal sentence: ss 19AC(1), 20(1). The court may order the federal offender be released on recognizance forthwith upon giving security, with or without surety, with or without conditions, or after serving a minimum term of imprisonment: s 20(1)(a), (b). If a recognizance release order includes a good behaviour condition, it must not exceed 5 years (s 20(1)(a)(i)) but may extend beyond the period of imprisonment ordered under s 20(1)(b): *Johnsson v R* [2007] NSWCCA 192 at [30] citing *R v Smith* [2004] QCA 417 at [9].

The minimum period must reflect the minimum time that justice requires the applicant must serve having regard to all the circumstances of the offences; there is no prescribed ratio: see *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525. Where the total sentence of imprisonment does not exceed 6 months, the court is not required to make a recognizance release order: s 19AC(3). Alternatively, the court can decline to make a recognizance release order if satisfied it is not appropriate to do so having regard to the nature and circumstances of the offence and the offender's antecedents, or the offender is expected to be serving a State or Territory sentence at the end of the federal sentence: s 19AC(4). If the court adopts this approach, it must state its reasons for not imposing a recognizance release order: s 19AC(5).

For a "Commonwealth child sex offence" (defined in s 3) committed on or after 23 June 2020, there is a presumption the offender will serve a minimum period of imprisonment before release to recognizance unless the court is satisfied there are "exceptional circumstances": s 20(1)(b)(ii), (iii). In such cases, s 20(1B) specifies the conditions which must be made as part of the order. "Exceptional circumstances" in s 20(1)(b)(ii) is not defined. By analogy, in the *Penalties and Sentences Act 1992* (Qld), s 9 provides that when sentencing an offender for any offence of a sexual nature committed in relation to a child under 16 years of age, the offender must serve an actual term of imprisonment unless there are exceptional circumstances. In *R v GAW* [2015] QCA 166, the Queensland Court of Appeal at [54] applied the reasoning in *R v Tootell; ex parte Attorney General (Qld)* [2012] QCA 273 that the intention of the phrase "exceptional circumstances" read in its statutory context was to:

> make it the usual case that those who commit sexual offences against children will serve actual imprisonment. And, while that intent was not to be subverted by, for example, an over-readiness to regard as exceptional any circumstances peculiar to an offender's case, it was not the case that a combination of circumstances which would not individually be unusual can never be judged extraordinary.

Quoting *R v Tootell* at [24] the Queensland Court of Appeal in *R v GAW* stated at [54]:

> … there is no one clear prescription for what circumstances are capable of being regarded as exceptional. Consideration must be given not only to the unusualness of individual factors but to their weight; and factors which taken alone may not be out of the ordinary may in combination constitute an exceptional case.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Imprisonment exceeding 3 years with non-parole period: ss 19AB

Pursuant to s 19AB(1), where the court convicts and sentences a person of a federal offence, or two more federal offences in the same sitting, and the total sentence of imprisonment exceeds 3 years, the court may convict and sentence a federal offender to imprisonment with a non-parole period and the balance of the term on parole.

Alternatively, the court can decline to fix a non-parole period if satisfied it is not appropriate to do so having regard to the nature and circumstances of the offence and the offender's antecedents, or if the offender is expected to be serving a State or Territory sentence at the end of the federal sentence: s 19AB(3). If the court adopts this approach, it must state its reasons for not doing so and enter those reasons in the records of the court: s 19AB(4).

There is no prescribed ratio between the non-parole period and parole period, and therefore "special circumstances" are not required to displace a particular ratio. The minimum period must reflect the minimum time that justice requires the offender must serve having regard to all the circumstances of the offences: see *Power v The Queen* (1974) 131 CLR 623; *Bugmy v The Queen* (1990) 169 CLR 525.

Sample orders for various Commonwealth penalties are included in the *Local Court Bench Book* at **[18-100]**.

Sentencing for certain offences:

- For a "terrorism offence" (defined in s 3), an offence against Div 80 Criminal Code, or an offence against ss 91.1(1), 91.2(1) Criminal Code, s 19AG provides for a minimum non-parole period.
- For certain child sex offences, s 16AAA prescribes mandatory minimum penalties.
- For second or subsequent convictions for certain child sex offences, s 16AAB prescribes mandatory minimum penalties.

Cumulative, partly cumulative or concurrent sentences of imprisonment: s 19

Section 19(1) addresses the situation where a person who is convicted of a federal offence is, at the time of that conviction, serving one or more federal, State or Territory sentences. The court must, when imposing the sentence for the present federal offence, direct when the federal sentence commences, but so that:

(a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and

(b) if a non-parole period applies in respect of any State or Territory sentences — the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

The intention of s 19 is to ensure that there is no gap between the end of a sentence which an offender is serving at the time they are convicted of a federal offence and the commencement of the sentence for the instant (federal) offence.

Determining the level of accumulation or concurrency in the structure of the ultimate disposition is a matter within the discretion of the sentencing judge, but ought to be applied principally: see for example, *Holt v R (Cth)* [2021] NSWCCA 14 at [74].

The common law principles, regarding structuring sentences cumulatively or concurrently that have developed for sentencing state offenders apply when sentencing federal offenders: *Holt v R (Cth)* at [75] endorsing the principles in *Cahyadi v R* [2007] NSWCCA 1 at [27]. Howie J in *Cahyadi v R* at [27] stated:

> In any event there is no general rule that determines whether sentences ought to be imposed concurrently or consecutively. The issue is determined by the application of the principle of totality of criminality: can the sentence for one offence comprehend and reflect the criminality for the other offence? If it can, the sentences ought to be concurrent otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the total criminality of the two offences. If not, the sentences should be at least partly cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two

> offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality. Of course it is more likely that, where the offences are discrete and independent criminal acts, the sentence for one offence cannot comprehend the criminality of the other. Similarly, where they are part of a single episode of criminality with common factors, it is more likely that the sentence for one of the offences will reflect the criminality of both.

In *R v Hausman* [2022] NSWCCA 24 at [106] the Court of Criminal Appeal when considering multiple sentences for State and Federal offences stated:

> While it might be said that the High Court in Johnson and other decisions of this Court which have followed it …have considered that the preferred or conventional approach in applying totality principles is to determine the degree to which the individual sentences should be concurrent, partly concurrent or wholly accumulated (or a notional assessment of those considerations when an aggregate sentence is imposed), the ultimate question is whether in application of totality principles the ultimate and effective sentence adequately and fairly encompasses the totality of the criminality so as to arrive at a sentence which also satisfies the principle of proportionality.

Section 19(5)–(7) contain additional requirements when an offender is being sentenced for a Commonwealth child sex offence. In summary, there is a presumption that sentences of imprisonment for child sex offences are entirely cumulative. However, s 19(6), (7) provide that, the court may, with reasons, impose a sentence in a different manner if it would result in sentences that are of a severity appropriate in all the circumstances. This suggests s 19(6) does not unduly fetter the sentencing exercise, and principles of totality still apply: *Mertell v R* [2022] ACTCA 69 at [18].

Additional sentencing alternatives: s 20AB

Pursuant to s 20AB, additional sentences or orders under State or Territory law are available if they are listed in s 20AB(1AA), or are similar to a sentence or order listed in s 20AB(1AA) (s 20AB(1)(b)), or are prescribed under cl 6 *Crimes Regulations* 1990 (Cth) (s 20AB(1)(c)). In *CDPP v Evans* [2022] FCAFC 182 at [12], the Federal Court stated:

> It is readily apparent that s 20AB of the *Crimes Act* was intended to provide a court with additional sentencing options in respect of federal offenders by empowering it to pass certain types of sentences or make certain types of orders which were available under applicable laws of participating states and territories. There is nothing in the text or context of either ss 20 or 20AB which is suggestive of any legislative intention that the availability of the additional sentencing options in s 20AB would somehow exclude or limit the types of orders that the sentencing court could otherwise lawfully make under s 20(1) of the *Crimes Act*.

Whether a sentence or order is similar to one listed in s 20AB(1AA) is a question of degree to be considered in context and in light of the legislative purpose of extending sentencing options: *DPP (Cth) v Costanzo* [2005] 2 Qd R 385 at [23].

In NSW, applying s 20AB, additional sentencing options may include intensive correction orders (ICOs) and community correction orders (CCOs) under ss 7, 8 *Crimes (Sentencing Procedure) Act* respectively. If such sentences are being considered, then any statutory requirements, limitations or prescriptions pursuant to the *Crimes (Sentencing Procedure) Act 1999* apply. This is to ensure the State laws are applied consistently to federal offenders: s 20AB(3).

There is no reference in s 20AB or cl 6 *Crimes Regulations* to a sentencing option of deferral of sentence (akin to that provided for in s 11 *Crimes (Sentencing Procedure) Act*) and, accordingly, is not available when sentencing federal offenders.

If the court is considering an ICO, Part 5 of the *Crimes (Sentencing Procedure) Act 1999* applies. Therefore, when considering whether to impose an ICO for a federal offender, the court must engage with the assessment required in s 66(2) of the *Crimes (Sentencing Procedure) Act*: *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3. Pursuant to s 66(3) of the *Crimes (Sentencing Procedure) Act*, when deciding whether to order an ICO the court must consider the purposes of sentencing in s 3A of the *Crimes (Sentencing Procedure) Act*: *Chan v R* [2023] NSWCCA 206 at [99]–[116]. In *Chan v R*, N Adams J (with Kirk JA and Rothman J agreeing) noted the "significant textual differences" between the purpose in s 3A(d) of the *Crimes (Sentencing Procedure) Act* which is "to promote the rehabilitation of the offender" and s 16A(2)(n) which lists as a factor the offender's "prospect of rehabilitation" Further, pursuant to s 67(1) of the *Crimes (Sentencing Procedure) Act 1999*, an ICO is unavailable for some Commonwealth offences including a terrorism offence (defined in s 3) or a "prescribed sexual offence" which includes certain federal offences pursuant to the definition in s 67.

For further detailed discussion, see **Intensive correction orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]ff** and particularly **Federal offences** at **[3-680]**.

Failure to comply with condition of discharge or conditional release: s 20A

Section 20A sets out the consequences of failing to comply with a condition of an order under s 19B(1) or s 20(1).

Where a person has been conditionally discharged under s 19B(1) and has failed, without reasonable excuse, to comply with a condition of the order without reasonable excuse, the court may:

(i) revoke the order, convict the person of the offence, and resentence the person, or

(ii) take no action: s 20A(5)(a).

If a person who has been conditionally released under s 20(1) fails to comply with a condition of the order without reasonable excuse, the options available to the court are set out in s 20A(5)(b) and include (i) and (ii) above but also a pecuniary penalty of 10 penalty units.

Breach of a recognizance release order without reasonable excuse may result in the court: imposing a monetary penalty not exceeding $1000; extending the period of supervision to a period not greater than 5 years; revoking the order and either imposing an alternative sentencing option under s 20AB or imprisoning the person for that part of the sentence they had not served at the time of release from custody; or taking no action: s 20A(5)(c).

In *DPP (Cth) v Seymour* [2009] NSWSC 555, Simpson J concluded that s 20A does not permit a magistrate to set aside a duly executed conviction and substitute an order under s 20BQ: at [8]–[9]. The conviction can only be set aside by a proper appeal process at [10].

Discharge or variation of a recognizance

A recognizance (either made under ss 19B(1) or 20(1)) can be varied or discharged: s 20AA. Examples of variations include:

- extending or reducing the duration of the recognizance (within the limits allowed under s 20AA(4))
- inserting additional conditions
- reducing the amount of compensation
- altering the manner in which reparation is to be made: s 20AA(3).

Reparation for offences: s 21B

Where a person is convicted of a federal offence or is discharged under s 19B the court may, in addition to the penalty imposed on the person, order the offender to make reparation by way of monetary payment or otherwise, for any loss suffered or expense incurred by the Commonwealth by reason of the offence: s 21B(1)(c). The court may also order the offender to make reparation to any person, in the same terms, for any loss suffered, or any expense incurred, by the person by reason of the offence: s 21B(1)(d).

Section 21B(2) clarifies that a person is not to be imprisoned for failure to pay the amount required under the reparation order.

Failure to comply with sentencing order made under s 20AB

Section 20AC outlines the procedure when an offender fails to comply with a sentence passed or an order made under s 20AB. The court — if satisfied the offender has, without reasonable cause or excuse, failed to comply with the sentence or order or any requirements related to it — may impose a pecuniary penalty not exceeding 10 penalty units; revoke the alternative sentence and re-sentence the offender; or take no action: s 20AC(6).

Section 20AC does not authorise the court to amend or revoke the order when the offender has a reasonable excuse for failing to comply with it. The options in s 20AC only apply when the offender lacks a reasonable excuse. This situation was illustrated in *R v Rivkin* [2003] NSWSC 447 where the offender was convicted of the federal offence of insider trading and sentenced to 9 months imprisonment, to be served by way of periodic detention. When the offender had difficulty complying with periodic detention, for medical and psychiatric reasons, a leave of absence was sought from the Commissioner of Corrective Services (NSW). In the absence of a judicial option, the problem was dealt with by the Commissioner agreeing to allow the offender to serve the eight remaining weekends of his periodic detention in one 16-day block.

[16-035] Relevance of decisions of other State and Territory courts

See also the extensive discussion concerning the issue of consistency, the use of other cases and the use of statistics in **Objective Factors at common law** at **[10-020]**ff and at **[10-024]**ff.

Sentencing principles

It is implicit in Pt IB *Crimes Act 1914* that the court must have regard to the sentences imposed in all States and Territories: *The Queen v Pham* (2015) 256 CLR 550 at

[23], [41]. The Commonwealth Sentencing Database (available through JIRS) contains information about the sentences imposed nationally for Commonwealth offences dealt with by the Commonwealth Director of Public Prosecutions.

In *The Queen v Pham*, the plurality (French CJ, Keane and Nettle JJ) said at [24]:

> a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth. Hence, in the absence of a clear statutory indication of a different purpose or other justification, the approach to the sentencing of offenders convicted of such a crime needs to be largely the same throughout the Commonwealth. Further, as Gleeson CJ stated in Wong, the administration of criminal justice functions as a system which is intended to be fair, and systematic fairness necessitates reasonable consistency. And, as was observed by the plurality in Hili, the search for consistency requires that sentencing judges have regard to what has been done in comparable cases throughout the Commonwealth.

Prior to *The Queen v Pham*, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, the High Court, citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, stated at [135]:

> Intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation unless they are convinced that the interpretation is plainly wrong.

The High Court expressly applied the *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* principle to the *Crimes Act 1914* in *Hili v The Queen* (2010) 242 CLR 520 at [57]. Further, *Hili v The Queen* at [57] was applied in *The Queen v Pham* at [18], [36].

Achieving consistency in sentencing

In *Hili v The Queen* (2010) 242 CLR 520, the High Court held (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [18]; Heydon J agreeing at [70]):

> Consistency in sentencing federal offenders is achieved by the proper application of the relevant statutory provisions, having proper regard not just to what has been done in other cases but why it was done, and by the work of the intermediate courts of appeal.

The plurality in *The Queen v Pham* (2015) 256 CLR 550 affirmed *Hili v The Queen* in the following passage at [18]:

> where a State court is required to sentence an offender for a federal offence, the need for sentencing consistency throughout Australia requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong.

In *Hili v The Queen* the High Court added at [49]:

> [W]hat is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form.

The High Court has repeatedly emphasised that the consistent application of the relevant legal principles is more important than numerical equivalence and that, in seeking such consistency, it is important to have regard to what has been done in other cases: *Hili v The Queen* at [48]–[49], [53]–[54]; *Barbaro v The Queen* (2014) 253 CLR 58 at [40], [41].

There may be issues associated with achieving consistency when trying to equate certain Commonwealth offences with a State equivalent. In *R v Nakash* [2017] NSWCCA 196, Simpson JA (N Adams J agreeing) adopted one approach saying, at [18]:

> I see no reason why, in the absence of a pattern of sentencing for the federal offence, some guidance could not have been obtained from the many cases decided under the State legislation. Although, in *Pham*, the High Court rejected the proposition that a State court sentencing federal offenders should sentence in accordance with the sentencing practice of that State to the exclusion of sentencing practices in other Australian jurisdiction, there is nothing in the judgment of the plurality that prevents reference to sentences imposed in respect of comparable offences under State law. Particularly is that necessary where, as the Crown here asserted, there was no relevant pattern of sentencing in respect of the Code offence.

However, in *Rajabizadeh v R* [2017] WASCA 133, the Western Australian Court of Appeal concluded, at [68], that it was wrong in principle to seek to achieve consistency by equating sentences for certain Commonwealth offences with a State equivalent, observing:

> The idea that sentences for Commonwealth offences should be equated with similar State offences for the purposes of achieving consistency is wrong as a matter of principle. An approach that seeks consistency with similar State offences would create inevitable problems. The equivalent State offences in each jurisdiction may have differing maximum penalties and may attract differing ranges of sentences.

Use of information about sentences in other cases

The High Court has held Simpson J's approach in *DPP (Cth) v De La Rosa* at [303]–[305] accurately identified the proper use of information about sentences that have been passed in other cases: *Hili v The Queen* at [54]; *Barbaro v The Queen* (2014) 253 CLR 58 at [41]. Justice Simpson at [304] said that a range of sentences imposed in the past:

- does not fix boundaries which future courts must follow; and
- can, and should, provide guidance, and stand as a yardstick against which to examine a proposed sentence.

However, when considering past sentences "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned": *DPP (Cth) v De La Rosa* per Simpson J at [304], citing *Wong v The Queen* (2001) 207 CLR 584 at [59]; *Barbaro v The Queen* at [41]; *The Queen v Pham* at [29].

Having regard to comparable cases can assist in identifying the relevant sentencing principles, and the range of available sentences: *The Queen v Pham* at [29].

[16-040] Sentencing for multiple offences

Aggregate sentences

Section 4K *Crimes Act 1914* states in part that:

(3) Charges against the same person for any number of offences against the same provision of a law of the Commonwealth may be joined in the same information, complaint or summons if those charges are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.

(4) If a person is convicted of 2 or more offences referred to in subsection (3), the court may impose one penalty in respect of both or all of those offences …

R v Bibaoui [1997] 2 VR 600 held that s 4K(3) was only concerned with summary offences and the words "information, complaint or summons" in the subsection did not embrace "on indictment".

Offences on indictment were covered by the application of s 68 *Judiciary Act 1903* (Cth), which picked up the provisions of State legislation with regard to the procedures for the trial of indictable offences. The High Court in *Putland v The Queen* (2004) 218 CLR 174 per Gleeson CJ at [9], Gummow and Heydon JJ at [46], Kirby J at [86] confirmed that *R v Bibaoui* had been correctly decided.

Where multiple offences are being dealt with on indictment, *Pearce v The Queen* (1998) 194 CLR 610 may be applied: *Thorn v R* [2009] NSWCCA 294 at [47]. A judge sentencing an offender for multiple federal offences may also impose an aggregate sentence under s 53A *Crimes (Sentencing Procedure) Act 1999*. The power to do so does not derive from s 20AB: *Watson v R* [2020] NSWCCA 215 at [25]. As Pt IB *Crimes Act 1914*, which includes s 4K(4), does not cover the field, s 68(1) *Judiciary Act* applies to pick up the aggregate sentencing scheme under s 53A for federal offenders dealt with on indictment: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [141]–[146]; *Kannis v R* [2020] NSWCCA 79 at [10].

An aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26]. Separate aggregate sentences must be imposed: *Fasciale v R* (2010) 30 VR 643 at [27].

See also **[7-507] Settled propositions concerning s 53A**.

Totality has application for multiple offences. See **Cumulative, partly cumulative or concurrent sentences of imprisonment: s 19** at **[16-030] Sentences of imprisonment** above.

Mixture of Commonwealth and State offences

Setting a non-parole period where there is a mixture of State and Commonwealth offences may pose difficulties for a court. There must be separate aggregate sentences imposed (see above at **Aggregate sentences**).

Ordinarily it is appropriate to apply the Commonwealth practice so far as the overall non-parole period is concerned where there is a mixture of State and Commonwealth offences and a Commonwealth offence is the most serious: *Cahyadi v R* [2007] NSWCCA 1 at [40].

Totality principle when previous sentence to be served: ss 16B, 19AD and 19AE

The totality principle, in the sense of taking into account other sentences to be served, is recognised in ss 16B, 19AD and 19AE *Crimes Act 1914*.

In sentencing a person convicted of a federal offence, the court must have regard to any outstanding sentence imposed on the offender by another court for a federal, State or Territory offence: s 16B(a). The court must also take into account any sentence the person is liable to serve because of the revocation of a parole order made or licence granted: s 16B(b).

When a court imposes a federal sentence on an offender who is serving a non-parole period for an existing federal sentence, the court must, in fixing the non-parole period,

consider the existing non-parole period, the nature and circumstances of the offence concerned, and the antecedents of the person: s 19AD. The same principle applies under s 19AE to offenders who are already subject to an existing recognizance release order.

Options that the court may take are set out by ss 19AD and 19AE; namely, it may:

- make an order confirming the existing non-parole period or recognizance release order
- fix a new single non-parole period or recognizance release order in respect of all federal sentences that the offender is to serve or complete
- cancel the existing non-parole period/recognizance release order and decline to set a new one, where the court decides that a non-parole period or recognizance release order is not appropriate.

A court cannot fix a single non-parole period or make a recognizance release order for both a federal sentence of imprisonment and a State/Territory sentence of imprisonment: s 19AJ.

Possible deportation is no impediment to fixing non-parole period: s 19AK

Section 19AK clearly states that a court is not precluded from fixing a non-parole period in respect of the sentence imposed for that offence merely because the person is, or may be, liable to be deported from Australia. Cases touching on this topic include: *The Queen v Shrestha* (1991) 173 CLR 48 and *DPP (Cth) v El Karhani* (1990) 21 NSWLR 370.

[16-045] Remissions

Pursuant to s 19AA(1), any remissions that are provided on the term of sentence to State or Territory offenders by the State or Territory in which the federal offender serves their sentence of imprisonment also apply to federal sentences. However, a State or Territory law that enables the remission or reduction of a non-parole period of a State or Territory prison sentence does not apply to a federal sentence (unless the remission or reduction is due to industrial action by prison warders): ss 19AA(2) and (4). New South Wales does not allow remissions.

Detention of offender in State or Territory prison: ss 18 and 19A

Section 18 provides that where, under State or Territory law, a convicted person may be imprisoned in a particular kind or class of prison, a person convicted of an offence against the law of the Commonwealth may, in corresponding cases, be imprisoned in the kind or class of prison appropriate to the circumstances. Section 19A provides that a federal offender who is ordered by a court or a prescribed authority to be detained in prison in a State/Territory, may be detained in any prison in that jurisdiction and may be removed from one prison to another prison as if the person were detained as a State/Territory offender.

[16-050] Conditional release on parole or licence

Last reviewed: August 2024

The function of directing release on parole or licence resides with the Attorney-General (Cth) (or departmental delegate). The Attorney-General also retains other important decision-making powers, such as revoking parole and amending the conditions

attached to it. By contrast, the court's role is to determine the length of the sentence and of any non-parole period. In *The King v Hatahet* [2024] HCA 23, the High Court discusses the distinction between the judicial function of sentencing and the executive function of determining parole.

Release on parole — making of parole order

If a federal offender has been sentenced to more than 3 years, the Attorney-General must, before the end of a non-parole period fixed for one or more federal sentences imposed on a person, either make, or refuse to make, an order directing that the person be released from prison on parole: s 19AL(1). (See s 19AC for sentences less than 3 years.)

If the Attorney-General refuses to make a parole order for a person under s 19AL(1) or s 19AL(2)(b), the Attorney-General must give the person a written notice, within 14 days after the refusal, and reconsider the making of a parole order for the person and either make, or refuse to make, such an order, within 12 months after the refusal. Section 19ALA contains a non-exhaustive list of the matters which may be considered by the Attorney-General in making a parole decision.

The Attorney-General is not required to make, or to refuse to make, a parole order if the offender is serving a State or Territory sentence or non-parole period and it ends after the federal sentence(s): s 19AL(5).

Discretionary release on licence: s 19AP

Release on licence is another form of conditional release of a federal offender. An offender, or someone acting on their behalf, must apply to the Attorney-General for such an order: s 19AP(2). The application must specify the exceptional circumstances relied upon, and the Attorney-General must be satisfied that those exceptional circumstances exist to justify the grant of the licence: s 19AP(3) and (4). Release on licence may be granted whether or not a non-parole period has been fixed, or a recognizance release order has been made, and whether or not the non-parole period or pre-release period has expired. Two examples of circumstances in which early release may be granted are when an offender requires medical treatment that cannot be provided in the prison system and when an offender has provided assistance to law enforcement authorities, but this was not taken into account at sentence.

Decision-making process

The Attorney-General's Department makes its parole determinations on the basis of written material, and there is no opportunity for the offender to appear in person at a parole hearing. This contrasts with the practice in NSW for State offences, whereby the State Parole Authority may invite the offender to appear at a hearing and make submissions if the Authority forms an initial intention to refuse parole. The State Parole Authority has a statutory basis under the *Crimes (Administration of Sentences) Act 1999* (NSW). There is no formal parole board at the federal level, although the Attorney-General's delegate may consult an advisory panel in difficult or controversial cases. The panel's members include representatives from the Office of the Commonwealth Director of Public Prosecutions.

Conditions and supervision: ss 19AN and 19AP

Certain conditions are automatically attached to parole or release on licence. These are that the offender must be of good behaviour, must not violate any law during

the period of parole or licence, and that, if subject to supervision, the offender must obey all reasonable directions of the supervisor: ss 19AN(1) and 19AP(7). The Attorney-General may also specify any other conditions in the order. The conditions applicable to a parole order or licence may be changed by written order of the Attorney-General at any time before the end of the parole or licence period: s 19APA.

Supervision following release on parole/licence is intended to reduce the risk of reoffending and to assist the offender in reintegrating into the community. There is no limit on the period of supervision. "Supervision period" is defined in s 16(1) by reference to the time between a person's release on parole or licence and when either the relevant order, or nominated period of supervision, expires.

Parole order where offender is serving State sentence: s 19AM

Section 19AM(2) confirms that an offender is not to be released on parole for a federal offence if the offender is serving (or is to serve) a State or Territory sentence.

[16-055] Revocation of parole or licence

A federal offender on parole or licence (conditional release) is still serving their sentence until the parole or licence period ends: s 19APB(1)(a). If an offender fails to comply with the conditions of their release the Attorney General may revoke their parole or licence: s 19AU. There will be an automatic revocation of an offender's parole or licence, if the offender on conditional release commits an offence resulting in the imposition of a sentence of more than 3 months' imprisonment: s 19AQ(1)–(2).

Because there is no federal equivalent of the NSW State Parole Authority, a court determines how much of the outstanding sentence the federal offender is liable to serve and fixes a new non-parole period (or declines to do so): s 19AQ(3)–(4). This does not involve "re-sentencing" the offender for the outstanding sentence: *Nweke v R (No 2)* [2020] NSWCCA 227 at [23].

The provisions do not apply to suspended sentences: s 19AQ(5).

Revocation of parole or licence by Attorney-General

The Attorney-General may revoke parole or a licence where a federal offender fails to comply with their conditions, or there are reasonable grounds for suspecting that the offender has failed to comply: s 19AU(1).

A person who is arrested (with or without warrant) after their parole or licence is revoked by the Attorney-General must, as soon as practicable, be brought before a magistrate in the State or Territory where they were arrested: s 19AV(3). The magistrate must direct the person be detained in prison for the unserved part of the sentence: s 19AW. This is calculated in accordance with NSW laws with an offender being taken to have served their sentence from release on parole or licence until its revocation therefore taking clean street time into account: s 19AA(1)–(3); see *Crimes (Administration of Sentences) Act 1999*, ss 171, 254 and 255.

Automatic revocation of parole or licence

A federal parole order or licence is automatically revoked when an offender commits a further federal, State or Territory offence (new offence) on conditional release for which they are sentenced to a term of imprisonment of more than 3 months:

s 19AQ. This includes an aggregate sentence of more than 3 months but not a suspended sentence: s 19AQ(1)–(2), (5). Parole will be automatically revoked even if the sentence has expired, so long as the offence which attracted a sentence of at least 3 months imprisonment was committed while the offender was on conditional release: s 19APB(2).

When sentencing the offender for the new offence, the court will generally deal with the outstanding sentence by:

1. Determining when the parole order or licence was revoked (s 19AQ(1)–(3));
2. Determining how much of the sentence the person is liable to serve (s 19AQ(4));
3. Imposing a new non-parole period for the outstanding sentence (s 19AR) (the court cannot impose a recognizance release order); and
4. Issuing a warrant for the offender's imprisonment for the unserved part of the outstanding sentence (s 19AS).

When determining how much of the outstanding sentence the offender is liable to serve, s 19AQ(4)(b) provides the court may, where appropriate, take into account the person's good behaviour between conditional release and revocation (clean street period). The earlier version of s 19AQ which applies to parole or licences revoked before 20 July 2020, when read together with s 19AA(2) also requires the clean street period to be taken into account: *Nweke v R* [2020] NSWCCA 153 at [75]–[77].

When sentencing the offender for the new offence/s, the court must fix a single non-parole period for all outstanding and new federal offences: s 19AR(1). A non-parole period for any new State or Territory offences committed while the offender was on conditional liberty must be fixed separately: ss 19AJ, 19AR(3). A court may decline to set a non-parole period but must provide reasons: s 19AR(4)–(5).

Section 19AS(1)(e) provides an offender "must begin to serve the unserved part of the outstanding sentence… on the day that the new sentence is… imposed" and the court is not able to backdate a sentence. Where an offender is entitled to the benefit of pre-sentence custody, the court's inability to backdate the sentence means it is "not possible to impose a sentence that does not involve some distortion of the common law and statutory principles that govern the sentencing task": *Nweke v R (No 2)* [2020] NSWCCA 227 at [41]. Instead, courts should make allowance for pre-sentence custody while providing "a transparent process of reasoning" and ensure the sentence structure is "not distorted so as to exceed or fall short of what would otherwise have been imposed": at [41]. One option is to reduce the total effective sentence while an alternative option is to backdate the sentence for the new offences to reflect the pre-sentence custody relating to the original offences. Neither approach is wrong or wholly satisfactory: *Nweke v R (No 2)* at [35], [39]–[41].

[16-060] Children and young offenders

Section 20C *Crimes Act 1914* provides that children and young persons may be tried and punished for federal offences in accordance with the law of the State or Territory in which they were charged or convicted. This enables the States and Territories to apply their respective juvenile justice regimes. However, it does not preclude the application of federal sentencing laws and considerations in Pt IB of the *Crimes Act* (Cth).

There is no definition of "child" or "young person" under the *Crimes Act 1914*. The definition used in the respective State or Territory is generally adopted, which may result in discrepancies in the treatment received between jurisdictions.

If the child is tried or punished for a federal offence in accordance with NSW laws, key provisions of the *Children (Criminal Proceedings) Act 1987* are engaged, such as the principles in s 6, the procedure in s 31 and the penalties in s 33.

[16-065] Imposing restrictions on passports at sentence

Section 22 authorises a court that passes a "relevant sentence" or makes a "relevant order" with regard to a person convicted of a "serious drug offence", or other prescribed offence against the Commonwealth, to surrender possession of their Australian passport or refrain from applying for an Australian passport.

A serious drug offence means an offence involving or relating to controlled substances and punishable by a maximum penalty of 2 years imprisonment or more: s 22(7). The other offences currently prescribed under cl 6AA *Crimes Regulations* 1990 (Cth) are indictable passport offences.

"Relevant sentence" is defined by s 22(7) as a sentence of imprisonment, other than a suspended sentence, or sentencing alternatives available pursuant to s 20AB (for example, intensive correction orders for offenders sentenced in NSW). "Relevant order" refers to remanding a person in custody or on bail, suspending the sentence upon entering a recognizance, or ordering a conditional release.

[16-070] Offenders with mental illness or intellectual disability

Divisions 6–9 of Pt IB cover unfitness to be tried and other issues relating to mental illness.

Only the provisions relevant to sentencing (under Divs 8 and 9) will be discussed here. Specific alternatives are available to the court instead of passing sentence.

Summary jurisdiction: s 20BQ

In the summary jurisdiction, if a federal offender is suffering from a mental illness within the meaning of the civil law of the State or Territory, or is suffering from an intellectual disability, and the court considers it would be "more appropriate" to deal with the offender within s 20BQ, the Court can dismiss the charge and discharge the offender conditionally or unconditionally into the care of a responsible person. See discussion in *Local Court Bench Book* at **[18-140] Persons suffering from mental illness or intellectual disability**.

Hospital orders: ss 20BS–20BU

Where a person has been convicted of an indictable federal offence the court may, without passing sentence, order that the person be detained in a hospital for a specified period for the purpose of receiving certain treatment. However, to make such an order, the court must be satisfied that:

(a) the person is suffering from a mental illness within the civil law of the relevant State/Territory

(b) the illness contributed to the commission of the offence by the person

(c) appropriate treatment for the person is available in a hospital in the State/Territory, and

(d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital: s 20BS(1).

Before reaching an opinion on these matters, the court must obtain and consider the reports of two "duly qualified psychiatrists with experience in the diagnosis and treatment of mental illness": s 20BS(5).

Furthermore, the court must not make a hospital order unless it would have otherwise sentenced the person to a term of imprisonment, but for the person's mental illness: s 20BS(2). The court must not specify a period that is longer than the period of imprisonment that would have been imposed if the hospital order had not been made: s 20BS(3).

Psychiatric probation orders: ss 20BV–20BX

Where a person is convicted of any federal offence, the court may, without passing sentence, order that the person reside at (or attend) a specified hospital or other place for the purpose of receiving psychiatric treatment, where the court is satisfied that:

(a) the person is suffering from a mental illness within the civil law of the relevant State/Territory

(b) the illness contributed to the commission of the offence by the person

(c) appropriate psychiatric treatment for the person is available in a hospital in the State/Territory, and

(d) the person consents to the order, and the person (or their legal guardian) consents to the proposed treatment: s 20BV(1) and (2).

Program probation orders: s 20BY

Where a person is convicted of any federal offence, the court may, without passing sentence, order that the person be released on condition that he or she undertake the program or treatment specified in the order, where the court is satisfied that: (a) the person is suffering from an intellectual disability (b) the disability contributed to the commission of the offence by the person, and (c) an appropriate education program or treatment is available for the person in the State/Territory: s 20BY(1).

[The next page is 9001]

Particular offences

Commonwealth child sex offences

Dangerous driving and navigation

Detain for advantage/kidnapping

Drug Misuse and Trafficking Act 1985 (NSW) offences

Fraud offences

Offences against justice/in public office

Robbery

Car-jacking and car rebirthing offences

Sexual assault

Murder

Manslaughter and infanticide

Assault, wounding and related offences

Firearms and prohibited weapons offences

Damage by fire and related offences

Domestic violence offences

COMMONWEALTH

Commonwealth drug offences

Money laundering

Conspiracy

[The next page is 9051]

Break and enter offences

[17-000] The statutory scheme

Last reviewed: August 2024

Part 4, Div 4 *Crimes Act* 1900 (NSW) ("the Act") contains a number of break and enter offences:

- break out of a dwelling-house after committing, or enter with intent to commit, an indictable offence (s 109, maximum penalty 14 years)
- break, enter and assault with intent to murder (s 110, maximum penalty 25 years)
- enter a dwelling house with intent to commit a serious indictable offence (s 111, maximum penalty 10 years)
- break, enter and commit a serious indictable offence (s 112, maximum penalty 14 years)
- break and enter with intent to commit a serious indictable offence (s 113, maximum penalty 10 years)
- being armed with intent to commit an indictable offence (s 114, maximum penalty 7 years), and
- being a convicted offender armed with intent to commit an indictable offence (s 115, maximum penalty 10 years).

There are aggravated and specially aggravated forms of offences under ss 109, 111, 112 and 113 with corresponding greater maximum penalties. The circumstances of aggravation and special aggravation are defined in s 105A(1). Section 115A provides that where the more serious offence is charged but not established, an alternative verdict may be reached on the basis of the non-aggravated offence.

[17-010] Break, enter and commit serious indictable offence: s 112(1)

Last reviewed: August 2024

Section 112(1)(a) makes provision for the offence of break, enter and commit a serious indictable offence in a dwelling house or other building. Section 112(1)(b) provides for the offence where a person, being in a dwelling-house or other building, commits a serious indictable offence, then breaks out of that dwelling-house or building.

The term "serious indictable offence" is defined by s 4 of the *Crimes Act* as an indictable offence that is punishable by imprisonment for life or for a term of five years or more. Section 112(1) therefore encompasses a wide range of offences and criminality: *Kelly v R* [2007] NSWCCA 357 at [19]; *Testalamuta v R* [2007] NSWCCA 258 at [38].

The seriousness of the "serious indictable offence" is an appropriate matter to consider on sentence: *R v Huynh* [2005] NSWCCA 220. However, this factor alone is not determinative; the objective seriousness of the offence depends on "all the facts and circumstances of the offence, and … the range of offences of its kind which come

before the court": *R v Huynh* at [27]. See also **[17-040] Aggravated break, enter and commit serious indictable offence** and **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**.

[17-020] Break, enter and steal — guideline judgment

Last reviewed: August 2024

Break, enter and steal has long been regarded as a serious crime by the legislature, and as such, general deterrence is a particularly important sentencing consideration: see for example *R v Maher* [2004] NSWCCA 177 at [44]; *Shaw v R* [2008] NSWCCA 58.

Guideline judgment

In *R v Ponfield* (1999) 48 NSWLR 327, Grove J (with Spigelman CJ and Sully J agreeing) considered whether the prevalence of s 112(1) offences involving larceny, and the inconsistency of sentences imposed, warranted the promulgation of a guideline judgment.

The Court outlined the appropriate considerations that are to be taken into account on sentence for offences of break, enter and steal. This approach of listing relevant factors in a guideline was subsequently approved by the joint judgment in the High Court decision of *Wong v The Queen* (2001) 207 CLR 584 at [60].

In *R v Ponfield*, the Court expressed the guideline at [48]–[49] as follows:

> ***Guidelines***
>
> A court should regard the seriousness of offence contrary to s 112(1) of the *Crimes Act 1900* as enhanced and reflect that enhanced seriousness in the quantum of sentence if any of the following factors are present. Necessarily, if more than one such factor is present there is accumulative effect upon seriousness and the need for appropriate reflection.
>
> (i) The offence is committed whilst the offender is at conditional liberty on bail or on parole.
>
> (ii) The offence is the result of professional planning, organisation and execution.
>
> (iii) The offender has a prior record particularly for like offences [no longer applicable (see below)].
>
> (iv) The offence is committed at premises of the elderly, the sick or the disabled.
>
> (v) The offence is accompanied by vandalism and by any other significant damage to property.
>
> (vi) The multiplicity of offences (reflected either in the charges or matters taken into account on a Form 1 pursuant to s 21 of the *Criminal Procedure Act 1986*). In sentencing on multiple counts regard must be had to the criminality involved in each: *Pearce v The Queen* (1998) 72 ALJR 1416.
>
> (vii) The offence is committed in a series of repeat incursions into the same premises.
>
> (viii) The value of the stolen property to the victim, whether that value is measured in terms of money or in terms of sentimental value.
>
> (ix) The offence was committed at a time when, absent specific knowledge on the part of the offender (a defined circumstance of aggravation — *Crimes Act* s 105A(1)(f)), it was likely that the premises would be occupied, particularly at night.

(x) That actual trauma was suffered by the victim (other than as a result of corporal violence, infliction of actual bodily harm or deprivation of liberty — defined circumstances of aggravation: *Crimes Act* s 105A(1)(c), (d) and (e)).

(xi) That force was used or threatened (other than by means of an offensive weapon, or instrument — a defined circumstance of aggravation *Crimes Act* s 105A(1)(a)).

It will of course be requisite for a sentencing court to give appropriate weight to matters in mitigation as manifest in the particular case. These will include evidence of genuine regret and remorse and any rehabilitative steps taken by the offender. Whilst addiction to drugs and alcohol is a relevant circumstance for the court to consider it is not of itself a mitigating factor. (See *R v Henry* supra at pars [193]–[203] and [217]–[259]).

However, the Court declined to specify a sentencing range or starting point for sentences in view of the great diversity of circumstances in which the offence is committed: [43], [46]. The Court was not able to identify a useful typical scenario, as in the armed robbery guideline of *R v Henry* (1999) 46 NSWLR 346, or a particular standard of general application, as occurred in *R v Jurisic* (1998) 45 NSWLR 209. A further significant consideration was the fact the majority of offenders charged under s 112(1) are dealt with in the Local Court, where the jurisdictional limit is two years imprisonment: [8], [44].

The prior record qualification

Guideline (iii) above — "The offender has a prior record particularly for like offences" — was disapproved and not followed in the five judge bench decision of *R v McNaughton* (2006) 66 NSWLR 566 per Spigelman CJ at [23]–[24] and Grove J at [66]–[76]. Prior offending is to be ignored when assessing the objective seriousness of the crime. It is not an "objective circumstance" for the purposes of the application of the proportionality principle. It is not open for a court to use prior convictions to determine the upper boundary of a proportionate sentence: *R v McNaughton* at [25]; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Baumer v The Queen* (1988) 166 CLR 51. However, prior convictions may be relevant to the determination of whether leniency should be extended: *Shaw v R* [2008] NSWCCA 58 at [21]; *Pattison v R* [2007] NSWCCA 186 at [39]. See further **Prior record** at **[10-405]**.

Guideline should not be applied arithmetically

Sentencing for the offence of break, enter and steal is not an arithmetical process of tallying the presence or absence of the aggravating or mitigating features identified in *R v Ponfield*: *R v Webster* [2005] NSWCCA 110 at [26]. In *R v Webster*, the offender relied on the absence of most of the aggravating features identified in *R v Ponfield* (at [22]) to support a submission that the objective seriousness of the offence did not warrant the sentence imposed. In rejecting this approach the Court stated at [26]:

> the reliance upon the guideline judgment in *Ponfield* is misconceived. Sentencing in relation to these kinds of offences does not involve simply adding up aggravating features. It involves a qualitative analysis of the particular facts surrounding the relevant offences, which includes the part played by particular aggravating features …

Aggravating factors not included in R v Ponfield

The Court in *R v King* [2003] NSWCCA 352 held that an offence committed after escaping from custody does not fall within the conditional liberty aggravating factor

identified in *R v Ponfield*. However, it is an aggravating factor nonetheless, and one, "in a scale of seriousness", above the fact of being on conditional liberty at the time of offending: [38]. The Court held at [39] that an: "'offence committed whilst the offender is unlawfully at large' should notionally be added to the table in *Ponfield*."

[17-025] Totality

Last reviewed: August 2024

The principle of totality will rarely, if ever, justify wholly concurrent sentences for a series of break and enter offences: *R v Merrin* [2007] NSWCCA 255 at [38] citing *R v Harris* [2007] NSWCCA 130 at [38]–[42]. The Court in *R v Harris* at [40] warned that failing to at least partially accumulate sentences for multiple offences may result in an offender escaping punishment for the second and subsequent offences.

See further **Structuring sentences of imprisonment and the principle of totality** at **[8-230]**.

[17-030] Summary disposal

Last reviewed: August 2024

An offence under s 112(1) is to be dealt with summarily by a Local Court, except where the prosecutor or the person charged elects to have the matter dealt with on indictment: s 260 *Criminal Procedure Act 1986*, or where the serious indictable offence alleged is stealing or maliciously destroying or damaging property and the value of the property stolen or destroyed, or the value of the damage to the property, does not exceed $60,000: Sch 1 Table 1 Pt 2 cl 8 *Criminal Procedure Act*. JIRS statistics reveal that the vast majority of break, enter and steal offences are dealt with in the Local Court and Children's Court.

In *Zreika v R* [2012] NSWCCA 44, the Court observed the fact an offence could be dealt with summarily could only be taken into account on sentence if the Court was able to clearly determine that the offence, considering the offender's criminal history, ought to have remained in the Local Court. The bare theoretical possibility does not suffice: [109]. Generally, all of the sentences imposed for an offence dealt with summarily and on indictment should be considered if comparison is to be made for the purpose of establishing a "yardstick": *Peiris v R* [2014] NSWCCA 58 at [90].

See further **Objective factors at common law** at **[10-080]**.

[17-040] Aggravated break, enter and commit serious indictable offence: s 112(2)

Last reviewed: August 2024

Section 112(2) provides for a more serious offence where a person commits an offence under s 112(1) in circumstances of aggravation. Pursuant to s 105A(1), "circumstances of aggravation" means circumstances involving any one or more of the following:

(a) the alleged offender is armed with an offensive weapon, or instrument (defined in s 4)

(b) the alleged offender is in the company of another person or persons

(c) the alleged offender uses corporal violence on any person

(d) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person

(e) the alleged offender deprives a person of his or her liberty

(f) the alleged offender knows that there is a person, or that there are persons, in the place where the offence is alleged to be committed.

Section 105A(2) provides that the matters referred to in paragraph (c), (d) and (e) above may occur immediately before, at the time of or immediately after, any of the elements of the offence.

Where the circumstances in paragraph (f) are charged in aggravation, the defendant is presumed to have known the premises were occupied, unless the court is satisfied there existed reasonable grounds for believing no one was in the place.

In *R v Huynh* [2005] NSWCCA 220, Simpson J said of the circumstances of aggravation defined in s 105A at [29]:

> the assessment of objective gravity must be made by reference to the particular facts of the case. There is no gradation of the circumstances of aggravation set out in s 105A. In saying this, I would accept that, generally speaking, certain of the circumstances of aggravation specified would, as a matter of common sense, appear to be more serious than others. One would expect that being armed with an offensive weapon, for example, or the use of corporal violence, or deprivation of liberty, would ordinarily, be regarded as more serious than committing an offence in company. But all depends upon the particular circumstances of the individual case.

Assessing objective seriousness

One of the relevant matters in assessing objective seriousness is the number of aggravating features present: *Maxwell v R* [2007] NSWCCA 304 at [26]. Simpson J said in *R v Huynh* at [30]:

> it is only common sense that, generally speaking, the more circumstances of aggravation [in s 112(2)] are present, the more serious will be the offence. But it does not necessarily follow that it is wrong to place an offence with only one such circumstance in the mid-range category.

In *R v Ball* [2021] NSWCCA 314 at [49]–[64], the Court discusses the assessment of objective seriousness where a conditional release order without conviction was imposed for a s 112(2) offence involving the infliction of actual bodily harm where the circumstance of aggravation was that the offender knew another person was present in the house.

Stealing

In *R v Huynh* at [27], the Court held the classification of an offence of break, enter and steal as "towards the mid-range" was not erroneous notwithstanding that larceny only carries a maximum penalty of five years, which is within the bottom of the range of serious indictable offences. The maximum penalty of a serious indictable offence does not of itself determine where the offence lies in the scale of gravity of offences against s 112(2), and the assessment of the objective seriousness is to be made by reference to all the facts and circumstances of the offence and to the range of offences of its kind which come before the court: *R v Huynh* at [27]. As to the assessment of standard

non-parole period offences under s 112(2) see **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**ff. In *R v Harris* [2007] NSWCCA 130 at [29], the Court said of stealing:

> Grove J's remarks [in guideline judgment] and those quoted and made in *Marshall v R* [2007] NSWCCA 24 certainly make it doubtful whether an offence of or involving breaking, entering and stealing could ever justify a sentence at the top of the ranges for which s 112(1) and (2) provide. Nevertheless the maxima of 14 years and 20 years provided by those subsections still leave plenty of scope for the imposition of heavy sentences where the addition to the elements of breaking and entering is stealing.

In *Marshall v R* [2007] NSWCCA 24, the Court held at [34]–[40] that for break, enter and steal cases under s 112(2), the guideline judgment in *R v Ponfield* (1999) 48 NSWLR 327 assists in evaluating the seriousness of the offence (see **[17-020] Break, enter and steal: s 112(1)**). The Court also must consider the element of aggravation relied upon, both as to its nature and what was actually done. The aggravating factors present should be assessed individually and in combination.

Prevalence, prior record and conditional liberty

The prevalence of an offence, an offender's prior criminal history and conditional liberty are not relevant to an assessment of the objective seriousness of an offence under s 112(2): *R v Johnson* [2004] NSWCCA 140 at [33]; *R v Van Rysewyk* [2008] NSWCCA 130 at [25].

Provocation by the victim

In a number of cases where the offence of aggravated break and enter was committed following provocation by the victim (the offender being motivated by a desire for retribution), the court has assessed the criminality as falling significantly below the mid-range or at the lower end: *Lovell v R* [2006] NSWCCA 22 at [63]; *R v Price* [2005] NSWCCA 285 at [23]; *R v Millar* [2005] NSWCCA 202 at [43]; *R v Tory* [2006] NSWCCA 18 at [37]; see also *R v Ball* [2021] NSWCCA 314. The Court held in *Lovell v R* that the offence fell below the middle range of objective seriousness because the applicants were not motivated by personal gain to acquire property but, rather, by the victim's lewd conduct towards the applicant's 15-year-old sister.

When deciding whether to impose a term of full-time imprisonment for an offence under s 112(2), it is permissible to take into account whether "… right minded members of the community would regard the criminality of [the] offence as such that it ought be denounced by a sentence of imprisonment": *Leese v R* [2007] NSWCCA 108 at [22].

Corporal violence

Where the use of corporal violence is charged as an element of aggravation, the sentence must reflect the difference between this element and the infliction of actual injuries, "lest it be thought that there is no point in limiting the violence used to commit crimes": *Gray v R* [2007] NSWCCA 366 at [28]. Although the offences in *Gray v R* were correctly described as "serious, violent, cruel and callous", it was an exaggeration to describe them as "extremely" so, where no physical injuries were actually inflicted.

Aid and abet

The standard non-parole period of five years also applies to offences of aiding and abetting an aggravated break and enter under s 112(2). In *R v Merrin* [2007]

NSWCCA 255, the offender pleaded guilty to several offences of aiding and abetting an aggravated break, enter and steal. The Court held the sentencing judge had fallen into error by failing to make any reference to the standard non-parole period and by failing to consider the objective seriousness of the offence: [43], [47]. In this case, the error resulted in sentences that were manifestly inadequate.

Domestic violence

In *Shaw v R* [2008] NSWCCA 58, the offender was sentenced for an offence under s 112(2) of aggravated break, enter and maliciously inflict actual bodily harm. The offender and the victim had been in a domestic relationship for approximately five years until shortly before the offence. The Court held at [24] that the offender's genuine display of remorse, as a mitigating factor under s 21A(3)(i) *Crimes (Sentencing Procedure) Act 1999*, was outweighed by the need in cases involving domestic violence for general and specific deterrence, denunciation of the conduct involved, and protection of the community. The fact the victim had expressed forgiveness and attempted to adopt responsibility for the offence could be of little relevance, as such "self interest denying forgiveness" was well known to the courts as a factor which inhibited the prosecution of domestic violence offences: [27].

[17-045] Specially aggravated break, enter and commit serious indictable offence: s 112(3)

Last reviewed: August 2024

Section 112(3) provides for an offence of greater seriousness (than an aggravated s 112(2) offence) where a person commits an offence under s 112(1) in circumstances of "special aggravation". Pursuant to s 105A(1), circumstances of special aggravation means circumstances involving either or both of the following:

(a) the alleged offender wounds or maliciously inflicts grievous bodily harm on any person;

(b) the alleged offender is armed with a dangerous weapon.

Section 105A(2) provides that the matters referred to in paragraph (a) above may occur immediately before, at the time of, or immediately after, any of the elements of the offence.

The range of sentences available for an offence under s 112(3) is influenced by the broad scope of criminality encompassed by the section: *Kelly v R* [2007] NSWCCA 357 at [19]. In *Testalamuta v R* [2007] NSWCCA 258, the offender pleaded guilty to breaking and entering a house, knowing a person was inside, and using a gun to intimidate a person who was to be called as a witness in judicial proceedings. The Court found no error in the sentencing judge's finding the offence was in the upper range of seriousness. The Court held at [38] that the serious indictable offence in this case (threatening a witness with intent to influence) was of "particular gravity", and it justified an increment of approximately 50% on the standard non-parole period.

In *Kelly v R* (involving break, enter and intimidate with a gun) the fact the gun was neither loaded nor discharged did not "diminish the seriousness of the conduct": [34]. Nor was the seriousness of the intimidation mitigated by the absence of express verbal threats, the intimidation consisting of menacingly pointing a gun directly at people: [32].

In *R v Chaaban* [2006] NSWCCA 107, a non-parole period of less than one-third of the standard non-parole period for specially aggravated break, enter and steal was manifestly inadequate: [48]. The circumstance of special aggravation was the fact the victim was wounded. In the course of a struggle to escape during a home invasion, the victim sustained a number of injuries, including lacerations to his head and face, and having his forearm almost severed with a machete. The Court held the sentencing judge failed to appreciate the seriousness of offences involving home invasions, as reflected in the decisions of *R v Ponfield* (1999) 48 NSWLR 327 and *R v Henry* (1999) 46 NSWLR 346: [49]. The judge also failed to appreciate the greater seriousness of offences under s 112(3) compared with those dealt with in *R v Henry*: [49].

Further, aspects of the discussion at **[17-040] Aggravated break, enter and commit serious indictable offence: s 112(2)** may be relevant to the specially aggravated offence.

[17-050] The standard non-parole period provisions

Last reviewed: August 2024

A standard non-parole period of five years for s 112(2) and seven years for s 112(3) is prescribed for an offence committed on or after 1 February 2003: s 54B *Crimes (Sentencing Procedure) Act 1999*. Section 54D(2) provides the standard non-parole period "… does not apply if the offence for which the offender is sentenced is dealt with summarily".

Guideline judgments such as *R v Ponfield* (1999) 48 NSWLR 327 may assist in the sentencing exercise, notwithstanding the subsequent introduction of standard non-parole periods: *Marshall v R* [2007] NSWCCA 24 at [34]–[40].

For a detailed list of appeal cases, see SNPP Appeals menu option on the Judicial Information Research System (JIRS). For consideration of the sentencing principles applicable to the standard non-parole provisions, see further **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**.

[17-060] Application of the De Simoni principle

Last reviewed: August 2024

The Queen v De Simoni (1981) 147 CLR 383 is authority for the proposition that a sentencer is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence (see **[1-500] De Simoni principle**).

Practices adopted by sentencing judges to avoid error, such as making it clear the principle has been considered and setting out the facts on which an offender can and cannot be sentenced, are reflected in cases such as *R v Baugh* [1999] NSWCCA 131 at [15]; *R v Channels* (unrep, 30/09/97, NSWCCA); *R v Smith* [2002] NSWCCA 378 at [11].

Taking into account "circumstances of aggravation" in a s 112(2), (3) offence

A court may properly take into account circumstances of aggravation (as described in s 105A(1) of the *Crimes Act*) which are not alleged in the indictment, when sentencing

for an offence under s 112(2), (3). In *R v Li* (unrep, 9/7/97, NSWCCA) the offender was sentenced for an offence of specially aggravated break, enter and rob, being armed with a dangerous weapon. The sentencing judge took into account other circumstances of aggravation, including that the accused was in company and deprived the victim of his liberty. The Court held that this was permissible as these circumstances of aggravation grounded a less serious offence, namely one under s 112(2), than that for which the offender was being sentenced. The *De Simoni* principle was therefore not applicable. This aspect of the decision in *R v Li* was followed in *Marshall v R* [2007] NSWCCA 24 at [10]; *MM v R* [2016] NSWCCA 235 at [118]; *Taufa v R* [2020] NSWCCA 264 at [81]–[82].

In *Taufa v R*, the offender was found not guilty by a jury of a s 112(3) offence involving use of a dangerous weapon, but convicted of the statutory alternative, under s 112(2) which involved being armed with an "offensive weapon". The sentencing judge noted the offender appeared to have a gun, and found he had a "toy gun". The *De Simoni* principle precluded a finding the offender carried an imitation pistol, but not that he carried a toy gun: [98].

Form 1 offences and De Simoni

In *R v BB* [2005] NSWCCA 215 at [13], the sentencing judge was confronted with the difficult task of attempting to appropriately deal with the criminality involved in the s 112(2) offence while taking into account a malicious wounding offence on a Form 1 — without effectively sentencing the applicant for the s 112(3) offence. The judge succeeded and the Court confirmed that if the judge had taken into account the wounding it would have infringed the *De Simoni* principle: [25].

[17-070] Application of s 21A

Last reviewed: August 2024

Section 21A(2) *Crimes (Sentencing Procedure) Act 1999* sets out aggravating features which are to be considered "in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law": s 21A(1).

Writing extra-judicially, Howie J opined that s 21A(2) has limited operation where there is a guideline judgment for an offence. In "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43 at 44, his Honour said:

> The guideline judgments are offence specific. The facts relevant to a determination of whether or not the guideline applies will generally merely be specific aspects of the aggravating and mitigating factors in s 21A. There will be few, if any, aggravating or mitigating features to take into account once the specific offence-related matters have been considered.

For example, guideline (ii) of the guideline judgment of *R v Ponfield* (1999) 48 NSWLR 327 refers to "professional planning" and planning is referred to as an aggravating factor in s 21A(2)(n). The error of double counting aggravating features that are referred to in a guideline judgment and s 21A(2) occurred in the robbery case of *R v Street* [2005] NSWCCA 139, where Hoeben J said at [35]:

> There was a further problem in this case in that his Honour first considered the guideline judgment in *R v Henry* which referred to factors, the absence or presence of which

> indicated that the guideline judgment was applicable and then by way of separate analysis took into account the specific factors referred to in s 21A albeit in a collective and non-specific way as has been described. This exacerbated the risk of aggravating factors being double counted.

There is nothing to suggest that the approach taken by the Court in *R v Street* would not be applied to *R v Ponfield* (1999) 48 NSWLR 327.

In some instances, however, the statutory criteria contained in s 21A(2) are relevant notwithstanding the existence of a guideline judgment. See further **Section 21A factors** at **[11-000]**ff.

Section 21A — break and enter case examples

Section 21A(2) aggravating factor cannot further aggravate offence if an element of offence or a s 105A circumstance of aggravation

In *R v Price* [2005] NSWCCA 285, the offender was convicted of aggravated break enter and commit serious indictable offence (assault occasioning actual bodily harm [AOABH]) pursuant to s 112(2). The circumstance of aggravation was that the offender knew that a person was in the dwelling at the time of the offence. The Court held at [28]–[31] that the sentencing judge erred by referring to the use of actual violence under s 21A(2)(b) as an aggravating factor as the use of violence was an element of the offence of AOABH and could not further aggravate the offence. Similarly in *Aslett v R* [2006] NSWCCA 49 at [110], it was held the use of actual violence could not constitute an aggravating factor under s 21A(2)(b), as it was itself an element of robbery, the serious indictable offence charged pursuant to s 112(3).

Error to take into account offence committed in company where offence charged under s 112(1)

In *R v Knight* [2005] NSWCCA 253, the offender was sentenced for several offences of break, enter and steal pursuant to s 112(1). The Court held the sentencing judge erred by taking into account as an aggravating factor under s 21A(2)(e) that the offences were committed in company. The offender was not charged with an aggravated form of the offence, which would have attracted a higher penalty. The approach taken was contrary to principles in *The Queen v De Simoni* (1981) 147 CLR 383 and infringed s 21A(4): [85]–[90].

Error to take into account use of actual violence where an element of the offence

In *R v Baxter* [2005] NSWCCA 234, the offender was convicted of a number of offences including break, enter and steal in circumstances of aggravation, namely using corporal violence, under s 112(2). The Court held the sentencing judge erred by taking into account the use of actual violence pursuant to s 21A(2)(b) as an aggravating factor in the offence, as it was already an element of the offence under s 112(2). Reference was also made to the fact that some of the offences committed under s 112(1) were in company, thereby breaching the *De Simoni* principle: [28]–[32].

Offence was committed in victim's home as an aggravating feature

Section 21A(2)(eb) lists as an aggravating feature the fact that "the offence was committed in the home of the victim or any other person". A judge is entitled to take into account, as an aggravating feature, the fact that the offence was committed in the

victim's home even though the element of breaking and entering under s 112(2) does not require that the premises be the home of the victim: *Palijan v R* [2010] NSWCCA 142 at [21]–[22]; *R v Bennett* [2014] NSWCCA 197 at [13] (approved in *Jonson v R* [2016] NSWCCA 286 at [40]–[41], [50]). Such an approach does not amount to impermissible double-counting: *BB v R* [2017] NSWCCA 189 at [38].

Planned or organised criminal activity

The court is entitled to take into account elements of planning and organisation as an aggravating factor regardless of whether planning is a common feature of break and enter offences: *R v Rich* [2007] NSWCCA 193 at [21]. It is impermissible to double count planning in guideline (ii) of the guideline judgment, and planning under s 21A(2)(n). Where the level of planning is not great, the degree of sophistication will determine the weight to be accorded to this factor. In *R v Rich*, the times of offending and the nature of the items stolen indicated an element of planning for the purposes of s 21A(2)(n), albeit that the offences were carried out ineptly.

Where co-offenders are involved, in determining whether planning and organisation should be taken into account and whether s 21A(2)(n) applies, the court should consider:

- the particular offence;
- the particular offending for which a person is to be sentenced within a broad category of offending;
- the extent of the particular offender's involvement such as whether threats of violence or non-exculpatory duress were applied prior to participation; and
- the offender's role and knowledge of the criminal enterprise: *Pham v R* [2020] NSWCCA 269 at [47].

Different approaches were taken in *R v Cornwall* [2007] NSWCCA 359 and *Legge v R* [2007] NSWCCA 244 to the application of s 21A(2)(n) where co-offenders were involved, and the Court noted in *Pham v R* [2020] NSWCCA 269 that this should be seen as reflecting a difference in the way s 21A(2)(n) might be applied in different factual contexts: [47].

In *R v Cornwall*, the Court found it will be of little relevance that an accused person may not have been personally involved in the planning of an offence for s 21A(2)(n) to apply, since the provision is concerned with planning and organisation as a characteristic of the offence, not the offender: [56]. However, in the circumstances of *Legge v R*, the Court found s 21A(2)(n) was not intended to apply where the offender was not involved in, or part of, the planning and organisation of the offence: [34].

[17-080] Double punishment — Pearce v The Queen

Last reviewed: August 2024

Where the criminal conduct involved in a break and enter offence overlaps with conduct for which the offender has already been punished in relation to another offence, an appropriate credit for the time served should be granted. In *R v Stewart* [2005] NSWCCA 290 the offender was sentenced for an offence of break, enter and steal under s 112(1). Several of the items stolen (watches) were also the subject of a charge of goods

in custody, for which a period of imprisonment had already been served. The Court held at [26] that, because the conduct involved in the earlier offence was necessarily a direct result and part of the conduct involved in the later offence, the sentencing judge should have allowed a credit for the time already served. The sentencing judge's failure to do so resulted in the offender being effectively punished twice for the same offence or for the overlapping criminal conduct: *Pearce v The Queen* (1998) 194 CLR 610 at 614.

[The next page is 9111]

Sexual offences against children (NSW)

Note: This chapter is under review.

This chapter should be read in conjunction with **Sexual assault** at **[20-600]**ff. For commentary in relation to **Commonwealth child sex offences**, see **[17-700]**.

[17-400] Change in community attitudes to child sexual assault

The abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in *R v BJW* [2000] NSWCCA 60 at [20], where Sheller JA stated:

> The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim. See the remarks of Kirby ACJ in *R v Skinner* (1994) 72 A Crim R 151 at 154.

The case of *R v Fisher* (unrep, 29/3/89, NSWCCA) at 6 is also frequently cited:

> This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations …
>
> This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults …

Tampering with children of tender years is a matter of grave concern to the community: *R v Evans* (unrep, 24/3/88, NSWCCA).

The courts have recognised a change in community attitudes to child sexual assault. In *R v MJR* (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> … has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.

Increased penalties

See also **Sexual assault** at **[20-610]**.

In *R v ABS* [2005] NSWCCA 255 at [26], Buddin J, with whom Brownie AJA and Latham J agreed, said:

> Offences involving acts of significant sexual exploitation against children are almost without exception met with salutary penalties. Moreover, the legislature has in recent years provided for increased penalties in respect of many such offences. It is an area in which the need to protect children from exploitation and to deter others from acting in a similar fashion assume particular significance.

According to *R v PGM* [2008] NSWCCA 172 at [37], the seriousness with which sexual offences against young children must be viewed is reflected in the increase in the maximum penalty for s 66A *Crimes Act 1900* offences from 20 to 25 years (effective 1 February 2003) and the introduction of a standard non-parole period of 15 years: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*.

[17-410] Sentencing for historical child sexual offences

Section 21B *Crimes (Sentencing Procedure) Act 1999* provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied at *the time the offence was committed,* not at the time of sentencing: s 21B(2). Further, when sentencing an offender for a child sexual offence, the court is to have regard to the trauma of sexual abuse on children as understood at the time of sentencing: s 25AA(3).

The exception to s 21B(1) — to sentence in accordance with sentencing practices and patterns *at the time of the offence* where exceptional circumstances exist — does not apply to child sexual offences: s 21B(3)(a). A "child sexual offence" is defined in s 25AA(5) to include specified offences committed against a person who, at the time of the offence, was under 16 years of age (also see s 21B(6)).

Section 21B applies to proceedings that commenced on or after 18 October 2022: *Crimes (Sentencing Procedure) Amendment Act 2022*, Sch 1[4]. Section 21B(1), (2) and (4) replaced s 25AA(1), (2) and (4) (which continues to apply to proceedings commenced before 18 October 2022), but expanded the requirement to sentence in accordance with current sentencing practices and patterns to all offences, rather than to child sexual offences only.

Section 21B(1) (formerly s 25AA(1)) overrides the common law principle expressed in *R v MJR* (2002) 54 NSWLR 368 that a court must apply the sentencing patterns and practices existing at the time of the offence: Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, NSW, Legislative Assembly, *Debates*, 6 June 2018, p 7. As to the rationale for the enactment of s 25AA(1) and the previous common law see: *R v Cattell* [2019] NSWCCA 297 at [103]–[126]; *Corliss v R* [2020] NSWCCA 65 at [73]–[94] (Johnson J); [131]–[139] (Lonergan J).

In addition to sentencing in accordance with sentencing patterns and practices at the time of sentence, the court must also have regard to the trauma of sexual abuse on children as understood at the time of sentence, which may include recent psychological research or the common experience of courts: s 25AA(3). Justice Price, in *R v Cattell* at [121], said "current sentencing practices" understand the harmful effects of sexual offending against children and would also include the court setting a non-parole period in accordance with s 44 *Crimes (Sentencing Procedure) Act 1999*.

Sentencing practices and patterns are not defined. Given the relatively recent enactment of ss 21B and 25AA, parties will be unable to provide sufficient Judicial Commission statistical material to assist the court in determining "current sentencing patterns": *R v Cattell* at [122].

Section 19, which deals with the effect of alterations in penalties, is not affected by s 21B: s 21B(5), or the former s 25AA: s 25AA(4).

In *Corliss v R*, Johnson J described s 25AA(2) and (4) (now s 21B(2) and (5) respectively) as constituting "the express statutory qualifications to the otherwise absolute operation of [s 25AA]": at [87]. The overall effect of s 21B(1), (2) (former s 25AA(1), (2)) is that, aside from the statutory guideposts of the maximum penalty and the applicable standard non-parole period, those matters previously identified as typically leading to a lesser sentence in historic cases cannot be taken into account. However, a court may consider the fact a historical offence encompassed a wider range of more serious conduct than would constitute the equivalent current offence: *O'Sullivan v R* [2019] NSWCCA 261 at [36], [46].

The Local Court must apply s 21B when sentencing for child sex offences: see for example *DPP v IJL* [2020] NSWLC 2 which considered the former s 25AA(1).

The approach to the former s 25AA

Note: Judicial consideration of the former s 25AA, which is discussed below, may guide the application of s 21B to historical child sexual offences for proceedings commenced on or after 18 October 2022.

In *R v Cattell* [2019] NSWCCA 297 at [123], Price J said a court sentencing an offender for an offence falling within s 25AA should:

- take into account the sentencing pattern existing at the time of sentence where such a pattern is able to be discerned
- determine the facts as now available to the court
- have regard to the maximum penalty and standard non-parole period (if any) applying at the time of the offence
- identify where the offence falls in the range of objective gravity
- take into account any relevant aggravating and mitigating factors in s 21A(2) and (3)
- set a non-parole period in accordance with s 44 as operative at the time of sentence
- fix the balance of the term.

The sentencing court should expressly state that the offender has been sentenced in accordance with s 25AA(1) and explain how the court has had regard to the trauma of sexual abuse on the child: *R v Cattell* at [125].

The breadth of conduct encompassed by a particular historical offence is likely to influence the identification of where a particular offence falls in the range of objective seriousness. This assumes some significance when s 25AA applies because certain historical offences incorporated conduct which is now the subject of separate offences with significantly higher maximum penalties. For example, the offence of indecent assault in s 81 *Crimes Act 1900* (rep) which carried a maximum penalty of 5 years included conduct that would now constitute sexual intercourse. Part of the rationale for the increased, or changed, penalties is recognition of the harm caused by these offences: see, for example, *MC v R* [2017] NSWCCA 316 at [40]–[44]; *Woodward v R* [2017] NSWCCA 44 at [46]–[54].

R v AD [2020] NSWCCA 275 and *WB v R* [2020] NSWCCA 159 include some general observations about how the requirements of s 25AA can be satisfied given what is now known about the long-term effects of child sexual abuse when the maximum penalties for historical offences were lower than for current offences. In *WB v R*,

Davies J (Bell P and N Adams J agreeing) acknowledged, in relation to the s 81 (rep) offences the subject of appeal in that case, that it had been superseded by offences with higher penalties, observing at [63]:

> Part of the reason for the heavier penalties is, obviously, that there is now much greater knowledge of the long-term effects of sexual abuse of a child or young person than was [previously] known... That may mean that it will be easier to find that damage or emotional harm is substantial where historical offences are dealt with under earlier legislation with much lower maximum penalties. Such an approach would not be inconsistent with the rationale behind s 25AA …

The operation of s 25AA was not otherwise considered in that case. Subsequently in *R v AD* [2020] NSWCCA 275, N Adams J (Rothman J agreeing) after endorsing that aspect of *WB v R* said, at [151], that "it may well be easier to make a finding of substantial injury to a child for a sentence imposed on a historical child sexual assault offence after the enactment of s 25AA if the maximum penalty is so low as to enable a conclusion that the significant lifelong trauma such offending can inflict on a child is not already reflected in the maximum penalty." In that case one of the grounds of the Crown appeal against sentence, which was accepted by the court, was that the impact of the offending on the victims was not reflected in the aggregate sentence that had been imposed.

However, the impact of offending on the victim is taken into account under s 3A(g) *Crimes (Sentencing Procedure) Act*. Recognition of the harm caused by child sexual assault is a necessary incident of sentencing in such cases in any event and, where there is evidence, substantial harm caused to a victim falling within s 21A(2)(g) is taken into account: see further **[12-830] Evidentiary status and use of victim impact statements on sentence** and **[12-832] Victim impact statements and harm caused by sexual assault**.

Where there are numerous sexual offences and some occur when the victim is 16 or 17 years old, the sentencing court must expressly state when s 25AA applies and when it does not: *R v Cattell* at [115]–[116]. In *Franklin v R* [2019] NSWCCA 325 the applicant's offending extended over a period when the victim was between five and 17 years old. The court dismissed the appeal but said if it had been necessary to resentence, s 25AA could only apply to the offences committed when the victim was under 16 years old and general law principles with respect to sentencing for historical sexual offences would apply to the balance: at [145]. As to the difficulties of applying the principle of totality in this situation, see *R v Cattell* at [152]. There is a degree of artificiality in attempting to do so. See also *Cunningham v R* [2020] NSWCCA 287 at [32]–[33].

Juvenile offenders

Section 21B applies if a juvenile offender commits a child sexual offence but is sentenced as an adult. In *JA v R* [2021] NSWCCA 10 at [62] the court (considering the former s 25AA) commented on the difficulties in sentencing in such circumstances.

Resentencing following successful appeal

When varying or substituting a sentence, a court must vary or substitute the sentence in accordance with the sentencing patterns and practices *at the time of the original sentencing*: s 21B(4). The former s 25AA did not make specific provision for the variation or substitution of a sentence.

Additional resources

H Donnelly "Sentencing according to current and past practices", paper presented at *Sentencing: New Challenges* conference, National Judicial College of Australia on 29 February 2020 at https://www.njca.com.au/wp-content/uploads/2023/03/1.pdf, accessed 22 July 2021.

[17-420] Statutory scheme in the Crimes Act 1900 (NSW)

Last reviewed: August 2024

Table 1 lists the provisions in the *Crimes Act 1900* which create sexual offences against children, or those that may be committed against children.

Sections 61L and 61M(1) are sexual offences of general application that, in their standard form, apply both to adults and children (see s 77, discussed below). Sections 61N(1), 61O, 66A–66EB, 73, and 91G–91H *Crimes Act 1900* specifically and exclusively pertain to sexual offences against children. Sections 61J, 61M(1), (2), 80A(2A)(b), 80D(2) and 91J–91L pertain to sexual offences against children by way of aggravation.

Before the commencement of the *Crimes Amendment (Child Pornography and Abuse Material) Act 2010* on 17 September 2010, the *Crimes Act 1900* defined "child pornography" as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to a reasonable person, a person who is (or appears to be) a child:

(a) engaged in sexual activity

(b) in a sexual context, or

(c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

For offences committed from 17 September 2010, such material, which is now more broadly defined, is referred to as "child abuse material" and is defined in s 91FB(1).

Table 1: Sexual offences against children under the Crimes Act 1900

Section^	Offence	Max (yrs)*	Commentary
s 61J(1)	Aggravated sexual assault	20 *[SNPP 10]*	[17-505]
s 61M(1)^	Aggravated indecent assault	7 *[SNPP 5]*	[17-510]
s 61M(2)^	Aggravated indecent assault — child under 16 years	10 *[SNPP 8]*	[17-510]
s 61N(1)^	Act of indecency — child under 16 years	2	[17-520]
s 61N(2)^	Act of indecency — person 16 years or above	1.5	[17-520]
s 61O(1)^	Aggravated act of indecency — child under 16 years	5	[17-520]
s 61O(1A)^	Aggravated act of indecency — person 16 years or above	3	[17-520]
s 61O(2)^	Aggravated act of indecency — child under 10 years	7	[17-520]

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 61O(2A)^	Aggravated act of indecency — child under 16 years (knowing it to be filmed for producing child abuse (previously "child pornography") material)	10	[17-520]
s 66A	Sexual intercourse — child under 10 years	life *[SNPP 15]*	[17-480]
s 66B	Attempting or assaulting with intent to have sexual intercourse with child under 10 years	25 *[SNPP 10]*	[17-480]
s 66C(1)	Sexual intercourse — child between 10 and 14 years	16 *[SNPP 7]*	[17-490]
s 66C(2)	Aggravated sexual intercourse — child between 10 and 14 years	20 *[SNPP 9]*	[17-490]
s 66C(3)	Sexual intercourse — child between 14 and 16 years	10	[17-490]
s 66C(4)	Aggravated sexual intercourse — child between 14 and 16 years	12 *[SNPP 5]*	[17-490]
s 66D	Assaulting with intent to have sexual intercourse with child between 10 and 16 years	as per s 66C(1)–(4)	—
s 66DA	Sexual touching — child under 10	16 *[SNPP 8]*	
s 66DB	Sexual touching — child between 10 and 16	10	
s 66DC	Sexual act — child under 10	7	
s 66DD	Sexual act — child between 10 and 16	2	
s 66DE	Aggravated sexual act — child between 10 and 16	5	
s 66DF	Sexual act for production of child abuse material — child under 16	10	
s 66EA	Persistent sexual abuse of a child	Life [25 if committed before 1.12.2018]	[17-500]
s 66EB(2)(a)	Procuring child for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2)(b)	Procuring a child for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(3)(a)	Grooming a child for unlawful sexual activity — child under 14 years	12 [*SNPP 5*]	[17-535]
s 66EB(3)(b)	Grooming a child for unlawful sexual activity — child under 16 years	10 [*SNPP 4*]	[17-535]
s 73(1)	Sexual intercourse with young person above 16 years and under 17 years who is under special care	8	[17-530]
s 73(2)	Sexual intercourse with young person above 17 years and under 18 years who is under special care	4	[17-530]
s 73A(1)	Sexual touching — young person of or above 16 years and under 17 years under special care	4	

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 73A(1)	Sexual touching — young person of or above 17 years and under 18 years under special care	2	
s 80A(2A)(b)	Aggravated sexual assault by forced self-manipulation	20	[20-720]
s 80D(2)	Aggravated causing sexual servitude	20	[17-540]
s 80G	Incitement to commit a sexual offence	Same as penalty for substantive offence	[17-545]
s 91D(1)	Promoting or engaging in acts of child prostitution — child 14 years or above	10	[17-540]
s 91D(1)	Promoting or engaging in acts of child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child 14 years or over	10	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91F(1)	Premises not to be used for child prostitution	7	[17-540]
s 91G(1)	Children not to be used for production of child abuse material — child under 14 years	14 [*SNPP 6*]	[17-541]
s 91G(2)	Children not to be used for production of child abuse material — child 14 years or above	10	—
s 91G(3)	Section 91G(1) or 91G(2) offence in circumstances of aggravation	20	—
s 91H(2)	Production of child abuse material Possession or dissemination of child abuse material	10	[17-541] [17-750]
s 91J(1)	Voyeurism	100 penalty units or 2 years or both	[17-543]
s 91J(3)	Aggravated voyeurism	5	[17-543]
s 91K(1)	Filming a person engaged in a private act	100 penalty units or 2 years or both	[17-543]
s 91K(3)	Aggravated filming a person engaged in a private act	5	[17-543]
s 91L(1)	Filming a person's private parts	100 penalty units or 2 years or both	[17-543]
s 91L(3)	Aggravated filming a person's private parts	5	[17-543]

Section 80AE explicitly states that consent is not a defence to a charge under ss 61E(1A), 61E(2), 61E(2A), 61M(2), 61N(1), 61O(1), 61O(2), 61O(2A), 66A, 66B, 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 66DF, 66EA, 66EB, 66EC, 67 (rep), 68 (rep), 71 (rep), 72 (rep), 72A (rep), 73, 73A, 74 (rep) or 76A (rep), or to a charge under ss 61E(1) (rep), 61L (rep), 61M(1), or 76 (rep) if the victim is a child under 16 years. Consent is also not a defence to a charge under s 91D: s 91D(3).

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* on 1 December 2018.

* SNPP: Standard non-parole period

On conviction of a person for a sexual offence against a child, the court may refer the matter to an appropriate child protection agency if the child is under the authority of the offender: s 80AA.

[17-430] Standard non-parole periods

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* introduced standard non-parole periods, as detailed in Table 1 at **[17-420]**.

The effect of the introduction of standard non-parole periods will generally be an upward movement in the length of sentences for offences to which they apply: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; *R v AJP* [2004] NSWCCA 434 at [37].

See further **Move upwards in the length of non-parole periods?** at **[7-990]**.

[17-440] Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A was inserted into the *Crimes (Sentencing Procedure) Act* in 2002 and provides a non-exhaustive list of aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence. The weight of authority indicates that Parliament intended the section to replicate the common law, rather than alter it: *R v Wickham* [2004] NSWCCA 193 at [23].

Some of the aggravating factors relevant to child sexual assault in s 21A(2) are:

- the offender has a record of previous convictions: s 21A(2)(d)
- the offence involved gratuitous cruelty: s 21A(2)(f)
- the injury, emotional harm, loss or damage caused by the offence is substantial: s 21A(2)(g)
- the offender abuses a position of trust or authority in relation to the victim: s 21A(2)(k)
- the victim is vulnerable, for example, because the victim is very young or has a disability: s 21A(2)(l)
- the offence involves multiple victims or a series of criminal acts: s 21A(2)(m)
- the offence was part of a planned or organised criminal activity: s 21A(2)(n).

Application of these subsections are discussed in **Section 21A factors "in addition to" any Act or Rule of Law** at **[11-060]**ff.

The aggravating factor in s 21A(2)(n) — the offence was part of a planned or organised criminal activity — was considered by the court in *Saddler v R* [2009] NSWCCA 83. The applicant who had downloaded more than 45,000 images and 700 movies from the internet, and stored them on external hard drives, CDs and a laptop, was sentenced for possessing child pornography contrary to s 91H(3) *Crimes Act 1900* (repealed). These circumstances, however, could not be properly regarded as constituting "planned or organised" criminal activity for the purpose of aggravating the offence under s 21A(2)(n): at [32]. In particular, there was no evidence of planning, or none that went beyond that which is inherent in the offence: at [36].

The court in *Saddler v R* also considered the aggravating factor in s 21A(2)(f) — the offence involved gratuitous cruelty. At that time, child pornography was defined by s 91H(1) *Crimes Act 1900* to include the element, "torture, cruelty or physical abuse" (the definition, which still includes that phrase, is now contained in s 91FB(1)(a) and child pornography material is now referred to as "child abuse material"). The sentencing judge found that this aspect of the definition of child pornography was present and had taken it into account in determining the objective gravity of the offence. Taking it into account again under s 21A(2)(f) would be impermissible double counting: at [41]. Further, although there is no direct authority on the question of whether the possession of images after they had been created "involved" gratuitous cruelty, it was likely that it would not. Some involvement of the applicant in the creation of the images is required: at [43].

[17-450] De Simoni principle

The court must disregard a matter of aggravation if taking it into account leads to punishing an offender for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when a basic form of the offence is charged and the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act 1900*; such as, the offence was committed in company (*R v Newham* [2005] NSWCCA 325), the offender used a weapon, or the offender was in a position of trust: *R v Wickham* at [26]. See also **Fact finding at sentence** at **[1-500]**.

[17-460] Victim impact statements

For the use of victim impact statements, see **Victims and victim impact statements** at **[12-800]**.

[17-480] Sexual intercourse — child under ten: s 66A

For a detailed discussion of the offence and applicable principles, see P Poletti, P Mizzi and H Donnelly, "Sentencing for the offence of sexual intercourse with a child under 10", *Sentencing Trends & Issues*, No 44, Judicial Commission of NSW, 2015.

The current form of the offence under s 66A *Crimes Act 1900*, as implemented by the *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (commenced upon assent on 29 June 2015) provides that any "person who has sexual intercourse with a child who is under the age of 10 years is guilty of an offence". The amendments represent a reversion to a single form of the offence which existed prior to the *Crimes Amendment (Sexual Offences) Act 2008*. A maximum penalty of life imprisonment (previously applicable only to the aggravated form of the offence) applies to the new offence. The standard non-parole period of 15 years continues to apply.

For offences committed between 1 January 2009 and 29 June 2015, the following maximums apply:

- s 66A(1): sexual intercourse with a child under 10 (maximum penalty of 25 years)
- s 66A(2): sexual intercourse with a child under 10 in circumstances of aggravation (maximum penalty of life imprisonment).

A standard non-parole period of 15 years applied to either form of the offence. Subsections 66A(3)(a)–(h) provided that the circumstances of aggravation included when an offender:

- intentionally or recklessly inflicted actual bodily harm on the child
- threatened to inflict actual bodily harm on the child or a person who is present or nearby
- committed the offence in company
- committed the offence on a child under his or her authority
- committed the offence on a child with a serious physical disability
- committed the offence on a child with a cognitive impairment
- took advantage of a child who was under the influence of alcohol or drugs
- deprived the child of his or her liberty, either before or after the commission of the offence, or
- committed the offence of break and enter into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Specific guidance on the factors relevant to assessing the objective seriousness for an offence under s 66A *Crimes Act 1900* has been provided by the Court of Criminal Appeal: *R v AJP* [2004] NSWCCA 434 at [25], *MLP v R* [2006] NSWCCA 271 at [22], *R v PGM* [2008] NSWCCA 172. These factors include how the offences took place, over what period, with what degree of coercion, the use of threats or pressure, and any immediate effect on the victim. However, caution should be exercised where these cases discuss assessing these factors by reference to being below or above a midpoint: *Muldrock v The Queen* (2011) 244 CLR 120. See **Consideration of standard non-parole period in sentencing** at **[7-920]**.

See also **Sexual assault** at **[20-630]** ff.

Attempting or assaulting with intent to have sexual intercourse with child under 10: s 66B

In *R v McQueeney* [2005] NSWCCA 168, the offender committed two counts of attempted sexual intercourse with a child under 10 years and was sentenced to a non-parole period of 7 years and a balance of term of 3 years. The court found that the sentencing judge did not offend the principles for an attempted offence. Justice Latham, Howie and Grove JJ agreeing, stated at [25]–[26]:

> [H]is Honour was dealing with the applicant for an attempt rather than the substantive offence. The approach to sentencing for an attempted substantive offence was expressed by this court in *Taouk* (1992) A Crim R 387 as follows:
>
> > "There is clearly an interrelationship between the seriousness of the intended consequences and the real prospects of having achieved them and that relationship has to be weighed in each case in the light of all the circumstances."
>
> In those circumstances his Honour's evaluation of the objective gravity of the offence required his Honour to consider that the substantive offence was not completed and the prospect that the attempt, if not interrupted, would have succeeded. On the facts before him his Honour was entitled to conclude that the substantive offence may well have succeeded but for the fact that the complainant awoke. The applicant had progressed a considerable way towards actual penetration. The boy's underwear had been removed

> and the applicant was holding the boy by the shoulders. The applicant was actively engaged in the attempt. Given these features of the offence and the gravity of the offence which was attempted, I am not persuaded that his Honour imposed a sentence in respect of this offence which was outside the range of his sentencing discretion. It may well be regarded as a sentence towards the top of the range, but that is insufficient to attract the intervention of this court.

Where committed on or after 29 June 2015, the offence is subject to a standard non-parole period of 10 years.

[17-490] Sexual intercourse — child between 10 and 16: s 66C

The *Crimes Amendment (Sexual Offences) Act 2008* inserted a new circumstance of aggravation for the aggravated form of this offence — where an offender deprives a child of his or her liberty for a period before or after the commission of the offence: s 66C(5)(h).

The courts have repeatedly emphasised the extremely serious view that has to be taken towards matters of this kind: *R v JVP* (unrep, 6/11/95, NSWCCA). In the early 1990s it was held that the ages of victims and the range of criminality of the offenders may vary greatly, rendering a wide range of sentences appropriate, including periodic detention (then available as a sentencing option, but now replaced by intensive correction orders): *R v Agnew* (unrep, 6/12/90, NSWCCA) per Loveday J; *R v McClymont* (unrep, 17/12/92, NSWCCA) per Gleeson CJ.

The most significant matter which determines where a particular offence is to be placed in the spectrum of offences of this kind is the degree to which the offender is seen to have exploited the youth of the victim: *R v Sea* (unrep, 13/8/90, NSWCCA) per Badgery-Parker J at 4.

In *R v KNL* [2005] NSWCCA 260 at [42]–[43], Latham J, Brownie AJA and Buddin J agreeing, stated:

> It is trite to observe that sexual intercourse with a child of 12, knowing the child's age, is objectively more serious than sexual intercourse with a child of 12, in ignorance of the child's true age. However, it is also the case that, in terms of the position occupied by a given offence on the spectrum of offences of this kind, the younger the child, the more serious the offence; *R v T* (1990) 47 A Crim R 29.
>
> The complainant was just over 12 years of age. She was closer to ten than she was to 16, yet that feature of the offence was largely disregarded, in favour of the mitigation constituted by the respondent's mistaken belief as to her age.

Whether a complainant is a willing participant, notwithstanding his or her age, is relevant to the level of objective seriousness of a s 66C offence: *Wakeling v R* [2016] NSWCCA 33 at [47], [49]; *Hogan v R* [2008] NSWCCA 150 at [77].

The *Crimes Legislation Amendment (Child Sex Offences) Act 2015* introduced standard non-parole periods for offences, inter alia, contrary to ss 66C(1), 66C(2) and 66C(4), committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act 1900*** at **[17-420]**.

[17-500] Maintain unlawful sexual relationship with child: s 66EA

Section 66EA(1) *Crimes Act 1900*, in its current form — for offences committed on or after 1 December 2018 — provides an adult who maintains an unlawful

sexual relationship with a child is liable to life imprisonment. An "unlawful sexual relationship" is a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2). At least one of those acts must have occurred in NSW: s 66EA(3). "Unlawful sexual act" is defined in s 66EA(15) as any act that constitutes, or would constitute, one of the sexual offences listed therein.

For offences committed before 1 December 2018, s 66EA(1) provided that a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a "sexual offence", is liable to imprisonment for 25 years. "Sexual offence" is defined to include, inter alia, the offences encompassed by ss 61I–61O *Crimes Act 1900*. McClellan CJ at CL said of the offence in *R v Langbein* [2008] NSWCCA 38 at [115]:

> The offence of persistent sexual abuse contrary to s 66EA carries a maximum prison term of 25 years. It is a more serious offence than the offences which comprise the individual acts.

Different considerations apply when sentencing for a s 66EA offence committed before 1 December 2018, and from 1 December 2018, because of the different wording of each provision and maximum penalty. However, the case law below may provide some guidance when sentencing for an offence committed in either time period.

Fact finding following a guilty verdict

It had been held that if a jury returns a guilty verdict to a s 66EA offence committed before 1 December 2018, the judge must consider which of the foundational offences are established beyond reasonable doubt so as to sentence in accordance with the verdict: *ARS v R* [2011] NSWCCA 266 at [230]. This is consistent with the duty of the judge to determine the facts relevant on sentence: *ARS v R* at [233] citing *R v Isaacs* (1997) 41 NSWLR 374 at 378; *Cheung v The Queen* (2001) 209 CLR 1 at [4]–[8], [161]–[166]. This approach was questioned in *Chiro v The Queen* (2017) 260 CLR 425, where the High Court analysed a materially similar South Australian provision to s 66EA and held that *Cheung v The Queen* did not concern a persistent abuse offence and is not authority for the proposition that questions should not be asked of a jury (as to which of the acts the Crown had proved). Kiefel CJ, Keane and Nettle JJ at [52] said:

> … where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child contrary to s 50(1) and the judge does not or cannot get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender will have to be sentenced on the basis most favourable to the offender.

Bell J agreed, at [67], that "the exercise of discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved". It was not open for the sentencing judge to sentence the appellant on the basis he had committed all the acts charged as such an approach was contrary to the *De Simoni* principle: at [72]. See also the plurality at [44].

However, in *R v RB* [2022] NSWCCA 142, which related to a s 66EA offence committed after 1 December 2018, the court did not apply *Chiro v The Queen* on the basis s 66EA(5)(c) provides that the members of the jury are not required to agree on which unlawful acts constitute the unlawful sexual relationship. Accordingly, the jury must be taken to have made no findings as to which unlawful sexual acts constituted the offence, and a trial judge is required to determine the facts of offending applying

the principles established in *The Queen v Olbrich* (1999) 199 CLR 270, *Cheung v The Queen* and *R v Isaacs*: at [43]–[45], [70] (also see [71]–[77] for a further discussion of the sentencing exercise after a jury's guilty verdict).

Assessing the seriousness of an offence

When sentencing an offender for a s 66EA offence committed on or after 1 December 2018, a consideration of the conduct constituting the unlawful sexual acts towards the child is integral to the assessment of objective seriousness: *GP (a pseudonym) v R* [2021] NSWCCA 180 at [65]. The offence potentially embraces a wide range of circumstances: *Towse v R* [2022] NSWCCA 252 at [13]. A number of factors bear upon an assessment of the objective seriousness of a s 66EA offence as observed in *Burr v R* [2020] NSWCCA 282 (see non-exhaustive list at [106]) and these factors are also relevant when sentencing for a s 66EA offence committed on or after 1 December 2018: *GP (a pseudonym) v R* at [64]; see also *Towse v R* at [26]. Regard should also be had to the maximum penalty of 25 years imprisonment for a s 66EA offence committed before 1 December 2018, and life imprisonment for an offence on or after 1 December 2018.

It is not logical to approach the sentencing task by considering what sentences the individual offences (or unlawful sexual acts for an offence committed on or after 1 December 2018) would have attracted had they been charged as isolated offences: *R v Fitzgerald* (2004) 59 NSWLR 493. There is nothing to suggest Parliament intended sentencing for a course of conduct that had crystallised into a s 66EA conviction to be more harsh than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences: *R v Manners* [2004] NSWCCA 181 at [21]. Section 66EA is capable of applying to a wide range of conduct constituting sexual offences against children: *R v Manners* at [34].

Where the offences constituting the s 66EA charge are three or more representative charges (that is, they are not isolated incidents but part of a course of conduct), s 66EA does not permit a departure from the common law approach taken to sentencing for representative counts: *ARS v R* at [226]. The court can still sentence on the basis the offences were not isolated incidents but the uncharged offences cannot be used to increase the punishment: *R v Fitzgerald* (2004) 59 NSWLR 493 at [13]; *ARS v R* at [226].

See *Hitchen v R* [2010] NSWCCA 77 for a case where the court accepted the sentencing judge's finding that the criminality of a s 66EA offence committed before 1 December 2018 was found to be in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see **[10-005] Cases that attract the maximum**); see also *Hitchen v R* at [11]–[14].

[17-505] Aggravated sexual assault: s 61J

The offence of aggravated sexual assault under s 61J *Crimes Act 1900* carries a maximum penalty of 20 years with a standard non-parole period of 10 years. The effect of s 61J(2) is to create an offence with a circumstance of aggravation where the victim was:

- under the age of 16 years: s 61J(2)(d)
- under the authority of the offender: s 61J(2)(e).

See for example, *Fisher v R* [2008] NSWCCA 129 (13-year-old victim) and *R v BWS* [2007] NSWCCA 59 (16-year-old victim). In *Rylands v R* [2008] NSWCCA 106, the victim was aged 15 years and 9 months. The offence comprised an act of cunnilingus. The court noted that crimes of this nature are regarded with great seriousness and that general deterrence and retribution require earnest consideration: at [98].

[17-510] Aggravated indecent assault: s 61M

As to the approach to sentencing for indecent assault committed many years earlier, see **Sentencing for offences committed many years earlier** at **[17-410]** and *PWB v R* [2011] NSWCCA 84.

RS Hulme J said in *BT v R* [2010] NSWCCA 267 at [41]:

> Sentencing for offences under s 61M is difficult because of the absurd relativity between the 7 years maximum term and the very high standard non-parole period of 5 years for a case in the mid-range of objective seriousness. If the proportions envisaged by s 44 of the *Crimes (Sentencing Procedure) Act* were adhered to, such a non-parole period would be appropriate for a head sentence of 6 years and 8 months, a sentence that in accordance with long-standing sentencing principles would be imposed only for an offence falling very close to a worst case of an offence under s 61M.

Prior to *BT v R* the court had described the ratio of the standard non-parole period to maximum penalty for indecent assault as "somewhat curious and inconsistent": *R v Dagwell* [2006] NSWCCA 98 per Howie J at [38].

The *Crimes Amendment (Sexual Offences) Act 2008* amended s 61M *Crimes Act 1900* to increase the maximum penalty for an aggravated indecent assault against a child aged under 16 years from 7 to 10 years imprisonment (effective 1 January 2009): s 61M(2).

An offender who commits an aggravated indecent assault against a victim who is under the authority of the offender is liable to 7 years imprisonment: s 61M(1).

Although it is difficult to reconcile, the court must give attention to the standard non-parole period: *Corby v R* [2010] NSWCCA 146 at [71].

The prescription of a standard non-parole period for indecent assault does not displace the principle that the court is to have regard to the fact that the offence could have been disposed of in the Local Court: *Bonwick v R* [2010] NSWCCA 177 at [47]. Davies J said at [48]: "It will have a greater influence in the sentencing as both the objective criminality falls below the mid-range, and as the subjective criminality of the offender assumes more significance".

Worst cases

In *R v Campbell* [2005] NSWCCA 125 at [31], the court held that the sentencing judge was correct in finding that the criminality of the offences committed by the applicant was within the worst category of the range of possible offences for aggravated indecent assault under s 61M(1).

See generally the discussion at **[10-005] Cases that attract the maximum**.

Section 61M(2)

It is of considerable significance when assessing the objective seriousness of indecent assaults against children to consider the actual character of the assault, including the degree of physical contact involved: *R v PGM* [2008] NSWCCA 172 at [31], applying *GAT v R* [2007] NSWCCA 208 at [22]; *Corby v R* [2010] NSWCCA 146 at [71].

In *R v PGM*, the degree of genital connection in two of the s 61M(2) counts, and the gross indecency involved in the other, meant that the judge's characterisation of the offending as at the lower end of mid-range was indicative of error: at [31], [40]. By way of contrast, where an indecent assault involved the kissing and cuddling of a child the offender believed, unreasonably, was over 16, the court said that in the particular circumstances this "was not deeply intrusive" and that the offence fell "towards the bottom of the range of objective seriousness": *Corby v R* [2010] NSWCCA 146 at [72], [78], [81]. The age difference (39 to 14 years in *Corby*) can also aggravate the offence: *Corby v R* at [77]. Other factors relevant to the assessment of objective seriousness include the specific age of the child within the range of 10–16 years, the duration of the conduct and any use of coercion: *BT v R* [2010] NSWCCA 267 at [22]–[24]; *R v KNL* [2005] NSWCCA 260 at [42]–[43]; *R v AJP* [2004] NSWCCA 434 at [25]. An absence of any threats "may have much less, and perhaps little, weight" in the context of offences by persons in positions of authority over their victims than in the case of offenders not in such a position: *BT v R* [2010] NSWCCA 267 at [24] per RS Hulme J referring to *R v Woods* [2009] NSWCCA 55 at [52]-[53].

See discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act 1999* at **[17-570]**.

Further appeal cases are accessible in the SNPP Appeals component of JIRS.

[17-520] Act of indecency: s 61N

Table 1 at **[17-420]** sets out the maximum penalties applicable to acts of indecency committed against persons under 16 years: s 61N(1) *Crimes Act 1900*, and against persons 16 years and above: s 61N(2).

While, ordinarily, a custodial sentence would be appropriate for indecent assaults, such a sentence is neither necessarily required nor inevitable in every case: *R v O'Sullivan* (unrep, 20/10/89, NSWCCA) at 4–5. However, the legislature does expect the courts to punish severely those who commit sexual assaults on young children: *R v Muldoon* (unrep, 13/12/90, NSWCCA) at 6. For example, periodic detention, when it was available as a sentencing option (prior to 1 October 2010), was said not to be appropriate where the offences occurred over a long period of time on young children: *R v Burchell* (unrep, 9/4/87, NSWCCA).

The Court of Criminal Appeal has declined to lay down a requirement that a custodial sentence should ordinarily be imposed in relation to the charge of act of indecency: *R v Baxter* (unrep, 26/5/94, NSWCCA) per Hunt CJ at CL at 11. In *R v Baxter*, the Court of Criminal Appeal emphasised the importance of looking to such considerations as the nature of the assault, the existence and extent of any penetration, the age of the victim and other features relevant to the case: *R v Barrett* (unrep, 26/7/95, NSWCCA) per Kirby ACJ at 6. In *Corby v R* [2010] NSWCCA 146 at [84], the Court of Criminal Appeal stated that if the act of indecency occurred in the physical presence

of the victim this will bear on the determination of the seriousness of the offence. The seriousness of the offence escalates if the offence continues over a period of days: at [86].

Aggravated act of indecency: s 61O

Table 1 at [17-420] sets out the maximum penalties for aggravated acts of indecency offences committed against a person under 16 years: s 61O(1) *Crimes Act 1900*, 16 years or above: s 61O(1A); or under 10 years: s 61O(2). Table 1 also sets out the maximum penalty for the offence of committing an act of indecency with or towards a person under the age of 16 years (or inciting a person under the age of 16 years to an act of indecency) knowing that the act of indecency is being filmed for the purpose of producing child abuse material (previously child pornography): s 61O(2A), inserted by the *Crimes Amendment (Sexual Offences) Act 2008* (effective 1 January 2009).

In *R v ARC* (unrep, 28/8/96, NSWCCA), Hunt CJ at CL stated the following in relation to s 61O offences:

> … the size of the scale in relation to the acts of indecency referred to in [the] NSW *Crimes Act* is necessarily small. Section 61O provides for circumstances of aggravation … That further reduces the size of the relevant scale. Moreover, it does not take much for an act of indecency to become an indecent assault, with a correspondingly higher maximum sentence.

[17-530] Sexual intercourse with child between 16 and 18 under special care: s 73

Any person who has sexual intercourse with someone under their special care who is of or above 16 but under 17 years of age, is liable to imprisonment for 8 years. Where the victim is of or above the age of 17 years and under the age of 18 years, the offender is liable to imprisonment for 4 years: s 73(2) *Crimes Act 1900*. "Under the special care of another person", for the purposes of s 73, is defined in s 73(3).

[17-535] Procuring or grooming: s 66EB

Last reviewed: August 2024

Under s 66EB(2) *Crimes Act 1900*, an adult who intentionally procures a child for unlawful sexual activity with that or any other person is guilty of an offence. The offence carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case.

In *Tector v R* [2008] NSWCCA 151, the offender was charged with using a telecommunications service to procure a 12-year-old boy to engage in sexual activity: s 474.26(1) Criminal Code (Cth). Section 474.26(1) is the Commonwealth equivalent of s 66EB(2). Like s 66EB(2)(a), it carries a maximum penalty of 15 years. The court (Hall J, Giles JA and Barr J agreeing) sentenced the offender to a head sentence of 8 years imprisonment, with a non-parole period of 5 years. The gravamen of the offence is conduct by an adult directed at a child under 16 years, undertaken with the intent of encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) that child to engage in sexual activity. "Sexual activity" is defined in s 474.28(11) (now repealed) to include "any" activity of a sexual or indecent nature and

"need not involve physical contact between people": at [90]. In addition to the nature of the sexual activity proposed, the following factors were relevant to the determination of sentence at [94]:

- the offender invited the child to engage in sexual activity with him
- money was offered as an inducement to sexual activity
- the offender persistently pursued the child (over a course of approximately six weeks)
- the child, at 12 years of age, was significantly below the age of 16 years
- the extent of the age difference between the 41-year-old applicant and the 12-year-old child
- the offender took steps to remain anonymous (false name, public telephones and internet cafes).

For a discussion of Commonwealth online grooming offences, see **[17-760] Grooming and procuring a child for sexual activity offences**.

[17-540] Child sexual servitude and prostitution

Part 3 Div 10A (ss 80B–80F) *Crimes Act 1900* deals with offences relating to sexual servitude. The aggravated form of the offence of causing sexual servitude applies to persons under the age of 18 years: ss 80C(a), 80D(2). The *Crimes Amendment (Sexual Offences) Act 2008* increased the maximum penalty for the aggravated form of the offence from 19 to 20 years imprisonment (effective 1 January 2009): s 80D(2).

Part 3 Divs 15 and 15A (ss 91C–91H) of the *Crimes Act 1900* deal with offences relating to child prostitution and child abuse/pornography material. The *Crimes Amendment (Child Pornography) Act 2004* amended ss 91C and 91G and introduced s 91H. Significantly, the maximum penalty for offences in s 91G was doubled, increasing from 7 to 14 years where the child is under the age of 14 years, and from 5 to 10 years where the child is of or above the age of 14. The *Crimes Amendment (Sexual Offences) Act 2008* increased the maximum penalty for offences under s 91E (obtaining benefit from child prostitution): see below.

Child prostitution

Promoting or engaging in acts of child prostitution: s 91D

In *R v Romano* [2004] NSWCCA 380, the applicant had been sentenced to a fixed term of 6 years on each of three counts of causing a child to participate in act of child prostitution and on each of three counts of causing a child under 14 years to participate in an act of child prostitution. The court found that, although the sentencing judge, in setting a sentence close to the maximum, erred in characterising s 91D prostitution offences as "in many ways … analogous to a violent aggravated sexual assault in terms of its effect on the community and particularly on the girl", when the offences on the Form 1 were taken into account, the sentence imposed was within the sentencing range.

For offences under s 91D(1) (see **Table 1: Sexual offences against children under the *Crimes Act 1900*** at **[17-420]**), committed on or after 29 June 2015, a standard non-parole period of 6 years applies.

Obtaining benefit from child prostitution: s 91E

On each of seven counts of obtaining benefit from child prostitution under s 91E in *R v Romano* [2004] NSWCCA 380, the applicant was sentenced to a fixed term of 3 years. The *Crimes Amendment (Sexual Offences) Act 2008* increased the maximum penalty for receiving money or any other material benefit knowing that it is derived from an act of prostitution involving a child under the age of 14 years from 10 to 14 years imprisonment (effective 1 January 2009): s 91E(1). The higher maximum penalty only applies where the age of the child is set out in the charge for the offence: s 91E(3).

For offences under s 91E(1) (see **Table 1: Sexual offences against children under the *Crimes Act 1900*** at **[17-420]**), committed on or after 29 June 2015, a standard non-parole period of 6 years applies where the offence is one involving a child under 14, attracting the 14 year maximum penalty.

Premises not to be used for child prostitution: s 91F

In *R v Hilton* [2005] NSWCCA 317, the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) and eight counts of premises not to be used for child prostitution under s 91F(1). His defence — that he did not know the two girls were under 18 years of age — was rejected by the sentencing judge. On appeal, the submission that he was double punished for his conduct was made good: *Pearce v The Queen* (1998) 194 CLR 610 applied. There was no need to charge the applicant with offences under s 91F(1) as well as under s 91E(1); the offences under s 91F, in point of criminality, being almost entirely subsumed in the offences committed under s 91E: at [8]. Therefore, the sentence for offences under s 91E(1) was reduced for each count to a fixed term of 2 months, whereas the sentence for offences under s 91F(1) was confirmed as a 3-year-term of imprisonment with a non-parole period of 12 months. Justice Adams (with Bell and Hall JJ agreeing), stated that despite the powerful subjective circumstances of this case the objective criminality of the offences was substantial and necessitated a term of full-time custody.

[17-541] Child abuse material offences

Last reviewed: August 2024

"Child abuse material" (CAM) is defined in s 91FB(1) as material which:

> … depicts or describes in a way that reasonable persons would regard as being, in all the circumstances, offensive:
>
> (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
>
> (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or
>
> (c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or
>
> (d) the private parts of a person who is, appears to be or is implied to be, a child.

"Private parts" of a person include genital or anal areas, whether "bare or covered by underwear" together with breasts of a female (including people identifying as female), whether or not the breasts are sexually developed: s 91FB(4). CAM also includes

material that "depicts a representation of a person or their private parts": s 91FB(3); see s 91FB(2) for factors to be considered in determining whether a reasonable person would regard material as being offensive.

The State offences relating to CAM contained in Part 3 Div 15A *Crimes Act 1900* are:

- using a child to produce CAM: s 91G(1)–(3); and
- producing, disseminating or possessing CAM: s 91H(2).

A combination of Commonwealth and State offences is not uncommon in a prosecution for CAM: *R v Porte* [2015] NSWCCA 174 at [55].

The Court of Criminal Appeal has developed relevant sentencing principles for State and Commonwealth CAM offences (see **[17-750] Child abuse material offences — possess, disseminate and transmit).** However, it is important to differentiate between the Commonwealth and State statutory sentencing schemes. For example, the aggravating and mitigating factors under s 21A *Crimes (Sentencing Procedure) Act* 1999 and treatment of prior good character in s 21A(5A) only apply to State offences.

Children not to be used for production of child abuse material: s 91G

A person commits an offence under s 91G(1)–(2) if they use a child for the production of CAM, cause or procure a child to be so used, or consent to a child in their care being so used. Section 91G(3) is an aggravated offence, where a s 91G(1), (2) offence is committed in the prescribed circumstances of aggravation in s 91G(3A).

Case examples relating to the assessment of objective seriousness for s 91G offences include:

- *CR v R* [2020] NSWCCA 289, where the offender superimposed photographs of his young nieces' faces onto pornographic images and videos. The Court found when assessing the objective seriousness of s 91G(1) offences, the children's ages and their relationship to the offender aggravated the seriousness of the offences: [65], [68].
- *TM v R* [2018] NSWCCA 88, where the offender secretly filmed his de facto partner's teenage daughters and their friends changing, showering and toileting. The fact the victims were unaware they were being filmed did not mitigate the objective seriousness of the offending: [64].

Where the s 91G offences involved the offender recording their sexual assault of a child and those assaults are the subject of separate charges, the overall sentence imposed must reflect the totality of the offending without doubly punishing the offender for the common elements between offences: *Pearce v The Queen* (1998) 194 CLR 610 at [40].

For example:

- In *NW v R* [2011] NSWCCA 178, the offender held his 11-year old niece's vagina apart (s 61M(2) (rep)) and took several photographs (s 91G(1)). While the explicit nature of the photographs needed to considered when assessing the seriousness of the s 91G(1) offence, the Court found the judge's reference to the applicant's use of his fingers to do so resulted in a measure of "double counting" on sentence: [26], [31].
- In *ZA v R* [2017] NSWCCA 132, the offender was sentenced for serious and differing acts of sexual violence against his daughter when she was aged between

8 and 9 years. The offender had also filmed several of these offences for his future viewing. The Court of Criminal Appeal found these s 91G offences "added a further sinister aspect" to the offending which required an appropriate level of recognition in the overall sentence: [92], [104].

Production of child abuse material: s 91H(2)

An offence against s 91H(2) is not restricted to CAM produced with an actual child, but may also include CAM comprised of drawings, discussions and computer generated images (CGI). Whether CAM constituted by drawings or discussions is the product of fantasies or a retelling of actual events is irrelevant: *R v Jarrold* [2010] NSWCCA 69 at [53]. However, if no actual children are used in the production of offending material, this may be a relevant to the assessment of objective seriousness: *Minehan v R* [2010] NSWCCA 140 at [94]. Nonetheless in *R v LS* [2020] NSWCCA 148, the written description of sexual acts related to the married offenders' children and as it concerned real children, who were also under the offender's protection, the Court held the offending must be regarded as more serious than those involving imaginary children: [136]–[137].

See also **[17-750] Child abuse material offences — possess, disseminate and transmit.**

[17-543] Voyeurism and related offences

New voyeurism and related offences were inserted into the *Crimes Act 1900* by the *Crimes Amendment (Sexual Offences) Act 2008*: Pt 3 Div 15B (ss 91I–91M) (effective 1 January 2009). The maximum penalties for these offences are detailed in Table 1 at **[17-420]**.

Voyeurism: s 91J

Voyeurism is the seeking of sexual arousal or gratification by observing another person engaged in a private act without the consent of the person and knowing that the other person has not consented to be observed for that purpose: s 91J(1). "Engaged in a private act" is defined in s 91I(2). An offence against s 91J(1) is a summary offence: s 91J(2).

An aggravated form of the offence is committed when the person observed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose facilitating the commission of the offence: s 91J(3), (4).

Filming a person engaged in a private act: s 91K

It is an offence for a person to seek sexual arousal or gratification (or enable another person to do so) by filming another person engaged in a private act without the consent of the person and knowing that the person being filmed has not consented to being filmed for that purpose: s 91K(1). An aggravated form of the offence is committed if the person being filmed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence: s 91K(3), (4).

Filming a person's private parts: s 91L

It is an offence for a person to seek sexual arousal or gratification (or seek to enable another person to do so) by filming another person's private parts without the consent

of the person and knowing that the person being filmed does not consent to being filmed for that purpose: s 91L(1). An offence against s 91L(1) is a summary offence. An aggravated form of the offence is committed if the person filmed was under 16 years of age or the offender constructed or adapted the fabric of a building for the purpose of facilitating the commission of the offence: s 91L(3), (4).

[17-545] Incitement to commit a sexual offence

An offence of inciting a person to commit a sexual offence was inserted into the *Crimes Act 1900* by the *Crimes Amendment (Sexual Offences) Act 2008* (effective 1 January 2009): s 80G. Inciting a person to commit a sexual offence carries the penalty provided for the commission of the sexual offence: s 80G(1).

[17-550] Intensive correction order not available for a "prescribed sexual offence"

Section 66 *Crimes (Sentencing Procedure) Act* provides that an intensive correction order may not be made in respect of a sentence of imprisonment for an offence under Div 10 or 10A of Pt 3 *Crimes Act 1900*.

For a further discussion of restrictions on the power to make intensive correction orders see **Intensive correction orders (ICOs)** at **[3-630]**.

[17-560] Other aggravating circumstances

Breach of trust

It is an obvious aggravating feature if the offender was in a position of trust and violated that trust by sexually assaulting the child: *R v Muldoon* (unrep, 13/12/90, NSWCCA). There is a variety of situations where breach of trust has been recognised.

Family members

The abuse of trust is considered more serious where the offender is the father (or family member) of the victim. Sentences must be of a severe nature and little leniency can be given, even though the parent has been otherwise of good character: *R v Evans* (unrep, 24/3/88, NSWCCA); *R v Welcher* (unrep, 9/11/90, NSWCCA) per Lee CJ at CL at [15]; *R v Bamford* (unrep, 23/7/91, NSWCCA). In *R v Hudson* (unrep, 30/7/98, NSWCCA) at 2, Sully and Ireland JJ, Spigelman CJ agreeing, stated:

> children in a family situation are virtually helpless against sexual attack by the male parent and … children have a right to be protected from sexual molestation within the family and … this can only be achieved by the courts imposing sentences of a salutary nature.

The Court of Criminal Appeal has expressed particular concern that in family situations children are required to obey their parents. The offender exploits that authority and their power to discipline the child: *R v JVP* (unrep, 6/11/95, NSWCCA); *R v RKB* (unrep, 30/6/92, NSWCCA). In *R v BJW* [2000] NSWCCA 60 at [20]–[21], Sheller JA stated:

> [A] child aged 13 or younger is virtually helpless in the family unit when sexually abused by a step-parent. All too often the child is afraid to inform upon the step-parent; see generally *R v Bamford* (unreported) CCA, 23 July 1991 per Lee CJ at CL at 5. The younger the victim the more serious is the criminality; see *R v PWH* (unreported) CCA, 20 February 1992.

Teachers, coaches and group leaders

In *R v King* (unrep, 20/8/91, NSWCCA), the respondent was a leader in a junior athletics organisation. In allowing the Crown appeal the court increased his sentence from a 2-year periodic detention order to a fixed term of 2 years.

In *R v MacDonnell* (unrep, 8/12/95, NSWCCA), the respondent was the head teacher at the victim's school. On the charge of carnal knowledge under s 73 he was sentenced to a minimum term of 6 months with an additional term of 2 years.

In *R v Lumsden* (unrep, 31/7/96, NSWCCA), the applicant was the victim's swimming coach. The court found that the sentencing judge did not err in finding that the breach of trust arising from a coach and pupil relationship aggravated the circumstances of the child sexual assault offences.

Carers

In *R v Eagles* (unrep, 16/12/93, NSWCCA), the applicant was a baby sitter. On multiple charges of homosexual child abuse he was sentenced to a minimum term of 7 years with an additional term of 3 years.

Priests

In *Ryan v The Queen* (2001) 206 CLR 267, the applicant was a priest who abused his position of trust by sexually assaulting young boys over an extended period of time.

Homeless children

In *R v Fisk* (unrep, 21/7/98, NSWCCA), the applicant was charged with 24 separate counts of serious sexual misconduct against three victims. In confirming the aggregate sentence of a minimum term of 9 years with an additional term of 3 years, the court found that the applicant's behaviour in manipulating, exploiting and taking advantage of the boys' dysfunctional family backgrounds and homeless state, was a further aggravating factor.

Multiple assaults

Merely that the offences occurred in the course of a single extended episode does not justify the conclusion that the sentences are to be wholly concurrent: *R v Dunn* [2004] NSWCCA 41 at [50]. In *Carlton v The Queen* [2008] NSWCCA 244 at [122], the court held that there should have been at least partial accumulation of the sentences notwithstanding that they occurred as part of one episode. The imposition of totally concurrent sentences failed to acknowledge the separate harm done to the victim by the different acts of the appellant: at [122]. This was an occasion where consideration of an offender's behaviour being closely related in time should not have obscured the fact that different offences were committed: at [122].

In child sexual assault cases where there are multiple assaults occurring as part of a background of continuous abuse, the fact that these offences are not isolated events is a material consideration in sentencing: *R v Bamford* (unrep, 23/7/91, NSWCCA). In *Dousha v R* [2008] NSWCCA 263 at [27]:

> I am satisfied that her Honour's finding that the counts were representative of a course of conduct was in order to emphasise the distinction between the leniency that might be extended for an isolated instance of misconduct as distinct from repeated and discrete misconduct.

Offences involving a number of victims or a large number of instances which occurred over a long period of time have been regarded as demonstrative of cases involving a very high degree of criminality: see *R v Hill* (unrep, 7/7/92, NSWCCA). Condign punishment is called for where grave and repeated sexual assaults are perpetrated upon young children, particularly by a person in a position of trust and authority: *R v JCW* [2000] NSWCCA 209 per Spigelman J at [121]. However, each case must be necessarily understood upon its own facts and by reference to the particular objective circumstances. Such consideration would necessarily include the number of victims involved, the duration of the offence(s) and the extent of sexual invasion seen: *R v Davis* [1999] NSWCCA 15 at [65].

Caution must be exercised when a criminal escapade involves consequences for more than one victim. In these circumstances, there is a special need to ensure that by imposing concurrent sentences, insufficient recognition is not given to the fact that more than one victim has been impacted by the criminal activity: *R v AB* [2005] NSWCCA 360.

In *R v Wicks* [2005] NSWCCA 409 at [49], McClellan CJ at CL stated:

> Persons who set about committing crimes of a sexual nature upon a number of different victims, even if the offence occurs in a short space of time can expect a penalty which imposes a prison term which will be served separately for at least some of the offences (… see the discussion about multiple victims in *R v Dunn* [2004] NSWCCA 41 at [50], *R v AB & Clifford* [2005] NSWCCA 360 at [90]–[84], *R v Weldon* (2002) 136 A Crim R 55 at 62 per Ipp J).

In *R v Katon* [2008] NSWCCA 228 at [41], the court, applying *R v Knight* [2005] NSWCCA 253 per Johnson J at [112], held that:

> The facts relating to the various offences disclose a course of serious criminal conduct over a number of years. That conduct involved the sexual abuse of 3 individual victims. In the ordinary course there should be a recognition of that separate offending by at least partial accumulation of the sentences …

In *Dousha v R* [2008] NSWCCA 263 at [57], a case involving discrete offending against two young children over a period of years, the court held that there was no error manifested in the fact that the sentences were partially accumulated.

[17-570] Mitigating factors

Last reviewed: August 2023

The issue of consent

Consent is *not* a mitigating factor or defence. Children are to be protected from sexual conduct, even if they are willing participants: *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Brady* (unrep, 3/3/94, NSWCCA).

Sections 77(1) and 91D(3) *Crimes Act 1900* provide that consent is no defence to the offences specified in those sections, as noted above at [17-420]. The judge erred in *R v Nelson* [2016] NSWCCA 130 by describing, as a factor in the respondent's favour, the offences as "consensual". "Consensual" is not a proper description; the offending may be better described as not being the subject of opposition. Lack of consent is

not an element of the offences because the law deems persons of that age unable to give informed consent. While the use of threats or force would have aggravated the offending, mere lack of opposition is irrelevant and not a mitigating factor: *R v Nelson* at [23]. The age difference between the victims and the respondent was significant: *R v Nelson* at [25], [64].

Good character

The *Crimes Amendment (Sexual Offences) Act 2008* inserted special rules for child sexual offences: s 21A(5A), (5B) *Crimes (Sentencing Procedure) Act* (effective 1 January 2009). Section 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). See further **[10-410]**.

A new definition of "child sexual offence" was also inserted: s 21A(6). The good character amendment applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59.

Prior to the commencement of the *Crimes Amendment (Sexual Offences) Act 2008*, an offender's prior good character was held to be of less significance in child sex cases than other types of offences: *R v Rhule* (unrep, 25/7/95, NSWCCA); *R v Muldoon* (unrep, 13/12/90, NSWCCA); *R v DCM* (unrep, 26/10/93, NSWCCA); *R v Balenaivalu* (unrep, 19/2/96, NSWCCA); *R v Levi* (unrep, 15/5/97, NSWCCA); *R v C* (unrep, 24/4/97, NSWCCA) ; *R v Elliot* [2008] NSWDC 238 at [42]; *Mouscas v R* [2008] NSWCCA 181 at [37]; *R v PGM* [2008] NSWCCA 172 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

In *R v PGM* [2008] NSWCCA 172 at [44], the court observed that, while the judge was entitled to take the respondent's previous good character into account, to afford it "very significant weight" failed to recognise that the pattern of repeat offending extended over a period of seven months and that the relationship with the victim was deliberately fostered by the respondent for his own sexual gratification. Further, a determined and conscious course of offending diminishes the mitigating impact of a finding of good character: *R v Kennedy* [2000] NSWCCA 527 at [21]; *R v ABS* [2005] NSWCCA 255 at [25]. The fact that the respondent used child pornography when perpetrating one of the s 61M(2) offences further indicated that his offending was "neither opportunistic nor in any meaningful contrast to his outward or public good character": *R v PGM* at [44].

Offender abused as a child

If it is established that a child sexual assault offender was sexually abused as a child, and that the history of abuse has *contributed* to the offender's own criminality, that is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty: *R v AGR* (unrep, 24/7/98, NSWCCA) at 13. However, while it is appropriate to take such a circumstance into account, it cannot be regarded as an excuse, notwithstanding the fact that such a link may aid in explaining the reason why

the offender committed the offence: *R v Lett* (unrep, 27/3/95, NSWCCA) per Hunt CJ at CL at [5]; *R v Reynolds* (unrep, 7/12/98, NSWCCA) per Hulme J. Courts have to do what they can to see that the cycle of sexual abuse is broken: *R v Reynolds*.

The weight to be given to this circumstance will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge: *R v AGR* (unrep, 24/7/98, NSWCCA) at [5]. Such a consideration will usually only go to reducing the offender's moral culpability for the acts, notwithstanding that it may also be relevant to the offender's prospects of rehabilitation: *R v AGR*.

In *R v Cunningham* [2006] NSWCCA 176 at [67], the court held that the applicant's history of sexual abuse did not entitle him to mitigation because the psychiatric evidence did not go so far as to suggest that the abuse contributed to his paedophilia or the offences. Furthermore, the offences were committed in breach of a bond for similar prior offences with regard to which the applicant had already received the benefit of the history at sentence.

In *Dousha v R* [2008] NSWCCA 263 at [47], the applicant conceded that there was no direct evidence that the single instance of sexual abuse he suffered as a child had in any way contributed to his offending. Indeed, there was evidence to the contrary, as a psychologist who assessed the applicant opined that the incident did not contribute to the applicant's offending. The court held at [47] that, "[i]n the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation)", the incident was not relevant to the sentencing discretion.

Delay

Substantial delay in bringing a matter before the court in some cases may operate to the offender's advantage, for example by providing the offender with the opportunity to establish a new life and demonstrate rehabilitation. In other cases, the period of delay may lead to some constraint upon the offender's lifestyle or other detriment which may also justify a degree of leniency: *R v V* (unrep, 24/2/98, NSWCCA) per Wood J. In *R v Todd* [1982] 2 NSWLR 517 at 519, a case concerned with factors arising from consideration of offences committed interstate and resulting delays, Street CJ set down the following principle:

> where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course he comes up for sentence on subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

In the case of child sexual assault, however, an offender should not benefit from the fact offences are not revealed until many years after they were committed. In *R v Moon* [2000] NSWCCA 534 at [35], the court held the 30-year delay in complaint should not be taken into account as a mitigating factor, noting it was the very nature of the

relationship between offender and child that leads to repression, inhibition and delayed complaint. Similarly, in *Richards v R* [2023] NSWCCA 107, the court held a 34-year delay in complaint did not operate as a mitigating factor, noting child sexual assault victims are loath to report matters because of fear, trauma and shame: at [94]. Where an offender remains silent, hoping the offences will not be discovered, a reduced sentence is inappropriate: *Richards v R* at [89]–[91], [95]–[96]; see also Beech-Jones CJ at CL at [3]–[4]; distinguishing *R v Todd* [1982] 2 NSWLR 517 at 519–520.

In *R v Dennis* (unrep, 14/12/92, NSWCCA), an authority cited in *Richards v R*, the applicant had been charged with five counts of indecent assault and two counts of buggery after the victim came forward in 1990 following a public appeal about child abuse, and complained of offences that had occurred over the period 1974–1980. James J, Hunt CJ at CL and Carruthers J agreeing, said:

> It is not infrequently the case that sexual offences committed against a child of which only the offender and the child have knowledge, are first revealed by the child to a third person only years afterwards when the child has attained a certain level of maturity. In such cases the mere passage of time between the committing of the offences and the disclosure of the offences and the apprehension of the offender is of little weight as a factor in mitigation of penalty.

Lapse of time between the commission of the offence and notification to police should be a mitigating factor only where the delay would cause unfairness to the offender: *R v Johnson* (unrep, 16/5/97, NSWCCA) per Priestley JA. However, it is impossible to lay down any general principle as to the operation of leniency arising from delay: *R v Thomson* (unrep, 18/6/96, NSWCCA) per Levine J.

In *R v Holyoak* (1995) 82 A Crim R 502, a case involving sexual offences in which the appellant had not been charged until more than 20 years had passed and in which there had been a further six years delay before conviction; "extra curial" punishment via the media; and "hate" communications, Allen J stated:

> Whether, in any particular case, so long a delay is a detriment depends upon the circumstances of that case. There is no rule of law that it always is a detriment — although often it will be. It could be, to take a case at one extreme, that the offender has spent years in emotional hell, appalled at what he has done, terrified that the day may come when he is found out, disgraced and convicted, fearing that at any time there will be that knock on the door and never feeling free to remain so long in any community that he comes to be known and his background be of interest to others. At the other extreme the offender may have gone through the years untroubled by his offences, lacking any remorse in respect of them and feeling confident that they will never come to light because the victim never would be prepared to talk about them, his confidence increasing as the years went by with his victim remaining silent — the offender enjoying over the many years unwarranted acceptance by his associates in his respectable and stable lifestyle.

In finding that the sentencing judge made no error in principle in relation to delay, Levine J in *R v Thomson*, Priestley JA and Abadee J agreeing, applied *R v Holyoak*. The sentencing judge had found this was not a case where there had been any dilatory conduct by the police or prosecuting authorities, nor was it a matter in which there had been charges 'hanging over' the prisoners head. As far as the applicant was concerned the matter was not going to proceed after the victim's mother refused to co-operate

with the authorities in 1987. There was no evidence to the effect that the prisoner's life was in any way affected by the delay between the detection by his wife in 1987 and the eventual furnishing of evidence enabling prosecution.

The issue of delay was considered in *R v Humphries* [2004] NSWCCA 370, where Barr J, Buddin and Campbell JJ agreeing, stated that the sentencing judge was entitled to ignore the fact that there was an 11-year delay between the victim's complaint to her mother and her complaint to police and the subsequent charging of the applicant. In that case, the complainant had been discouraged from making a report by her family. Justice Barr stated at [19]–[20]:

> Although a lengthy delay between finding and charging can be taken into account in favour of an offender, there is no rule that that must happen. Each case depends on its own facts. There is no rule of law that delay is always a detriment to the offender, though it often will be: *R v Holyoak* (1995) 82 A Crim R 502 at 508.
>
> One of the incidents of a lengthy delay can be that the offender is left in an agony of mind, not knowing whether or not he will be charged. The applicant was not put into any such frame of mind. He was able confidently to rely, until the police were finally told, upon the complainant's not telling the police, in accordance with the understanding he believed had been reached [among the family].

In *R v EGC* [2005] NSWCCA 392, in referring to the distinction drawn in *R v Holyoak*, the applicant submitted that, while the rehabilitation of an offender is not necessarily a mitigating factor in cases where there is a time lapse between the commission of the offences and conviction for them, it is a powerful mitigating factor where delay was a consequence of the prosecuting authorities failing to expeditiously bring the offender to trial. Justice Latham, Sully and Hulme JJ agreeing, doubted whether such a neat distinction can be drawn. Justice Latham stated at [32]:

> nothing in the judgment [in *R v Holyoak*] suggests that the weight to be afforded to the rehabilitation of an offender varies according to whether delay has been occasioned by tardiness on the part of the prosecution.

In *R v EGC*, although police were notified in 1991, both the victim and her mother rejected police involvement. The victim's mother had in fact married the applicant six months after being told by the victim of the sexual assaults. Stating at [35] that "mere knowledge of such allegations cannot found a justifiable inference of deliberate inaction by prosecuting authorities", Latham J continued at [36]:

> A number of decisions of this court are consistent with the Judge's approach to this issue, in circumstances where the complainant and members of her family decline to make a statement or contact the police, despite some early intervention by welfare authorities. *V*, *Thompson* and *Humphries* all fall into that category and resulted in the dismissal of sentence appeals premised upon non-adherence to the principles established in *R v Todd* [1982] 2 NSWLR 517. In *V*, Wood CJ at CL cites *Thompson* and *Holyoak* amongst others, as illustrative of the proposition that leniency is not necessarily extended wherever there is a stale offence or substantial delay (at 300).

Although the court in *R v EGC* held that the sentencing judge did not fail to give sufficient weight to the applicant's rehabilitation in the context of the delay between notification of the assaults to police and charge, it found that the passage of time between the commission of the offences and sentence was capable of, and ought to

have, constituted special circumstances. The Court of Criminal Appeal has recognised prosecution for a stale offence as a special circumstance warranting alteration of the statutory ratio: *R v Virgona* [2004] NSWCCA 415; *R v Fidow* [2004] NSWCCA 172.

In *Dousha v R* [2008] NSWCCA 263 at [30], where there was a delay of about 20 years, the court held that it was open to her Honour to conclude that rehabilitation was not established. Although the fact that a lengthy period has elapsed without further offences being committed may allow for a finding that an offender has either rehabilitated or has good prospects for doing so, such a finding is not mandated. Her Honour gave greater weight to the psychologist's opinion that the applicant possessed persisting features of paedophilic orientation: at [18], [29].

Pre-Trial Diversion of Offenders Program

The *Pre-Trial Diversion of Offenders Act 1985* applied to "a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner": s 3A. It established a procedure whereby certain offenders are to be diverted from the ordinary curial path and made subject to a program of treatment intended to modify their criminal behaviour; the ultimate aim of the treatment being the reduction of the prospects of re-offending: *R v DWD* (unrep, 2/3/98, NSWCCA). As the legislation was explained when it was introduced into Parliament, the Act was based upon the theory that there are certain cases in which punishment is not an effective or appropriate deterrent. It has as its principal objective the protection and alleviation of the stress of victims of child sexual assault.

Following the repeal of the *Pre-Trial Diversion of Offenders Regulation 2005* on 1 September 2012, the program closed. See *Attorney General for NSW v CMB* [2015] NSWCCA 166 at [5]–[12] for a legislative history.

Possibility of summary disposal

See discussion under **Sexual assault** at **[20-770]**.

Health

Ill-health may be a mitigating factor where the evidence establishes that imprisonment will be more burdensome because of the offender's state of health or that imprisonment will have a "gravely adverse effect on the offender's health": *R v Smith* (1987) 44 SASR 587 at 589. See also *R v Bailey* (unrep, 3/6/88, NSWCCA); *R v Zappala* (unrep, 4/11/91, NSWCCA) at 5–6; *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Cole* (unrep, 29/3/94, NSWCCA) at 10. For a lengthy discussion on the principles relating to ill-health see *R v L* (unrep, 17/6/96, NSWCCA) at 6–9.

Ultimately, the fact that a person may suffer hardship in gaol by reason of some illness or disability is a matter for the prison authorities. It is their responsibility to ensure that the prisoner is not subjected to undue hardship: *R v Zappala* and *R v L*.

There may be exceptional cases where the offender's condition is so severe that imprisonment would be inhumane: *R v Vento* (unrep, 6/7/93, NSWCCA); *R v Dowe* (unrep, 1/9/95, NSWCCA) referred to in *R v L*.

Age

The age of the offender is relevant on sentence primarily on the basis that imprisonment may be more onerous for an older individual. There is no automatic reduction because

of age. It is a matter to be considered together with the other circumstances of the case: *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Holyoak* (1995) 82 A Crim R 502. In *R v DCM* (unrep, 26/10/93, NSWCCA) at 3, Badgery-Parker J said, Kirby ACJ and Loveday AJ agreeing:

> Age is not a licence to commit sexual offences nor should it be thought that a person who commits such offences can then expect to be allowed to go free merely because of advanced years.

There is no principle that the offender should not be sentenced to a term that would result in him or her spending the rest of his or her life in gaol: *R v Varner*; *R v Holyoak*; *R v Gallagher* (unrep, 29/11/95, NSWCCA).

The youth of an offender may also be a relevant consideration. In *R v JJS* [2005] NSWCCA 225 the applicant, a 14-year-old boy who assaulted his three-year-old cousin contrary to s 61M(2), was sentenced to a 5-year good behaviour bond. The bond was reduced on appeal to a term of 3 years, the court finding that the sentence was unduly burdensome and inappropriate in the circumstances of the case.

Intellectual handicap/mental disorder

General deterrence should be given less weight in cases where the offender is suffering from a severe intellectual disability or mental disorder because such an offender is not an appropriate medium for making an example to others. The court moderates the consideration of general deterrence to the circumstances of the particular case. See the discussion about an offender's mental condition and *Muldrock v The Queen* (2011) 244 CLR 120 at [10-460].

In *R v Morrow* [1999] NSWCCA 64, where the intellectually disabled applicant was charged with one count of sexual intercourse with child under 10 years contrary to s 66A, the court dismissed the Crown appeal against a 5-year s 558 recognizance order. The applicant was suffering from serious depression and his ability to function in the general community was 99.9% lower than the rest of the population.

Where the offender knows what he or she is doing and understands the gravity of his or her actions, the moderation will not be great: *R v Champion* (1992) 64 A Crim R 244 at 254. See also *R v DCM* at 6–7; *R v Engert* (unrep, 20/11/95, NSWCCA); and *R v Monk* (unrep, 2/3/98, NSWCCA) at 3–5.

As to the relevance of an offender's mental condition for standard non-parole period offences see *Mental condition* in **What is the standard non-parole period?** at **[7-890]**.

Offender undertakes treatment

It has been said that it is "an important matter in his favour" that the offender is prepared to undertake treatment for his sexual attraction to children. This is particularly so in cases involving Depo Provera treatment ("chemical castration"), where there are significant side effects. In *R v DCM* (unrep, 26/10/93, NSWCCA), the respondent was charged with 16 counts of child sexual assault offences involving five children over a period of 4 years and 5 months. In dismissing the Crown appeal and confirming the 300 hours community service and recognizance orders, Badgery-Parker J, Kirby ACJ and Loveday AJ agreeing, had regard to "the quite exceptional circumstances of this case", including that the respondent underwent a course of treatment of Depo Provera and Androcur.

Extra-curial punishment

The sentencing court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property: *R v Allpass* (unrep, 5/5/93, NSWCCA). In *R v Holyoak* (unrep, 1/9/95, NSWCCA), the fact that the applicant had suffered substantially from personal harassment by media representatives as well as received a large volume of "hate" communications from members of the public, meant that the punishment commenced, in a real sense, before his sentence.

Section 24A(1) provides that, in sentencing an offender, the court must not take into account, as a mitigating factor, the fact that the offender has or may become:

(a) a registrable person under the *Child Protection (Offenders Registration) Act 2000* as a consequence of the offence, or

(b) the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act 2004*, or

(c) as a consequence of being convicted of the offence, has become a disqualified person under the *Child Protection (Working with Children) Act 2012*, or

(d) the subject of an order under the *Crimes (High Risk Offenders) Act 2006* (whether as a high risk sex offender or as a high risk violent offender).

Section 24A(1)(a)–(b) has effect despite any Act or rule of law to the contrary: s 24A(2). It applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59. Section 24A(1)(c) applies to offences whenever committed unless, before 3 March 2011, a court has convicted the person being sentenced of the offence, or a plea of guilty has been accepted and the plea has not been withdrawn: *Crimes (Sentencing Procedure) Act 1999*, Sch 2, Pt 21, cl 62.

For the position before the enactment of s 24A see *R v KNL* [2005] NSWCCA 260 at [49]–[50].

Hardship of custody for child sex offender

Protective custody is not automatically to be regarded as a circumstance mitigating the sentence: *Clinton v R* [2009] NSWCCA 276 at [24]; *R v Way* (2004) 60 NSWLR 168 at [176]–[177]; *R v Durocher-Yvon* (2003) 58 NSWLR 581. The Court of Criminal Appeal has repeatedly applied the principle that where an offender seeks to receive a reduction of sentence on the ground that conditions of imprisonment will be more onerous, it is for the offender to lead evidence of what those conditions entail: *Clarkson v R* [2007] NSWCCA 70 per Howie J, Sully J agreeing, at [273]. It will be an error to take into account in mitigation the fact that an offender will serve a sentence in protective custody — either in the determination of the sentences or in the finding of special circumstances under s 44(2) *Crimes (Sentencing Procedure) Act* — without evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21].

The Sentencing Council of NSW said in a report, "*Penalties Relating to Sexual Assault Offences in New South Wales*", 2008, Vol 1, at [6.49]:

> In the case of sexual offenders, it is difficult to imagine that those prisoners who are assumed likely to serve their sentences in special management areas or in limited

> association areas, who have access to programs or services or a reasonable degree of association with other inmates, would qualify for special consideration. Each case would, however, need to depend on its own facts.

The Council expressed the view at [6.51] that "the conditions of protective custody should more actively be promoted to judicial officers".

A paper on protective custody by Domenic Pezzano, Superintendent Operations Branch, Corrective Services NSW, "*Information for ODPP/Courts on options for offenders who request protective custody — limited association and non-association*" (revised December 2010) describes the programs and employment opportunities.

[The next page is 9151]

Commonwealth child sex offences

[17-700] Summary of relevant provisions

Last reviewed: August 2024

- "Commonwealth child sex offence" is defined in s 3 *Crimes Act 1914* (Cth). It includes offences in the Criminal Code committed overseas and online. See **[17-720] "Commonwealth child sex offence" and other definitions**; see **Table 1** at **[17-800]**.
- In determining an appropriate sentence, regard must be had to the matters listed in s 16A(1), (2), (2AAA) *Crimes Act 1914*. See **[17-730]** to **[17-740]**), and other matters, including the maximum penalty and any applicable mandatory minimum sentence (**[17-780]**, **[17-790]**).
- Sentencing in relation to a combination of Commonwealth and State offences for child abuse material offences is not uncommon. State offences of possessing child abuse material (s 91H(2) *Crimes Act 1900*) are discussed alongside Commonwealth offences relating to accessing, transmitting and soliciting this material (s 474.22(1) Criminal Code). See **[17-710] Introduction**, **[17-780] Penalties for some Commonwealth child sex offences**, and **Totality** in **[17-730] General sentencing principles (including relevant s 16A(2) factors)**.
- For penalties that may generally be imposed on federal offenders, see **[16-000] Sentencing Commonwealth offenders**. Special provisions in the *Crimes Act 1914* apply to sentences for some Commonwealth child sex offences:
  - Recognizance release orders under s 20(1)(b). See **[17-780]**.
    - immediate release from imprisonment only in exceptional circumstances: s 20(1)(b)(ii), (iii)
    - mandatory conditions upon release: s 20(1B)
  - Mandatory minimum penalties under ss 16AAA and 16AAB. See **[17-790]**, **Table 1** at **[17-800]**.
- Additional sentencing options under NSW/State laws generally available for federal offences under s 20AB, such as intensive correction orders, may not be available for Commonwealth child sex offences: **[17-780]**.

[17-710] Introduction

Last reviewed: August 2024

This chapter should be read in conjunction with **Sentencing Commonwealth offenders** at **[16-000]**. See also *Sentencing of Federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 7th edn, 2024.

Unless otherwise indicated, references to provisions in this chapter are to the Criminal Code (Cth) and references to the *Crimes Act*, are to the *Crimes Act 1914* (Cth).

Commonwealth child sex offences (defined in s 3 *Crimes Act*) are contained in Ch 8 and 10 of the Criminal Code and concern sexual offending against children overseas, via the postal service or by using a carriage service, for example, by phone or internet services. This chapter focuses on offences in Ch 10, Div 474 which are committed using a carriage service including:

- Subdivision D — using a carriage service to access, transmit, solicit etc child abuse material (ss 474.19 (rep), 474.22, 474.22A); and
- Subdivision F — using a carriage service to engage with a child for sexual activity (s 474.25A(1)), to procure a child for sexual activity (s 474.26) and to groom a child (ss 474.27, 474.27AA), and other similar offences.

Mixture of State and Commonwealth offences — child abuse material

For consistency, the term "child abuse material" (CAM) is used throughout this chapter. In 2009, "child abuse material" replaced "child pornography" in the NSW *Crimes Act 1900*. On 21 September 2019, the previous distinction between "child pornography material" and "child abuse material" in the Criminal Code was replaced with a single, reconstituted definition of "child abuse material" in s 473.1.

A combination of State and Commonwealth offences is not uncommon in a prosecution for offences involving CAM: *R v Porte* [2015] NSWCCA 174 at [55]. Courts have identified common factors relevant to assessing the objective seriousness of the State offences of possessing and disseminating CAM (*Crimes Act 1900*, s 91H(2)) and Commonwealth offences of accessing or transmitting CAM (ss 474.19 (rep), 474.22(1)): *R v Hutchinson* [2018] NSWCCA 152 at [45]. However, it is still important to differentiate between the State and Commonwealth statutory sentencing schemes. Accordingly, if the aggregate sentencing scheme is to be applied in such a case, separate aggregate sentences must be imposed in relation to the State and Commonwealth offences (see **[16-040] Sentencing for multiple offences**). Also, while State and Commonwealth offences may overlap, they will generally not be identical and any overlap in offences will need to be taken into account as part of totality (see **[17-730] General sentencing principles** and **[17-740] Objective factors (including relevant s 16A(2) matters)**).

[17-720] "Commonwealth child sex offence" and other definitions

Last reviewed: August 2024

Section 3 *Crimes Act* defines "Commonwealth child sex offence" as Criminal Code offences in:

(i) Division 272 (Child sex offences outside Australia);

(ii) Division 273 (Offences involving child abuse material outside Australia);

(iia) Division 273A (Possession of child-like sex dolls etc.);

(iii) Subdivisions B and C of Division 471 (which create offences relating to use of postal or similar services in connection with child abuse material and sexual activity involving children);

(iv) Subdivisions D and F of Division 474 (which create offences relating to use of telecommunications in connection with child abuse material, sexual activity involving children and harm to children).

It also includes the above offences:

- as an offence against ss 11.1 (attempt), 11.4 (incitement) and 11.5 (conspiracy) of the Criminal Code (subs (b)); and
- taken to have been committed because of ss 11.2 (complicity and common purpose), 11.2A (jointly) and 11.3 (by proxy) of the Criminal Code (subs (c)).

See **Table 1: Commonwealth child sex offences — maximum and minimum penalties** below at **[17-800]**.

Section 3 also provides definitions for the terms:

- child abuse material, (as per Pt 10.6 Criminal Code);
- child sexual abuse offence;
- Commonwealth child sexual abuse offence;
- State or Territory registrable child sex offence.

Commonwealth offences against children which may be of a sexual nature, and other related offences, that do not fall within the definition of Commonwealth child sex offence include:

- Importing or exporting child pornography or CAM: s 233BAB *Customs Act 1901* (Cth).
- Aggravated forced marriage offences where the victim is under 16 years of age contrary to ss 270.7B and 270.8(1) Criminal Code.
- Person on a child protection offender register departing Australia: s 271A.1 Criminal Code.
- Internet service provider or content host, aware that a service they provide can be used to access material they believe on reasonable grounds is CAM, not referring details to the Australian Federal Police within a reasonable time: s 474.25.

[17-730] General sentencing principles (including relevant s 16A(2) factors)

Last reviewed: August 2024

Section 16A(1) *Crimes Act* provides the court must impose a sentence that is of a severity appropriate in all the circumstances of the offence. Section 16A(2) provides the court must take into account matters including the need to ensure adequate punishment (s 16A(2)(k)) and the deterrent effect the sentence may have on the person (s 16A(2)(j)) or others (s 16A(2)(ja)). See also **[16-025] Section 16A(2) factors**.

General deterrence and denunciation

General deterrence and denunciation are important considerations for offences involving CAM as well as offences involving predatory conduct towards children

online: *Lazarus v R* [2023] NSWCCA 214 at [76]; *Martin v R* [2019] NSWCCA 197 at [83]; *R v Edwards* [2019] QCA 15 at [63], [86]; *R v Porte* [2015] NSWCCA 174 at [60]; *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [21].

In *R v Booth* [2009] NSWCCA 89 at [40]–[44], Simpson J discusses the relationship between the exploitative nature of the offence of possessing CAM (in relation to *Crimes Act 1900*, s 91H(3) (rep)) and the importance of general deterrence:

> …[P]ossession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime. In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material. What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes. And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.

The growing prevalence of such offences and the difficulty in detecting them is another reason for emphasising the importance of general deterrence on sentence. In *Small v R* [2020] NSWCCA 216 at [59] Johnson J (Hoeben CJ at CL and Lonergan J agreeing) quoted the following passage from *DPP v Watson* [2016] VSCA 73 at [89]:

> … the internet may be used as a highly effective medium through which to exploit and sexualise vulnerable children who now are able to have unsupervised access to the internet. Computers and mobile phones with internet access, afford the willing offender with unparalleled world-wide opportunity to exploit the young and impressionable. It is a form of offending that is difficult to detect. It is already evident that the rapidly advancing technology will require courts to increasingly address cases of this kind.

Specific Deterrence

Specific deterrence has been found to be an important consideration in the following circumstances:

- The offender has a prior conviction for similar offences: *R v Booth* [2009] NSWCCA 89 at [45]; *Small v R* [2020] NSWCCA 216 at [60]; [83].
- There is evidence of a lack of insight into the offence: *DPP (Cth) v D'Alessandro* [2010] VSCA 60 at [34], [36]; *DPP v Watson* [2016] VSCA 73 at [62].
- The offender has a paraphilic disorder: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [205].
- There is a high risk the offender will reoffend: *R v Scavera* [2016] NSWCCA 145 at [75].

Totality

When sentencing an offender for more than one offence, the overall sentence must be "just and appropriate": *Johnson v The Queen* [2004] HCA 15 at [18], citing *Mill v The Queen* (1988) 166 CLR 58 at [63]; see also **[8-200] The principle of totality**.

For example, it is not uncommon for an offender to be sentenced for accessing (ss 474.19 (rep), 474.22(1)), and possessing, the same CAM (*Crimes Act 1900*, s 91H(2)). While the overall sentence must reflect that these offences overlap, some measure of accumulation is likely to be required: *R v De Leeuw* [2015] NSWCCA 183 at [142], [179]. This is to address that, after accessing the material, the offender took the further step of taking possession of it: *R v Porte* [2015] NSWCCA 174 at [55]–[56], applying *R v Fulop* [2009] VSCA 296.

In *Rajasekar v R* [2017] NSWCCA 113, the offender used false identities to groom five children online (s 474.27(1)) and, on one occasion, had a child engage in sexual activity online (s 474.25A(1)). Although the offending was an ongoing course of conduct, it was necessary for there to be some accumulation of the individual sentences to comprehend the distinct criminality of each offence: [34]. See also *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [155]–[158].

Proportionality

There must be reasonable proportionality between the sentence and the objective gravity of the offence: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472; see also **[10-010] Objective seriousness and proportionality**.

In *R v Booth* [2009] NSWCCA 89, the Court held the sentencing judge gave undue focus to the offender's need for counselling when imposing a good behaviour bond for an offence of possessing CAM (*Crimes Act 1900*, s 91H(3) (rep)), at the expense of other sentencing considerations such as the need for general and specific deterrence, and denunciation: [47]–[48].

In *R v De Leeuw* [2015] NSWCCA 183, the Court held the imposition of an intensive correction order for offending involving possession of over 30,000 items of CAM which the offender had obtained from the internet over a lengthy period (*Crimes Act 1900*, s 91H(2); Criminal Code, s 474.19 (rep)) was manifestly inadequate: [146]. The sentencing judge approached the offender's prospects of rehabilitation (a significant factor on sentence) in an erroneous way so the offender's subjective circumstances overshadowed the substantial objective gravity of the offences: [136].

Note: Section 67 *Crimes (Sentencing Procedure) Act 1999* provides an ICO must not be made in relation to a prescribed sexual offence which includes many Commonwealth child sex offences.

Comparative Cases

The court must have regard to the sentences imposed in all States and Territories: *The Queen v Pham* (2015) 256 CLR 550 at [23], [41]; see also **[16-035] Relevance of decisions of other State and Territory courts**.

For offences involving CAM, it is useful to have regard to comparative cases, given a particular case will lie on a spectrum in accordance with factors identified as relevant to assessing objective serious: *Lyons v R* [2017] NSWCCA 204 at [81]–[82]. Although, the comparative cases should bear similarity to the case before the court. In *Kannis v R* [2020] NSWCCA 79, the Court held the sentencing judge erred by relying on sentencing decisions which were materially and significantly different from the offender's case: [284].

[17-740] Objective factors (including relevant s 16A(2) matters)

Last reviewed: August 2024

Assessing the objective seriousness of an offence is an important aspect of the sentencing exercise (see **Nature and circumstances of the offence: s 16A(2)(a)** in **[16-025] Section 16A(2) factors**; **[10-000] Objective seriousness and proportionality**; s 16A(2)(a) *Crimes Act*). The court also needs to consider the maximum penalty and any applicable minimum penalty (see **[16-025] Maximum penalties**; **[17-790] Mandatory minimum penalties**; s 20(1)(b)(ii), (iii) *Crimes Act*.

The court must also take into account other relevant objective matters from the non-exhaustive list of matters in s 16A(2) *Crimes Act* including any course of conduct (s 16A(2)(c)), and any harm suffered by victims (s 16A(2)(e), (ea)) (see at **[16-010] General sentencing principles applicable**.

In relation to:

- Sexual offences against children outside Australia in Div 272, Subdiv B;
- Offences relating to the use of postal or similar service involving sexual activity with person under 16 in Div 471, Subdiv C; and
- Offences relating to use of carriage service involving sexual activity with, or causing harm to, person under 16 in Div 474, Subdiv F;

the following additional objective matters must also be taken into account, so far as known to the court:

(a) The age and maturity of the person in relation to whom the offence was committed, if relevant;

(b) If that person was under 10 when the offence was committed, that fact aggravating the seriousness of the related criminal behaviour;

(c) The number of people involved in the commission of the offence, if relevant: ss 272.30, 471.29A, 474.29AA.

For a list of factors that may be relevant to the objective seriousness of offences of sexual intercourse, other sexual activity, persistent sexual abuse and procuring for sexual activity, with/of children outside Australia (ss 272.8, 272.9, 272.11, 272.14 Criminal Code), see *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [127]; *Baden v R* [2020] NSWCCA 23 at [27]. These factors may be relevant to other similar offending.

See below for a discussion of factors relevant to the assessment of objective seriousness for CAM offences, online grooming and procuring offences.

[17-750] Child abuse material offences — possess, disseminate and transmit

Last reviewed: August 2024

This discussion relates to Commonwealth offences of accessing, transmitting, or soliciting CAM (ss 474.19 (rep), 474.22(1) Criminal Code) and State offences of possessing and disseminating CAM (s 91H(2) *Crimes Act 1900*). For State offences of producing CAM (ss 91G, 91H(2) *Crimes Act 1900*), see **Child abuse material offences** at **[17-541]**.

In *R v Hutchinson* [2018] NSWCCA 152 at [45], RA Hulme J (Meagher JA and Button J agreeing) identified the following factors as being relevant to an assessment of the objective seriousness of possessing, disseminating and transmitting CAM:

1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material — in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in *The Queen v De Simoni* (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.
9. The degree of planning, organisation, sophistication and/or deception employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. The age of any person with whom the offender was in communication in connection with the acquisition or dissemination of the material relative to the age of the offender.
11. Whether the offender acted alone or in a collaborative network of like-minded persons.
12. Any risk of the material being seen or acquired by vulnerable persons, particularly children.
13. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
14. Any other matter in s 21A(2) or (3) *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A *Crimes Act* (for Commonwealth offences) bearing upon the objective seriousness of the offence.

These are based on the factors set out in *Minehan v R* [2010] NSWCCA 140 at [94], with two additional factors to account for offending involving engagement with a child victim online, including the age disparity with the victim (factor 10) and whether the offender used deception, including a false persona, to commit the offence (factor 9).

The list of factors is not exhaustive as individual cases can always identify other matters relevant to an assessment of objective seriousness: *R v Hutchinson* at [46], applied in *Burton v R* [2020] NSWCCA 127 at [27]; *CR v R* [2020] NSWCCA 289 at [55]–[56].

The absence of a factor, for example, the offender did not have the purpose of selling the CAM accessed and possessed (factor 5), does not act in mitigation on sentence: *R v Porte* [2015] NSWCCA 174 at [66].

In terms of the "nature and content of the material" (factor 2), CAM typically includes images and videos. CAM may also be comprised of written stories, messages (*Burton v R* [2020] NSWCCA 127) and chat room discussions (*Lyons v The Queen* [2019] VSCA 242).

The use of classification scales is a helpful way to assist a sentencing court to assess the gravity of the CAM, and the objective seriousness of the offence: *R v Porte* [2015] NSWCCA 174 at [75]. The Child Abuse Material Interpol Baseline Categorisation contains two categories of CAM:

- Interpol Baseline Category A — An image depicting a real prepubescent child and the child is involved in a sex act, witnessing a sex act or the material is focused/concentrated on the child's anal or genital region.
- Other CAM Category B — Other child abuse material, illegal in NSW, but which does not fit in Category A, including a person who, is, appears to be or is implied to be a child and is depicted or described in a way that reasonable persons would regard in all the circumstances offensive who:
  - is a victim of torture, cruelty or physical abuse; or
  - is engaged in or apparently engaged in a sexual pose or activity (alone or in the presence of others); or
  - is in the presence of another person who is engaged in or apparently engaged in a sexual pose or activity; or
  - is exposing the genital or anal area, or the breasts of a female child:

See *Gilshenan v R* [2019] NSWCCA 313 at [13].

This classification system does not give a gradation based upon the gravity of the child abuse depicted: *Curle v R* [2024] NSWCCA 117 at [13].

The Child Exploitation Tracking System (CETS) Scale, which classifies CAM into six categories, depending on its type and seriousness, has also been used to categorise such material: *R v Porte* [2015] NSWCCA 174 at [16], [73]–[75].

While these categories have been considered helpful in the assessment of the objective seriousness of such offences, all CAM involves the sexual exploitation of children and is capable of possessing significant gravity: *R v Porte* at [75], [77]; see also *R v De Leeuw* [2015] NSWCCA 183 at [140]–[141]; *DPP v Watson* [2016] VSCA 73 at [45]–[46]; *R v Edwards* [2019] QCA at [79]. CAM classification scales are not legislated and, although they are a useful tool, they cannot overwhelm the assessment of the CAM's nature as part of assessing the objective seriousness of the conduct: *R v Edwards* at [79].

In *R v Edwards*, most of the CAM the offender accessed (s 474.19(1) Criminal Code) were CGIs of children engaged in sexual activity. The Queensland Court of Appeal held it would be an error to assess such material as victimless or harmless because it did not involve real children as the material may normalise or encourage others to participate in the activity depicted; fuel the demand for such material; and have the capacity to groom recipients of it: [60]–[61], [69], [78].

In *Burton v R*, the offender transmitted messages describing sexual acts between himself and non-existent children to other adults (s 474.19 (rep)) and the Court found

the seriousness of the offence was informed by the nature and content of the material together with the possibility of the CAM being seen by either vulnerable recipients or those susceptible to act in the ways described (factors 12 and 13): [36].

In *R v LS* [2020] NSWCCA 148, an appeal in relation to NSW CAM offences, the written description of sexual acts related to the married offenders' children and, as it concerned real children who were also under the offender's protection, the Court held the offending must be regarded as more serious than those involving imaginary children: [136]–[137]; *Ponniah v The Queen* [2011] WASCA 105 at [38]. See *Lyons v The Queen* for an example of CAM in a chatroom discussion.

It may assist in sentence proceedings for such offences, for the Crown to provide random sample evidence of the material so that something more than a formulaic classification which may not communicate its true nature is before the court: *R v Porte* [2015] NSWCCA 174 at [114]. Such evidence is permitted under s 289B *Criminal Procedure Act 1986*. However, where there is an adequate written description of the material, it will not be essential for the judicial officer to view a sample in order obtain a full appreciation of the offence: *R v Hutchinson* at [49]–[50]; [90]; cf *Smit v State of Western Australia* [2011] WASCA 124 at [17].

Other objective factors which may be relevant when assessing the objective seriousness of CAM offences include:

- Harm to victims

  In *Kannis v R* [2020] NSWCCA 79, the offending included the soliciting of CAM from three children (s 474.19 (rep)) and the Court found the implicit presumption a child has suffered harm as a result of prohibited sexual activity applied to this offending: [125]–[128]; see also discussion of *Adamson v R* (2015) 47 VR 268 below at **[17-760] Grooming and procuring a child for sexual activity** and **Victim of the offence — personal circumstances and victim impacts statements: ss 16A(2)(d), (ea), 16AAAA and 16AB** in **[16-025] Section 16A(2) factors**.

- "Rolled up" charges

  On a plea of guilty, the parties may agree to "roll up" multiple instances of the same offence into a single charge. This is not uncommon where the sentence concerns large quantities of CAM. In *R v De Leeuw*, the offender accessed large amounts of CAM on the internet over 7 years and the Court held each of the three "rolled up" charges involved numerous episodes of criminal conduct which magnified the objective gravity of each offence: [116]. In *DPP v Watson* [2016] VSCA 73, the Court held the sentence imposed for one "rolled up" offence contrary to s 474.19 (rep) was inadequate to reflect that it encompassed the soliciting of CAM from 10 children: [77], [93].

- Other Commonwealth offences the offender admits and wishes to have taken into account on sentence under s 16BA *Crimes Act* (see **Taking other offences into account: ss 16A(2)(b) and 16BA** in **[16-025] Section 16A(2) matters**).

[17-760] Grooming and procuring a child for sexual activity offences

Last reviewed: August 2024

This discussion relates to the Commonwealth offences of using a carriage service to groom (s 474.27 Criminal Code) and procure a child for sexual activity (s 474.26

Criminal Code). The State offences of grooming and procuring a child for sexual activity (s 66EB *Crimes Act 1900*) are discussed at **[17-535] Procuring or grooming: s 66EB.**

In relation to offences relating to use of a carriage service involving sexual activity with, or causing harm to, person under 16 in Div 474, subdiv F, which includes ss 474.26, 474.27, in addition to the matters in s 16A(2), the court is required to take into account, where known:

(a) The age and maturity of the person in relation to whom the offence was committed, if relevant;

(b) If that person was under 10 when the offence was committed, that fact aggravating the seriousness of the related criminal behaviour;

(c) The number of people involved in the commission of the offence, if relevant: s 474.29AA.

Nature and circumstances of offence (s 16A(2)(a) Crimes Act)

In *Tector v R* [2008] NSWCCA 151, the Court found the following factors in the case relevant to the assessment of criminality for three offences of procuring a child for sexual activity (s 474.26(1)):

- the child's age;
- the age differential between the offender and the child;
- the offender's efforts to preserve his anonymity;
- the offender's persistence in contacting the child;
- the financial inducement offered; and
- the nature of the sexual activity proposed, although it may be open on the facts for a judge not to accept that the proposal was a true reflection of the sexual activity intended: [94]–[99].

In *Lazarus v R* [2023] NSWCCA 214, the Court held the offender's persistent and predatory behaviour over eight years involving more than one victim and the use of another person's identity were relevant to assessing the objective seriousness for offences including procuring a child for sexual activity (s 474.26(1)): [31], [80].

For a serious example of grooming (s 474.27(1)) where the much older offender exploited a child's emotional vulnerability and subjected her to sustained, predatory communications for over a month, see *Small v R* [2020] NSWCCA 216 at [54].

Harm to victim (s 16A(2)(e), (ea))

The presumption a child has suffered harm applies to online grooming (s 474.27(1), (2)) and procuring (s 474.26(1)) where the offender has engaged with a child: *Adamson v The Queen* [2015] VSCA 194 at [47]; *R v Kannis* [2020] NSWCCA 79 at [126]. In *Adamson v The Queen* the Court concluded at [56]–[57]:

> The persuasive presumption that a child has suffered harm as a result of prohibited sexual activity applies no less to cybersex offences than to "in person" offences. The presumed harm need not be immediate and manifest, but includes the danger of future

> harm. The presumption arises by way of inferential reasoning, and the objective gravity of the offending is informed by the content of the communications. Where there is evidence of manifested harm, the nature of that harm may aggravate the offending.
>
> …
>
> Where the content of the activity is less sexually explicit, the objective gravity of the offence may correspondingly be reduced. In some instances the presumption of harm may be rendered almost negligible. The offender may rebut the presumption by adducing or identifying evidence establishing that no harm has, in fact, been caused. Ordinarily it will be difficult to overcome the persuasive effect of the presumption. Ultimately, it is for the sentencing judge to be satisfied to the criminal standard that harm should be presumed.

The presumption does not apply where the offender has been communicating with a person who assumed the identity of a child: *Adamson v The Queen* at [30]; see also *R v Bredal* [2024] NSWCCA 75 at [114].

R v Kannis is a case where a victim impact statement illustrated the harms caused by a grooming offence (s 474.27(1)) which included humiliation, anxiety and ongoing fears about intimate material remaining on the internet: [119]–[123].

[17-770] Subjective factors (including relevant s 16A(2) matters)

Last reviewed: August 2024

Section 16A(2)(m) provides an offender's character (subject to s 16A(2)(ma)), antecedents, age, means and physical or mental condition are also matters to be taken into account on sentence.

Other matters that are personal to an offender under s 16A(2) *Crimes Act* include any guilty plea (s 16A(2)(g), co-operation or assistance (s 16A(2)(h)) and the probable effect of any sentence on the offender's family or dependents (s 16A(2)(p)). These are discussed in more detail in **[16-010] General sentencing principles applicable**.

Some subjective factors such as an offender's background and mental condition may also be relevant to the assessment of their moral culpability for the offending.

Good character

Generally prior good character will be given limited weight for sexual offences against children, including offences involving CAM: *DPP (Cth) v D'Alessandro* [2010] VSCA 60; *R v Porte* [2015] NSWCCA 174 at [126]. However, in *Henderson v The King* [2024] ACTCA 3 at [52], the ACT Court of Appeal took the offender's prior good character into account, but found it did not mitigate the seriousness of offences of possessing and transmitting CAM.

Section 16A(2)(ma) *Crimes Act* provides that where a person's community standing aided the commission of the offence, this aggravates the seriousness of the offending. Section 16A(2)(ma) applies to Commonwealth offenders charged with, or convicted of, an offence from 20 July 2020.

Mental condition

For a detailed discussion of the relevance of a mental health condition, see **[10-460] Mental health or cognitive impairment**.

Examples of cases involving Commonwealth child sex offences where a mental health condition has been taken into account include:

- *Kannis v R* [2020] NSWCCA 79, where the Court found the offender's mental health condition (major depressive disorder with some borderline personality traits) reduced his moral culpability for online grooming and CAM offences: [299].
- *DPP (Cth) v Beattie* [2017] NSWCCA 301, where the Court found the offender's paraphilic disorder provided an explanation for the offending and reduced his moral culpability "to some extent", but also heightened the need for specific deterrence: [205].

Psychiatric or psychological reports may also contain material relating to motive. For example, offending related to learned behaviour from early exposure to CAM (*Puhakka v R* [2009] NSWCCA 290 at [8]) and confusion about an offender's sexual identity (*R v Booth* [2009] NSWCCA 89 at [16]).

Rehabilitation

While the prospect of rehabilitation is to be taken into account on sentence under s 16A(2)(n) *Crimes Act*, the Court must ensure it is not given undue focus at the expense of other important sentencing considerations such as general deterrence and denunciation: *R v Porte* [2015] NSWCCA 174 at [71]–[72]; *R v Booth* [2009] NSWCCA 89 at [47]; see also discussion of **Proportionality** in **[17-730] General sentencing principles**.

When sentencing for a Commonwealth child sex offence, s 16A(2AAA) provides the court must have regard to the objective of rehabilitating the offender, by considering treatment options. This includes, when determining the length of a sentence of imprisonment or non-parole period, that there is sufficient time for the offender to undertake a rehabilitation program.

The Explanatory Memorandum to the amending legislation, the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2019 at [255] to [258] states:

> [255] This item inserts subsection 16A(2AAA) which introduces a specific sentencing factor relating to rehabilitation that the court must have regard to when sentencing Commonwealth child sex offenders. This factor must be considered in addition to the general sentencing factors in subsection 16A(2), as part of the overall balancing exercise undertaken in order to determine a sentence of appropriate severity.
>
> [256] This amendment recognises the importance of rehabilitative justice. Rehabilitation of offenders decreases the likelihood of recidivism and is vital for public and community safety. However, state and territory correctional facilities advise that typically a non-parole period of 18 months to two years is required for offenders to be able to complete a relevant custodial sex offender treatment program.

In *Darke v R* [2022] NSWCCA 52, the Court held it was an error not to consider an offender's rehabilitation when sentencing for Commonwealth child sex offences: [35]–[36]; see also *Henderson v The King* [2024] ACTCA 3 at [52].

In *Curle v R* [2024] NSWCCA 117, the Court held s 16A(2AAA) does not require a sentencing judge to identify how a period of imprisonment takes into

account the rehabilitation objective, and nor is it inconsistent with s 16A(2AAA) to impose a custodial sentence where it may have an adverse impact upon an offender's rehabilitation: [52].

Youth

In *Clarke-Jeffries v R* [2019] NSWCCA 56, the Court found the offender's criminality for offending including online soliciting of CAM from a child (s 474.17 (rep)) and online procuring (s 474.26(1)) was reduced by his youth and immaturity which had materially contributed to the offending: [50]–[51]. The Court also found the offender's youth was of significance because this "was not a case of a person of mature years grooming a much younger victim" where the offender was aged 18, and the child victim aged 15: [52]; see also *Kannis v R*.

See also general discussion of sentencing principles relevant to young offenders at **[10-440] Youth**.

[17-780] Penalties for some Commonwealth child sex offences

Last reviewed: August 2024

This section should be read in conjunction with **[16-030] Penalties that may be imposed**. See also *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 7th edn, 2024.

Special penalty provisions apply to some Commonwealth child sex offences committed on or after 23 June 2020.

Imprisonment

Mandatory minimum penalties apply to offences specified in ss 16AAA–16AAB *Crimes Act*: see **[17-790] Mandatory minimum penalties**.

Further, s 19(5) *Crimes Act* provides a presumption that sentences of imprisonment for Commonwealth child sex offences are to be entirely cumulative upon other child sex offences (including Commonwealth offences and State or Territory registrable child sex offences). However, the court may, with reasons, impose a sentence in a different manner if it results in sentences of a severity appropriate in all the circumstances: s 19(6)–(7). This suggests the presumption does not unduly fetter the sentencing exercise, and principles of totality still apply: *Mertell v DPP (Cth)* [2022] ACTCA 69 at [18].

Recognizance release orders (*Crimes Act*, s 20(1)(b))

Section 20(1B) specifies conditions to be imposed on a recognizance release order where at least one offence is a Commonwealth child sex offence. Those mandatory conditions concern supervision, treatment, and travel restrictions. Section 20(1)(b)(ii), (iii) also provides a presumption the offender will serve a minimum period of imprisonment before release unless the court is satisfied there are "exceptional circumstances". "Exceptional circumstances" is not defined but its meaning is discussed in *R v Bredal* [2024] NSWCCA 75 at [58]–[65]. The term "exceptional" in the context of s 20(1)(b) requires the circumstances to be sufficiently "exceptional" such that, despite a period of imprisonment being required, the offender should not be required to serve any part of it in actual custody: [63]. Factors, each not in itself

exceptional, may in combination demonstrate the circumstances are exceptional: [61]; *Griffiths v The Queen* (1989) 167 CLR 372 at 379. Also, although a finding in relation to exceptional circumstances is a step in the sentencing process, it is not made in a vacuum and instinctive synthesis remains engaged: [63].

Intensive correction orders

Under s 67(2) *Crimes (Sentencing Procedure) Act 1999*, an intensive correction order (ICO) is not available for a "prescribed sexual offence" which is defined to include most Commonwealth child sex offences. For further detailed discussion, see **Additional sentencing alternatives: s 20AB** in **[16-030]**; **Intensive correction orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]ff** and particularly **Federal offences** at **[3-680]**.

[17-790] Mandatory minimum penalties

Last reviewed: August 2024

In addition to immediate release on recognizance not being available for Commonwealth child sex offences unless there are "exceptional circumstances" (see also **Recognizance release orders (*Crimes Act*, s 20(1)(b))** above at **[17-780]**), ss 16AAA, 16AAB(2) provide for mandatory minimum sentences which apply to some, but not all, Commonwealth child sex offences. Subject to the exclusions and reductions in s 16AAC:

- s 16AAA provides the offences in column 1 where the court must impose a sentence of imprisonment of at least the period of imprisonment specified in column 2; and
- s 16AAB(2) provides the offences in column 1 where, in relation to a person who has been previously convicted of a "child sexual abuse offence" (see s 3), the court must impose a sentence of imprisonment of at least the period specified in column 2.

All of the offences listed in s 16AAA are strictly indictable. Section 16AAB(2) includes strictly indictable offences, and offences with a maximum penalty of 10 years imprisonment which may be dealt with summarily: s 4J *Crimes Act*. For these latter offences, the maximum summary penalty is 2 years imprisonment and/or 120 penalty units: s 4J(3). See also *Local Court Bench Book* at **Dealing with certain indictable offences summarily** and **Penalty** at **[18-060]**.

Section 16AAC provides:

(1) Sections 16AAA and 16AAB(2) do not apply to persons who, when the offence in column 1 was committed, was under 18 years of age.

(2) A sentence of imprisonment less than that specified in column 1 in ss 16AAA and 16AAB(2) may be imposed if the court considers it appropriate to reduce the sentence because of:

  (a) A plea of guilty (s 16A(2)(g)), and/or

  (b) Cooperation with law enforcement agencies in the investigation of the offence or a Commonwealth child sex offence (s 16A(2)(h)).

(3) If a court may reduce a sentence, it may do so as follows:

  (a) In relation to s 16A(2)(g), a reduction by an amount up to 25% of the period specified in column 2 of the relevant table;

(b) In relation to s 16A(2)(h), a reduction by an amount up to 25% of the period specified in column 2 of the relevant table;

(c) In relation to both s 16A(2)(g) and (h), a reduction by an amount up to 50% of the period specified in column 2 of the relevant table.

See **Table 1: Commonwealth child sex offences table** at **[17-800]**.

Transitional provision

The transitional provision provides ss 16AAA and 16AAB apply where the "relevant conduct" was "engaged in" on or after 23 June 2020: *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020*, Sch 6, item 3.

The High Court in *Hurt v The King* [2024] HCA 8 held the transitional provision is concerned with "acts rather than the results of those acts or the circumstances in which they occur": [12]–[15]; [80]–[81]. Accordingly, the High Court found s 16AAB applied to a s 474.22A(1) offence of accessing CAM where an offender had possession of it after 23 June 2023, but accessed some of the material prior to 23 June 2023: [11]; [82]–[84].

Applying the mandatory minimum penalty

The majority in the High Court in *Hurt v The King* (Edelman, Steward and Gleeson JJ) held a mandatory minimum penalty has the following "double function" in sentencing proceedings:

- to restrict sentencing power to the minimum period of imprisonment, subject to the exceptions in s 16AAC; and
- to provide a sentencing yardstick, the opposite of the maximum term of imprisonment, for the exercise of the sentencing discretion: [54]; see also Gageler CJ and Jagot J at [33], [43].

As the yardstick approach imposes an increased starting point for the appropriate term of imprisonment for a specified offence in the least serious circumstances, it operates to increase the appropriate term of imprisonment generally: *Hurt v The King* at [50]–[51]; [54].

When mandatory minimum penalty provisions were introduced, the yardstick approach to minimum penalties had been adopted consistently throughout Australia in relation to "people-smuggling offences" in the *Migration Act 1958* (Cth): *Hurt v The King* at [89], citing *Bahar v R* (2011) 45 WAR 100. In *R v Delzotto* [2022] NSWCCA 117, one of the decisions appealed to the High Court in *Hurt v The King*, the Court of Criminal Appeal concluded there is no relevant distinction between the *Migration Act 1958* (Cth) provisions considered in *Bahar v R* and s 16AAB warranting a different conclusion about the applicability of the "*Bahar* approach": [89]–[90].

Reduction below the mandatory minimum sentence

The discounts associated with an offender's plea of guilty (s 16A(2)(g)) and/or cooperation with law enforcement agencies (s 16A(2)(h)), by up to 25% each, could result in the reduction of an offender's sentence below the prescribed minimum: *Hurt v*

The King at [103]; ss 16AAB(2), 16AAC(2), (3). This does not detract from the role of the minimum sentence as a yardstick, but rather the process contemplated by s 16AAC reinforces the yardstick role of the minimum sentence: *Hurt v The King* at [104].

The majority in the High Court stated:

> The discretion in s 16AAC(2) applies where it is "appropriate to reduce the sentence", implying that a legitimate procedure will involve determining a prima facie sentence with the use of the prescribed minimum sentence as a yardstick, prior to considering the discount. The subsequent and transparent consideration of the discounts [for the plea of guilty and cooperation with law enforcement agencies] reinforces the utilitarian goals underlying those considerations: [104].

A different approach was taken in *Trinh v The King* [2024] VSCA 61 at [44] (a post *Hurt v The King* decision). See also ch 7.3, *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 7th edn, 2024.

Applicability to non-custodial orders

It is unclear whether non-custodial orders under s 19B (bond without conviction) and s 20(1)(a) (recognizance without passing sentence) as well as sentences under s 20(1)(b) (imprisonment where the court directs an offender's release upon security, including an immediate release in exceptional circumstances) would be available for an offence to which a minimum penalty applies. The majority in *Hurt v The King* (Edelman, Steward and Gleeson JJ) held it was unnecessary to resolve the issue: [98]–[101]. While the minority (Gageler CJ and Jagot J) held the minimum penalty represents "…Parliament's view of the least worst possible case warranting imprisonment" and its application "presupposes both conviction and that the court has decided, first, to impose a sentence of imprisonment (thereby excluding s 19B and s 20(1)(a)), and, second, that the sentence of imprisonment is not to be subject to any direction under s 20(1)(b)": [34]–[35]. See also *R v Taylor* [2022] NSWCCA 256 at [63]; *Bahar v R* at [53], both decided before *Hurt v The King*.

See also *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, 7th edn, 2024, ch 7.3.

[17-800] Table of Commonwealth child sex offences, related provisions and resources

Last reviewed: August 2024

Case digests, case summaries, sentencing statistics and other material relating to the offence available on JIRS may be accessed by clicking on the legislative provision in the table below.

Table 1: Commonwealth child sex offences (related provisions and resources)

Criminal Code Section	Offence Description	Max Penalty (yrs)	*Crimes Act* Min Penalty (yrs) *s 16AAA[1] **s 16AAB[2]
272.8 (1)–(2)	Sexual intercourse with child outside Australia (Aust)	25	*6
272.9 (1)–(2)	Sexual activity (other than sexual intercourse) with child outside Aust	20	*5
272.10 (1)	Aggravated sexual intercourse or other sexual activity with child outside Aust	Life	*7
272.11 (1)	Persistent sexual abuse of child outside Aust	30	*7
272.12 (1)–(2)	Sexual intercourse with young person outside Aust	10	**3
272.13 (1)–(2)	Sexual activity (other than sexual intercourse) with young person outside Aust	7	**2
272.14 (1)	Procure child to engage in sexual activity outside Aust	15	**4
272.15 (1)	Groom child to engage in sexual activity outside Aust	15	**4
272.15A (1)	Groom person to make it easier to engage in sexual activity with child outside Aust	15	**4
272.18 (1)	Benefit from child sex offence outside Aust	25	*6
272.19 (1)	Encourage child sex offence outside Aust	25	*6
272.20 (1)	Prepare/Plan ss 272.8, 272.9, 272.10, 272.11 or 272.18 offence against child	10	**3
272.20 (2)	Prepare/Plan ss 272.12 or 272.18 offence against young person	5	**1

1 Section 16AAA *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020. See detailed discussion in **[17-790]**.

2 Section 16AAB *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020 provided, they had been previously convicted of a "child sexual abuse offence" (s 3). See detailed discussion in **[17-790]**.

Criminal Code Section	Offence Description	Max Penalty (yrs)	*Crimes Act* Min Penalty (yrs) *s 16AAA[1] **s 16AAB[2]
273.6 (1)	Possess, control, produce, distribute, or obtain CAM outside Aust	15	**4
273.7 (1)	Aggravated s 273.6 offence	30	*7
273A.1	Possess child-like sex dolls 21.9.2019 –	15	**4
471.19 (1)–(2)	Use postal or similar service for child pornography	15^	**4
471.20 (1)	Possess, control, produce, supply or obtain CAM through a postal or similar service	15	**4
471.22 (1)	Aggravated s 471.19 or 471.20 offence	30^^	*7
471.24 (1)–(3)	Use postal or similar service to procure persons under 16	15	**4
471.25 (1)–(3)	Use postal or similar service to groom persons under 16	15	**4
471.25A (1)–(3)	Use postal or similar service to groom another person to make it easier to procure persons under 16	15	**4
471.26 (1)	Use postal or similar service to send indecent material to person under 16	10	**3
474.22 (1)	Use carriage service for CAM	15^	**4
474.22A (1)	Possess or control CAM obtained accessed by carriage service	15	**4
474.23 (1)	Possess, control, produce, supply or solicit CAM through carriage service	15^	**4
474.23A (1)	Create, control promote etc CAM to commit or facilitate ss 474.22(1), 474.22A(1) or 474.23 offences	20	*5
474.24A	Aggravated offence — CAM — conduct on 3 or more occasions and 2 or more people	30^^	*7
474.25A (1)–(2)	Use carriage service for sexual activity with person under 16	20^^	*5
474.25B (1)	Aggravated s 474.25A offence	30^^	*7

1 Section 16AAA *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020. See detailed discussion in **[17-790]**.

2 Section 16AAB *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020 provided, they had been previously convicted of a "child sexual abuse offence" (s 3). See detailed discussion in **[17-790]**.

Criminal Code Section	Offence Description	Max Penalty (yrs)	*Crimes Act* Min Penalty (yrs) *s 16AAA[1] **s 16AAB[2]
474.25C	Use carriage service to prepare or plan to cause harm, engage in sexual activity or procure persons under 16 to engage in sexual activity	10	n/a
474.26 (1)–(3)	Use carriage service to procure persons under 16	15	**4
474.27 (1)–(3)	Use carriage service to groom person under 16	15	**4
474.27AA (1)–(3)	Use carriage service to groom another person to make it easier to procure persons under 16	15	**4
474.27A (1)	Use carriage service to transmit indecent communication to person under 16	10	**3

[^] Maximum penalties for ss 471.19(1), (2), 474.22(1) and 474.23(1) apply to offences committed on or after 15 April 2010. The maximum penalty for offences committed before that date was 10 years imprisonment.

[^^] Maximum penalties apply to offences committed from 23 June 2020. For offences committed before that date the maximum penalty for offences contrary to ss 471.22(1), 474.24A and 474.25B was 25 years imprisonment. For an offence contrary to s 474.25A(1)–(2), the maximum penalty was 15 years.

[The next page is 9241]

1 Section 16AAA *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020. See detailed discussion in **[17-790]**.

2 Section 16AAB *Crimes Act* applies to offences committed by an adult offender on or after 23 June 2020 provided, they had been previously convicted of a "child sexual abuse offence" (s 3). See detailed discussion in **[17-790]**.

Dangerous driving and navigation

[18-300] Statutory history

Last reviewed: August 2023

In 1994, the offence of culpable driving was replaced with four dangerous driving offences under s 52A *Crimes Act 1900* (NSW) which carry heavier penalties than was previously the case.

In 1998, following "a pattern of inadequacy" of sentences, a guideline was promulgated: *R v Jurisic* (1998) 45 NSWLR 209 at 229–230. The guideline was reformulated in *R v Whyte* (2002) 55 NSWLR 252 and is set out at **[18-320]**. The guideline has statutory force because of Pt 3, Div 4 of the *Crimes (Sentencing Procedure) Act 1999* and must be taken into account on sentence: *R v Whyte* at [32]–[67]; *Moodie v R* [2020] NSWCCA 160 at [24]; see also **[13-600] Sentencing guidelines**. However, it must only be taken into account as a "check or sounding board": *Kerr v R* [2016] NSWCCA 218 at [96]. Additionally, since *R v Whyte*, there have been changes to sentencing practice including an acknowledgement that references to "moral culpability" in the guideline are now to be understood as references to the objective criminality of the offence: *R v Eaton* [2023] NSWCCA 125 at [56].

In 2006, new offences against s 52AB *Crimes Act 1900* were introduced concerning the failure to stop and assist after a vehicle impact causing the death of, or occasioning grievous bodily harm to, another person.

[18-310] The statutory scheme for dangerous driving offences

Last reviewed: May 2023

A person is guilty of a s 52A dangerous driving offence if, they were driving under the influence of an intoxicating liquor or drug, at a dangerous speed or in a dangerous manner, when they drove a vehicle involved in an impact resulting in death or grievous bodily harm.

The maximum penalties for the four dangerous driving offences are as follows:

Section	Offence	Maximum penalty
52A(1)	Dangerous driving occasioning death	10 yrs imprisonment
52A(2)	Aggravated dangerous driving causing death	14 yrs imprisonment
52A(3)	Dangerous driving occasioning grievous bodily harm	7 yrs imprisonment
52A(4)	Aggravated dangerous driving occasioning grievous bodily harm	11 yrs imprisonment

Circumstances of aggravation are set out in s 52A(7). These include driving more than 45 km per hour, driving to escape police and being very substantially impaired by drugs and/or alcohol.

Where a person knows, or ought to reasonably know, an impact has caused death or grievous bodily harm to another person, it is an offence to fail to stop and give assistance. A maximum penalty of 10 years imprisonment applies if the other person dies (s 52AB(1)) and 7 years where the person suffers grievous bodily harm (s 52AB(2)). See further at **[18-415]**.

Further offences may be committed when the relevant dangerous driving offence causes the loss of a foetus of a pregnant woman: see ss 54A and 54B. These provisions only apply to offences allegedly committed on, or after, 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act 2021*, Sch1[2]. If the offence is a "relevant GBH provision" (defined in s 54A(7)), the maximum penalty is the total of the maximum penalty and 3 years imprisonment: s 54A(3). For example, an offence against s 52A(3) would be a relevant GBH provision. As such, the maximum penalty would be a total of 10 years imprisonment (7 years imprisonment being the maximum penalty for an offence against s 52A(3) plus the 3 years specified in s 54A(3)). If the victim of the offence is a pregnant woman and the relevant conduct constitutes an offence under a "homicide provision" (defined in s 54B(6) to include offences against ss 52A(1), (2) and 52AB(1)), the maximum penalty is 3 years imprisonment: s 54B(3).

[18-320] Guideline judgment

Last reviewed: August 2023

The guideline judgment in *R v Whyte* (2002) 55 NSWLR 252, provides as follows:

A typical case

A frequently recurring case of an offence under s 52A has the following characteristics:

(i) young offender

(ii) of good character with no or limited prior convictions

(iii) death or permanent injury to a single person

(iv) the victim is a stranger

(v) no or limited injury to the driver or the driver's intimates

(vi) genuine remorse

(vii) plea of guilty of limited utilitarian value.

Guideline with respect to custodial sentences

> A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment: at [214].

Aggravating factors

(i) extent and nature of the injuries inflicted

(ii) number of people put at risk

(iii) degree of speed

(iv) degree of intoxication or of substance abuse

(v) erratic or aggressive driving

(vi) competitive driving or showing off

(vii) length of the journey during which others were exposed to risk

(viii) ignoring of warnings

(ix) escaping police pursuit

(x) degree of sleep deprivation

(xi) failing to stop.

Items (iii) to (xi) relate to the moral culpability of an offender.

Guideline with respect to length of custodial sentences

For offences against s 52A(1) and (3) for the typical case:

> Where the offender's moral culpability is high, a full-time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate: at [229].

For the aggravated version of each offence under s 52A an appropriate increment is required. Other factors, such as the number of victims, will also require an appropriate increment.

Spigelman CJ said at [228]:

> In the above list of aggravating factors, items (iii)–(xi) are frequently recurring elements which directly impinge on the moral culpability of the offender at the time of the offence. Individually, but more often in some combination, they may indicate that the moral culpability is high. One way of expressing such a conclusion is to ask whether the combination of circumstances are such that it can be said that the offender has abandoned responsibility for his or her own conduct. That is not the only way of expressing such a conclusion.

The guideline is a check or indicator

The guideline is a "check" or "indicator", and in a given case the sentence "… will be determined by the exercise of a broad discretion": *R v Whyte* (2002) 55 NSWLR 252 at [232], *Kerr v R* [2016] NSWCCA 218 at [96]. The reference to a head sentence of three years is not prescriptive: *R v Nguyen* [2008] NSWCCA 113 at [48]. A guideline is "not a tramline" and should not be used to impermissibly confine the exercise of sentencing discretion: *Legge v R* [2007] NSWCCA 244 at [59]. It is also erroneous to treat the *Whyte* guideline as a "starting point" rather than a reference point: *R v Errington* [2005] NSWCCA 348 at [40]. While formal reference to the guideline is not necessarily required, it is expected that a sentencing judge will advert to the presence or absence of the factors identified in the guideline: *Moodie v R* [2020] NSWCCA 160 at [47]–[48].

The guideline is not a comprehensive checklist

Relevant factors influencing the assessment of the objective serious of these offences are found in three distinct, but related areas: the elements of the offence, the guideline and s 21A of the *Crimes (Sentencing Procedure) Act 1999*: there is a degree of overlap between them: *R v Berg* [2004] NSWCCA 300 at [15]; *SBF v R* [2009] NSWCCA 231 at [77].

In *R v Berg*, Howie J, (Spigelman CJ and Wood CJ at CL agreeing), said at [21]:

> The factors in the list set out in *Whyte*, as indicative of a typical case, do not operate as a checklist, the presence or absence of characteristics having some mathematical relationship with the sentence to be imposed. They merely describe the typical case and were not intended to circumscribe the sentencing judge's discretion …

Further, while the guideline outlines a list of frequently recurring aggravating factors, there may be other circumstances of aggravation, not found in the guideline, which may also be taken into account: *R v Tzanis* [2005] NSWCCA 274 at [24]–[25]; *Kerr v R* at [96]. For example, speed may be taken into account as an aggravating factor where it is excessive in light of the surrounding circumstances: *Kerr v R* at [97]. In that case, the court concluded the sentencing judge was entitled to treat the offender's driving at a speed of 70 kph in the near vicinity of a group of cyclists as a matter of aggravation even though it was within the speed limit.

While the guideline focuses attention on the objective circumstances of the offence, the subjective circumstances of the offender such as contrition, good prospects of rehabilitation and the unlikelihood of re-offending also require consideration and may be deserving of considerable weight: *R v Tzanis* [2005] NSWCCA 274 at [28]; *R v Whyte* at [233].

Impact of changes in sentencing practice since guideline

Changes in sentencing practice since *R v Whyte* (2002) 55 NSWLR 252 was decided should be taken into account when applying the guideline. In particular, the references to "moral culpability" in *R v Whyte* are now to be understood as references to the objective criminality of the offending: *R v Eaton* [2023] NSWCCA 125 at [56]. The assessments of objective criminality and moral culpability are considered to be different but related assessments as part of the instinctive synthesis process: *R v Eaton* [2023] NSWCCA 125 at [56]; see also *Stanton v R* [2021] NSWCCA 123 at [29]; see **Objective and subjective factors at common law** at **[9-700]**.

Also, while the "typical case" in *Whyte* included an offender who had offered a guilty plea of limited utilitarian value, suggesting the guideline allowed for the effect of the plea, guilty plea discounts, for offences on indictment, are now specified by statute: *Stanton v R* [2021] NSWCCA 123 at [29]; see **[11-515] Guilty plea discounts for offences dealt with on indictment**.

[18-330] The concepts of moral culpability and abandonment of responsibility

Last reviewed: August 2023

Note: References to "moral culpability" in the guideline of *R v Whyte* (2002) 55 NSWLR 252 (as indicated in the commentary below) are to be understood as references to the objective criminality of the offence: *R v Eaton* [2023] NSWCCA 125 at [56].

The guideline indicates that an assessment of the offender's moral culpability, which is a critical component of the objective circumstances of these offences, is relevant to determining whether a custodial sentence should be imposed, as well as to determining the appropriate length of the sentence: *R v Whyte* (2002) 55 NSWLR 252 at [205], [214] and [229]; *R v Errington* [2005] NSWCCA 348 at [26]. This is because a wide range of negligence or recklessness may result in commission of any of the offences: *Lawson v R* [2018] NSWCCA 215 at [32].

Although a full-time custodial sentence may be inevitable where it is determined the offender has abandoned responsibility, it does not follow that where the offender has not abandoned responsibility that a full-time custodial sentence can be avoided: *R v Dutton* [2005] NSWCCA 248 at [29].

The expressions "abandonment of responsibility", "low level of culpability" and "the offender's moral culpability is high", employed in the guideline, are useful but necessarily flexible and were not intended to become "terms of art in this branch of sentencing law": *Markham v R* [2007] NSWCCA 295 per Hidden J at [25].

Assessing moral culpability and abandonment of responsibility

Sentencing judges must make a clear finding of where on the continuum of criminality the moral culpability of the offender lies: *DPP v Samadi* [2006] NSWCCA 308 at [21]. The requirement to do so is not discharged by a finding that an offender's culpability is "significantly below the upper end of the scale, yet not at the lowest point in the scale". Within those two points lies a considerable continuum of criminality: *DPP v Samadi* at [21].

It is wrong to "take a restrictive view of the circumstances that can lead to the conclusion that there is a high degree of moral culpability", the judge must have regard to all the objective circumstances relevant to the assessment: *R v Gardiner* [2004] NSWCCA 365 at [41]. Evidence relevant to an offender's moral culpability should not be narrowly confined and can include evidence about any disability or impairment laboured by the offender: *Rummukainen v R* [2020] NSWCCA 187 at [26]; *R v Shashati* [2018] NSWCCA 167 at [24]; *R v Manok* [2017] NSWCCA 232 at [4]–[7]; [74], [76]. The entirety of the surrounding circumstances is relevant to the assessment of moral culpability: *R v Shashati* at [23]–[24].

Howie J said in *Gonzalez v R* [2006] NSWCCA 4 at [13]:

> There is a high degree of moral culpability displayed where there is present to a material degree one or more of the aggravating factors numbered (iii) to (ix) set out in *Whyte*. However, there may be other factors that reflect on the degree of moral culpability involved in a particular case and the factors identified in *Whyte* can vary in intensity: *R v Tzanis* (2005) 44 MVR 160 at [25]. The list of factors is illustrative only and not definitive: *Errington* at [36].

According to *Rosenthal v R* [2008] NSWCCA 149 at [16], abandonment of responsibility:

> … is directed to the objective gravity of the offence. It is concerned, where relevant, with the extent to which the driver was affected by alcohol or a drug and, generally, with the course of driving and the danger posed by it in its attendant circumstances.

The fact the offender was disqualified from driving, on conditional liberty at the time of the offence and had previous driving offences is not relevant to the question of whether he or she had abandoned responsibility: *Rosenthal v R* at [16].

In *R v Errington*, Mason P, with whom Grove and Buddin JJ agreed, said at [27]:

> The jurisprudence in this field recognises "abandonment of responsibility" as one method of describing a high degree of moral culpability (cf *Whyte* at 287 [224]). This does not however endorse a brightline sub-category. There is a wide spectrum of behaviour indicative of differing levels of moral culpability, indeed differing degrees

of abandonment. It is not required that cases be assigned to one or other of two pigeon holes marked respectively "momentary inattention or misjudgment" and "abandoned responsibility". In *R v Khatter* [2000] NSWCCA 32, Simpson J (dissenting) held at [31]:

> "Offences under s 52A are not divided into those of momentary inattention and those of abandonment of responsibility. Those are the two extremes. There are shades and gradations of moral culpability in different instances of the offence and it is proper for the courts to recognise a continuum, rather than a dichotomy, when assessing moral culpability."

Sully J (Carruthers AJ concurring) agreed with these remarks, while differing from her Honour in the disposition of the appeal.

Latham J in *DPP v Samadi* said at [21]:

> … it is not correct to assert that an offender's moral culpability must be low, once the circumstances of the offence do not warrant the description "abandonment of responsibility" or do not justify a finding of high moral culpability.

[18-332] Momentary inattention or misjudgment

Last reviewed: May 2023

The *R v Whyte* guideline provides at [214]:

> A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgement.

This aspect of the guideline is premised upon the fact that, since the offence may be committed where the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence. A non-custodial sentence for an offence against s 52A is almost invariably confined to cases involving momentary inattention or misjudgment: *R v Pisciuneri* [2007] NSWCCA 265 at [75]; see, for example, *R v Balla* [2021] NSWCCA 325.

However, a failure to see a vehicle because the offender did not look properly and assess oncoming traffic will not constitute "momentary inattention": *Elphick v R* [2021] NSWCCA 167 at [24]–[25].

If a collision is not due to momentary inattention, the time and distance travelled by the offender without attention to the road becomes a relevant and aggravating factor: *Kerr v R* [2016] NSWCCA 218 at [98]–[99].

[18-334] Prior record and the guideline

Last reviewed: May 2023

An offender's prior driving record is to be ignored when assessing the objective seriousness of the offence: *R v McNaughton* (2006) 66 NSWLR 566 at [25]. An offender's prior record is relevant to determining where a sentence should lie within a boundary set by the objective circumstances of the offence: *R v McNaughton* at [26]; *Kerr v R* [2016] NSWCCA 218 at [69]. It "cannot be given such a weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence": *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

In *Rosenthal v R* [2008] NSWCCA 149 at [16]–[17], the judge erroneously used the fact that the offender was subject to a 12-month licence disqualification at the time of the offence as relevant to the question of whether the offender had abandoned responsibility. The court held that prior record was not relevant to that issue but rather to issues of personal and general deterrence. The commission of prior driving offences may be indicative of "an attitude of disobedience towards the law" and require increased weight to be given to retribution and deterrence: *R v Nguyen* [2008] NSWCCA 113 at [51]; *R v Scicluna* (unrep, 19/9/1991, NSWCCA).

Generally it is matter for the sentencing court to decide whether a criminal record will be used for or against an offender: *R v Borkowski* [2009] NSWCCA 102 at [47]. It was open to the judge in *R v Borkowski* to find that the offender's previous record disentitled him to the leniency usually extended to a first offender: *R v Borkowski* at [47]. In *Kerr v R* at [117], the judge was entitled to hold that the offender's traffic record indicated a need for personal deterrence. In *Stanyard v R* [2013] NSWCCA 134, it was permissible for the judge (see [25]–[26]) to hold that the offender's traffic history distinguished him from the typical case of a young offender with good character with limited or no prior convictions for the purposes of the guideline: *Stanyard v R* at [38]. In *Rummukainen v R* [2020] NSWCCA 187 at [29], it was permissible for the judge to take a prior drink driving offence into account in a "limited way … as a matter of context".

The *Whyte* ((2002) 55 NSWLR 252) guideline applies to a frequently recurring case which is said to include a young person of good character with no or limited prior convictions: see **Mitigating factors** at **[18-380]**. However, youth, good character and a clear record are not afforded the same weight for dangerous driving offences as they are for other offences. It is erroneous to hold that the fact that the offender has no criminal record should be regarded as an "important mitigating factor": *R v Price* [2004] NSWCCA 186 at [45].

See further discussion in **Prior record** at **[10-405]**.

[18-336] Length of the journey

Last reviewed: August 2023

The guideline provides that an aggravating factor is the "[l]ength of the journey during which others were exposed to risk": see item (vii) in **[18-320]**. This permits the judge to take into account the distance travelled and the distance intended to be travelled before detection: *R v Takai* [2004] NSWCCA 392 at [39]. In *R v Russell* [2022] NSWCCA 294, the offender towed a grossly overloaded caravan for 130 km into a planned 250 km journey before it began swaying, causing a fatal collision. Even though the dangerousness of that journey did not manifest until the caravan began to sway (and regardless of the foreseeability of that occurring) the Court of Criminal Appeal found others were exposed to risk for 130 km, and that the intended longer journey was relevant to assessing the offender's moral culpability: at [57], [68], [115].

There is no absolute demarcation of what is a "long journey", a "not long journey" or a "short journey". The danger created by the length of the journey will vary according to other circumstances, such as the time at which the journey is undertaken, the amount of traffic, and the locale: *R v Takai* at [39]; *R v Shashati* [2018] NSWCCA 167 at [28].

[18-340] General deterrence

Last reviewed: May 2023

In *R v Jurisic* (1998) 45 NSWLR 209, Spigelman CJ at CL at 228 quoted the following passage from the judgment of Hunt CJ at CL in *R v Musumeci* (unrep, 30/10/97, NSWCCA) describing it as being in many respects a guideline relating to the approach to be taken in sentencing for offences under s 52A *Crimes Act 1900*:

> This court has held that a number of considerations which had to be taken into account when sentencing for culpable driving must also be taken into account when sentencing for this new offence of dangerous driving:
>
> 1. The legislature has always placed a premium upon human life, and the taking of a human life by driving a motor vehicle dangerously is to be regarded as a crime of some seriousness.
> 2. The real substance of the offence is not just the dangerous driving; it is the dangerous driving in association with the taking of a human life.
> 3. Such is the need for public deterrence in this type of case, the youth of any offender is given less weight as a subjective matter than in other types of cases.
> 4. The courts must tread warily in showing leniency for good character in such cases.
> 5. So far as youthful offenders of good character who are guilty of dangerous driving, therefore, the sentence must be seen to have a reasonable proportionality to the objective circumstances of the crime, and persuasive subjective circumstances must not lead to inadequate weight being given to those objective circumstances.
> 6. Periodic detention has a strong element of leniency built into it and, as presently administered, it is usually no more punitive than a community service order.
> 7. The statement made by this court in relation to the previous offence of culpable driving — that it cannot be said that a full-time custodial sentence is required in every case — continues to apply in relation to the new offence of dangerous driving. As that offence is committed even though the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence (although that does not mean that a non-custodial sentence is ordinarily appropriate in such a case), but the case in which a sentence other than one involving full-time custody is appropriate must be rarer for this new offence.

Spigelman CJ added that although these observations were made in the context of dangerous driving causing death, the comments can be readily adapted to the cognate offence of dangerous driving causing grievous bodily harm: *R v Jurisic* at 228.

It can readily be seen that, particularly in cases involving death of the victim, general deterrence is usually given primacy over other considerations personal to the offender. In *R v Musumeci*, Hunt CJ at CL also said:

> It is never easy to send a youthful person of good character to gaol but, where it is appropriate, it is something which must be done as a deterrent to others. The need for public deterrence will usually outweigh the fact that the particular offender has already learned his or her lesson. Also, retribution remains an important purpose which the sentence must serve.

In *R v Manok* [2017] NSWCCA 232, Wilson J reiterated the importance of general deterrence, explaining that this was "because of the prevalence of the activity of driving, and the terrible consequences that can flow from a failure by a driver in the management of a motor vehicle": at [78]–[79]. The risk any driver could commit an

offence resulting in death or severe injury meant all drivers must be deterred from driving dangerously by the sentences imposed on those who transgress: *R v Manok* at [79].

Where the offence involves the intoxication of the offender, there is a particular need for sentences to adequately reflect general deterrence: *R v Carruthers* [2008] NSWCCA 59 at [29]–[31]. McClellan CJ at CL there emphasised the fact that a licence is a privilege, and that the use of alcohol significantly increases the risk to other drivers on the road. Where the blood alcohol reading of an offender is high and that person has previous convictions for driving a motor vehicle while under the influence of alcohol, a term of full time imprisonment may be the only appropriate sentence to deter both that offender and others contemplating similar offending: *R v Carruthers* at [30]. Even if the Crown cannot prove an offender was above the legal limit, evidence of alcohol consumption remains relevant to general deterrence: *Rummukainen v R* [2020] NSWCCA 187 at [29].

In *Kerr v R* [2016] NSWCCA 218, general deterrence was considered important to emphasise that cyclists lawfully using the road are entitled to do so without the danger of a random act of dangerous driving: *Kerr v R* at [117].

In *Elphick v R* [2021] NSWCCA 167, where the offender's conduct in driving into the side of a highly visible vehicle on a highway was found to demonstrate an egregious want of care, the court found general deterrence was not served by ordering the sentence be served by way of an intensive correction order: at [26]–[27].

For young offenders, in some cases, general deterrence is a dominant factor on sentence: *SBF v R* [2009] NSWCCA 231 at [152]; *Byrne v R* [2021] NSWCCA 185 at [102]–[103]. See further **[18-380]** below.

[18-350] Motor vehicle manslaughter

Last reviewed: May 2023

The question of whether a motor vehicle manslaughter falls under the manslaughter category of gross criminal negligence or an unlawful and dangerous act is determined by applying the test in *R v Pullman* (1991) 25 NSWLR 89 at 97:

> (1) An act which constitutes a breach of some statutory or regulatory prohibition does not, for that reason alone, constitute an unlawful act sufficient to found a charge of manslaughter within the category of an unlawful and dangerous act.
>
> (2) Such an act may, however, constitute such an unlawful act if it is unlawful in itself — that is, unlawful otherwise than by reason of the fact that it amounts to such a breach.

In some cases, the requirements of both manslaughter by gross criminal negligence and manslaughter by unlawful and dangerous act will be satisfied: *Crowley v R* [2021] NSWCCA 45 at [18].

There is no hierarchy of seriousness within manslaughter and it will be the particular facts rather than the class of manslaughter that determines the seriousness of the offending: *R v Borkowski* [2009] NSWCCA 102 at [49], [51], applying *R v Pullman*.

Further, manslaughter is no less serious a crime because it is committed by the use of a motor vehicle: *Lawler v R* [2007] NSWCCA 85 at [41]; see also, *R v McKenna*

(1992) 7 WAR 455. In *Lawler v R*, the applicant appealed his sentence of 10 years 8 months, with a non-parole period of 8 years, for manslaughter caused when his prime mover collided with the victim's vehicle. The applicant was aware the braking system was defective, but continued driving for commercial gain. In dismissing the appeal, the Court of Criminal Appeal emphasised the importance of general deterrence in cases where people are prepared to blatantly disregard the safety of other users of the road: *Lawler v R* at [42].

When sentencing for motor vehicle manslaughter, it is "unproductive" to consider what might have been the appropriate sentence for an offence of aggravated dangerous driving occasioning death, which is a much less serious offence, carrying a maximum penalty of 14 years imprisonment compared to 25 years for manslaughter: *R v Cameron* [2005] NSWCCA 359 at [26]; *R v Cramp* [1999] NSWCCA 324 at [108]. Of the relationship between these offences, Howie J in *R v Borkowski* [2009] NSWCCA 102 said, at [58] that:

> [I]n cases of motor manslaughter, in my opinion, the sentence to be imposed must also take into account the fact that there is a structure of offences dealing with the occasioning of death through driving and that manslaughter stands at the very pinnacle of that structure as the most serious offence. In particular the sentence must take into account that there is a less serious offence of causing death by driving under s 52A(2) of the *Crimes Act* that carries a maximum penalty of imprisonment for 14 years.

Examples of cases include: *Director of Public Prosecutions v Abdulrahman* [2021] NSWCCA 114 (a particularly serious example); *Smith v R* [2020] NSWCCA 181 at [49]–[78], *Day v R* [2014] NSWCCA 333 at [17]–[28], *Spark v R* [2012] NSWCCA 140 at [48] and *Bombardieri v R* [2010] NSWCCA 161 at [41]–[55]. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving, as it did, one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

[18-360] Grievous bodily harm

Last reviewed: May 2023

The extent and nature of injuries inflicted will contribute to the determination of the appropriate penalty for these offences: *R v Whyte* (2002) 55 NSWLR 252 at [214]. Where the injuries are serious, both retribution and general deterrence need to be reflected to a considerable level in the sentence imposed: *R v Dutton* [2005] NSWCCA 248 at [34]. Grievous bodily harm encompasses a very broad range of consequences extending from, at one end of the spectrum, a broken leg, and, at the other, a permanent vegetative state: *Conte v R* [2018] NSWCCA 209 at [5].

Offences relating to the infliction of grievous bodily harm extend to the destruction of the foetus of a pregnant woman: s 4(1) *Crimes Act 1900*. See also the discussion of s 54A at **[18-310]** above.

[18-365] Victim impact statements

Last reviewed: May 2023

See generally **Victims and victim impact statements** at **[12-790]**ff, **Victim impact statements of family victims** at **[12-838]**.

A victim impact statement cannot be taken into account to indicate that the offence of dangerous driving occasioning death caused "substantial" harm to the victim for the purposes of aggravating the offence under s 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999*. The fact the victim suffered "substantial" harm is already an element of the offence. Issues of fact or degree may, however, arise in the case of grievous bodily harm: *R v Tzanis* [2005] NSWCCA 274 at [11]–[13].

There is no statutory or other restriction upon the extent to which a court may set out the contents of victim impact statements providing the limitations of such statements are acknowledged: *SBF v R* [2009] NSWCCA 231 at [88].

[18-370] Application of the De Simoni principle

Last reviewed: May 2023

The statutory hierarchy

Manslaughter sits above a s 52A offence in the hierarchy of offences. This is evidenced by s 52AA(4) which provides that on a trial for an offence of manslaughter a jury can return a verdict of guilty of an offence under s 52A: *SBF v R* [2009] NSWCCA 231 at [108].

The suggestion in *R v Borkowski* [2009] NSWCCA 102 at [56] and *SBF v R* at [97] that the driving offences in *Crimes Act 1900* (including manslaughter) "involve varying degrees of negligence" was not accepted by the High Court in *King v The Queen* (2012) 245 CLR 588 at [38]. The High Court in *King v The Queen* at [38] said in the course of analysing a materially similar dangerous driving causing death offence that it:

> … takes its place in a coherent hierarchy of offences relating to death or serious injury arising out of motor vehicle accidents. It is not necessary to that coherence that the terms of the section be embellished by reading into them a requirement for proof of some species of criminal negligence.

There are differences between dangerous driving causing death and manslaughter by criminal negligence. Dangerous driving is not a species of negligent driving and negligence is not an element of dangerous driving: *King v The Queen* at [44]–[46]. The offence of dangerous driving causing death does not require the Crown to prove an element of negligence: *King v The Queen* at [44]–[46]. As to the concept of negligence having "no role to play" for an offence of dangerous driving, see *King v The Queen* at [45]. The assessment of whether the manner of driving was dangerous depends on whether it gave rise to the degree of risk set out by Barwick CJ in *McBride v The Queen* (1966) 115 CLR 44 at 50, approved in *Jiminez v The Queen* (1992) 173 CLR 572. Therefore, an assessment of a dangerous driving causing death offence should avoid reference to degrees of negligence or an evaluation of the breach of duty of care.

Nonetheless, in the statutory hierarchy of offences, manslaughter should be treated as a most serious offence for the purposes of the principle in *The Queen v De Simoni* (1981) 147 CLR 383: *SBF v R* at [118]. The distinction between the extent of culpability

for an offence of manslaughter and an offence of dangerous driving causing death may be a fine one: *R v Vukic* [2003] NSWCCA 13 at [10]; *Thompson v R* [2007] NSWCCA 299 at [15].

According to *SBF v R* at [128]:

> An assessment of the level of moral culpability and the degree of abandonment of responsibility may in some cases involve language which is close to aspects of manslaughter.

The factual findings by the court in *SBF v R* — that the applicant must have realised the very serious danger in driving in the way he did and that it was "potentially lethal" — did not cross "the line into findings which took into account circumstances of aggravation which would have warranted a conviction for the more serious offence of manslaughter": *SBF v R* at [129].

Facts constituting a more serious offence

It is not an error to take into account other circumstances of aggravation different from the circumstances supporting the charge. The offence of dangerous driving causing death under s 52A(1) has three variations: driving under the influence, driving at a speed dangerous, and driving in a manner dangerous. Each variation carries the same penalty. The *De Simoni* principle can have no application in a case where the so-called matters of aggravation are merely variations of the same offence and do not render the offender to a greater penalty: *R v Douglas* (1998) 29 MVR 316.

The appellant in *R v Vale* [2004] NSWCCA 469 was intoxicated to an extent that was sufficient to establish the more serious offence of aggravated dangerous driving occasioning death (carrying a maximum penalty of 14 years). However, the appellant's charge and plea were based on the lesser offence under s 52A(1)(a) of dangerous driving occasioning death (carrying a maximum penalty of 10 years). Santow JA said at [31]:

> … the sentencing judge explicitly used the language of "the aggravating factors" thus wrongly conflating the more serious offence of "aggravated dangerous driving occasioning death" (s 52A(2)) to the still serious but lesser offence of "dangerous driving occasioning death" (s 52A(1)).

The judge breached the *De Simoni* principle by taking into account the higher level of intoxication as an aggravating factor.

Where an act of dangerous driving causes the death of a pregnant woman, it is an error to have additional regard to the death of her foetus as a matter increasing the seriousness of the offence: *Hughes v R* [2008] NSWCCA 48 at [33]. The death of a foetus constitutes grievous bodily harm: *R v King* (2003) 59 NSWLR 472 at [96].

It is already comprehended in the charge of dangerous driving causing death that the victim has sustained grievous bodily harm: *Hughes v R* at [28].

See further **Fact Finding at Sentence** at **[1-400]**ff.

Conduct of the victim

It is not appropriate to have regard to the conduct of the victim as mitigating the offender's criminal behaviour in putting members of the public, including passengers, at risk: *R v Dutton* [2005] NSWCCA 248.

It is not a mitigating factor that the victim knew the driver was intoxicated and willingly travelled in the vehicle fully aware of the danger. The fact the passenger was also intoxicated and did not try to dissuade the offender from driving cannot go to mitigation: *R v Errington* [1999] NSWCCA 18 at [27]–[28].

In *R v Dutton* at [35], the fact the victim had her arm out the window was not a relevant matter, whether the respondent was aware of it or not. It was noted at [36] that a driver is responsible for the safety of his or her passengers. In *R v Berg* [2004] NSWCCA 300 at [26] the fact the passenger was not wearing a seat belt and so suffered the injuries leading to his death was held to be an aggravating factor in the circumstances of that case rather than a matter of mitigation.

[18-380] Mitigating factors

Last reviewed: May 2023

Youth

Generally, deterrence is given less weight in cases involving young offenders and there is a greater emphasis on rehabilitation. This is often not the case for dangerous driving offences because there is a prevalence of these offences among young drivers and the courts have a duty to seek to deter this behaviour: *R v Smith* (unrep, 27/8/97, NSWCCA).

In some cases general deterrence is a dominant factor on sentence: *SBF v R* [2009] NSWCCA 231 at [152]. The fact young men may perceive themselves as "bullet proof" is a significant reason for general deterrence to be a prominent factor in dangerous driving cases: *SBF v R* at [151]; *Byrne v R* [2021] NSWCCA 185 at [101]–[103]. "Inexperience and immaturity, in persons aged 17 years and over, cannot operate as mitigating factors where the offender commits grave driving offences, with fatal consequences …": *SBF v R* at [151]. Persuasive subjective considerations, such as youth and good character, must not lead to inadequate weight being given to the objective circumstances: *R v Slattery* (unrep, 19/12/96, NSWCCA); *R v Musumeci* (unrep, 30/10/97, NSWCCA); *R v Jurisic* (1998) 45 NSWLR 209 per Spigelman CJ at 228–229. See also **General deterrence** at **[18-340]**.

Section 6(b) *Children (Criminal Proceedings) Act 1987* provides that courts exercising criminal jurisdiction over children consider that "children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance". It is a misconception to see s 6 *Children (Criminal Proceedings) Act 1987* as having some talismanic quality which entitles a young person of 17 years and 11 months (the age in the case) who commits a serious criminal offence to be dealt with as though a child in the colloquial understanding of the description: *R v Williams* (unrep, 17/12/1996, NSWCCA). See discussion of s 6 *Children (Criminal Proceedings) Act 1987* in **Principles relating to the exercise of criminal jurisdiction** at **[15-010]**; **Sentencing principles applicable to children dealt with at law** at **[15-090]**.

However, even where the relevant dangerous driving offences are close to the worst kind, youth remains a relevant factor. In *Conte v R* [2018] NSWCCA 209*,* the 20 year old applicant's offending demonstrated an atrocious abandonment of responsibility — he was disqualified from driving, under the influence of drugs, and seen to be driving in what witnesses described as "the most reckless form of driving imaginable": at

[40]. However, Payne JA and Button J (Schmidt J dissenting) concluded an aggregate sentence of 14 years imprisonment with a non-parole period of 10 years 6 months, did not appropriately reflect the applicant's youth or his deprived upbringing, the fact the offences (against ss 52A(2), 52A(4) and 52AB(1)) arose from one incident, and that the maximum penalty for aggravated dangerous driving causing death is 14 years imprisonment, compared to manslaughter which is 25 years: at [23].

To suggest youth cannot operate as a mitigating factor when the offender commits grave driving offences is not to dispense with the principles that apply to youth, but involves balancing those principles against the greater need and greater significance of general deterrence to deter persons in that class from undertaking such conduct by an understanding of the dire consequences: *Byrne v R* at [103]. In *Byrne v R*, Bell P (Button J agreeing) observed at [3] that the fact both drivers, youths engaging in a street race, were on provisional licences exacerbated the culpability of their offending and made deterrence particularly important. His Honour said at [5]:

> The message must be sent in unequivocal terms that motor vehicles are not playthings or dodgem cars to be raced by young people for fun or thrills and with impunity. They are to be used responsibly and strictly in accordance with the rules of the road … The holding of a driver's licence conferring the right to drive a motor vehicle is a privilege which carries heavy responsibilities.

Good character

The courts must tread warily in showing leniency for good character in these cases to avoid giving the impression that persons of good character may, by their irresponsible actions, take the lives of others and yet receive lenient treatment: *R v MacIntyre* (unrep, 23/11/88, NSWCCA); *R v Musumeci* (see above under **General deterrence** at **[18-340]**).

In *R v Whyte* (2002) 55 NSWLR 252, Spigelman CJ said at [145]:

> Some sentencing judges find it very difficult to accept that a person of good character who is unlikely to re-offend should be sent to gaol. However, Parliament has made it quite clear that the injuries occasioned by driving dangerously and, no doubt, the prevalence of the offence, require condign punishment.

Extra-curial suffering

The offender's relationship with the victim "may be some indication of extra-curial suffering flowing from the occurrence": *R v Howcher* [2004] NSWCCA 179 at [16]. In *R v Koosmen* [2004] NSWCCA 359, Smart AJ at [32]–[33] cautioned:

> *Dhanhoa* [[2000] NSWCCA 257] is authority for the proposition that the effect of the death in the accident on the offender and self punishment (the self inflicted sense of shame and guilt) were often highly relevant factors, that the weight to be given to these depended on the circumstances and that different judges may give different weight to those factors. Where the facts reveal gross moral culpability judges should be wary of attaching too much weight to considerations of self punishment. Genuine remorse and self punishment do not compensate for or balance out gross moral culpability.
>
> In the present case the judge took the self punishment into account, including the major depression and the post traumatic stress disorder. His reasons indicate some real understanding of the applicant's position.

In *Hughes v R* [2008] NSWCCA 48 at [23], Grove J emphasised that "leniency does not derive from the mere fact that the deceased was not a stranger: *R v Howcher*

[2004] NSWCCA 179, but from the consequential quality and depth of the remorse and shock". The despair and depression experienced by the applicant was a significant element of mitigation: *Hughes v R* at [25].

The impact of the crime upon the offender's mental health where the victim has not died may also be a matter in mitigation, on the same basis as if a physical injury had been suffered: *R v Dutton* [2005] NSWCCA 248 at [38]. It was also relevant in *R v Dutton* that the victim was the offender's friend, and the offender had given her assistance and support following the accident. In *Rosenthal v R* [2008] NSWCCA 149 at [20], the injury occasioned to the applicant's wife and the loss suffered by the applicant at the death of his unborn child were taken into account in re-sentencing.

Injuries to the offender

The fact the offender suffered serious injuries in the collision may be taken into account: *R v Turner* (unrep, 12/8/91, NSWCCA); *R v Slattery* (unrep, 19/12/96, NSWCCA); *Rosenthal v R* at [20].

Family hardship

Hardship caused to family/dependents by full-time imprisonment is only taken into account in extreme or highly exceptional cases where the hardship goes beyond the sort of hardship that inevitably results when the breadwinner is imprisoned: *R v Edwards* (unrep, 17/12/96, NSWCCA); *R v Grbin* [2004] NSWCCA 220; *R v X* [2004] NSWCCA 93. The fact that young children will be left without a carer as a result of the imposition of a gaol term is not normally an exceptional circumstance: *R v Byrne* (unrep, 5/8/98, NSWCCA); *R v Sadebath* (1992) 16 MVR 138; *R v Errington* [1999] NSWCCA 18 at [29]–[30].

Payment of damages

The fact the offender has lost their car or suffered significant financial loss because their car was damaged in the collision is not a mitigating factor: *R v Garlick* (unrep, 29/7/94, NSWCCA). However, the court may take into account that the offender has paid or is required to pay a significant amount in damages: *R v Thackray* (unrep, 19/8/98, NSWCCA).

[18-390] Other sentencing considerations

Last reviewed: May 2023

Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A(2)(i) *Crimes (Sentencing Procedure) Act 1999* provides that an aggravating feature that a court may take into account is where "the offence was committed without regard to public safety". Section 21A(2) provides that the court is not to have regard to a factor if it is an element of the offence. In *R v Elyard* [2006] NSWCCA 43 at [10] it was held that the prohibition in s 21A(2) extends to inherent characteristics of an offence. An inherent characteristic of dangerous driving offences is that they are committed without regard for public safety.

Basten JA said at [10]:

> … acting without regard for public safety should not, in [s 52A cases], be given additional effect as an aggravating factor in its own right, unless the circumstances of the case involve some unusually heinous behaviour, or inebriation above the statutory precondition.

Howie J said at [43]:

> … in a particular case the lack of regard for public safety may be so egregious that it transcends that which would be regarded as an inherent characteristic of the offence.

In this case there was no evidence to support that finding of unusually heinous behaviour. The court approved of the approach in *R v McMillan* [2005] NSWCCA 28 at [38] and disapproved the comment in *R v Ancuta* [2005] NSWCCA 275 at [12]. The approach taken in *R v Elyard* has been followed in other decisions: *Hei Hei v R* [2009] NSWCCA 87 at [15]–[21]; *Rose v R* [2010] NSWCCA 166 at [9].

Section 21A(2)(g), that "the injury, emotional harm, loss or damage caused by the offence was substantial", cannot be taken into account as an aggravating factor of an offence causing death. Spigelman CJ said in *R v Tzanis* [2005] NSWCCA 274 at [11] that: "[i]n the case of death there can be no issue of fact and degree. The injury was necessarily 'substantial'". The seriousness of the injuries to the victim of the grievous bodily harm remains relevant to the objective seriousness of the offence: *R v Tzanis* at [12]–[13].

[18-400] Totality

Last reviewed: May 2023

It is legitimate in sentencing for dangerous driving to have regard to the consequences of that driving. In terms of seriousness, the greater the number of deaths, the greater the number of persons injured, the graver the crime becomes.

In *R v Janceski* [2005] NSWCCA 288, the sentencing judge erred in imposing concurrent sentences for two dangerous driving occasioning death offences and taking the approach of sentencing for a single action aggravated by multiple victims. Hunt AJA said at [23]:

> … separate sentences should usually be fixed which are made partly concurrent and partly cumulative, each such sentence being appropriate to the existence of only one victim and the aggregate of the sentences reflecting the fact that there are multiple victims resulting from the same action by the offender.

The principle was applied in *Kerr v R* [2016] NSWCCA 218 at [109] where there were seven victims. In *Richards v R* [2006] NSWCCA 262 at [78], the sentencing judge's failure to accumulate sentences for one dangerous driving occasioning death offence and three dangerous driving occasioning grievous bodily harm offences "appears to have been a failure to acknowledge the harm done to the individual victims".

See the discussion of dangerous driving cases in **Structuring sentences of imprisonment and the principle of totality** at **[8-230]**.

Worst cases

See generally the discussion with regard to worst cases and the abolition of the word "category" at **[10-005] Cases that attract the maximum**.

A determination of whether or not offences fall into the worst class of case is not dependent precisely on whether all of the matters referred to in s 52A(7) are present, but is to be determined on a consideration of all objective and subjective features: *R v Black*

(unrep, 23/7/98, NSWCCA), per Ireland J. For examples of the most serious cases (causing grievous bodily harm), see *R v Austin* [1999] NSWCCA 101 and *R v Scott* [1999] NSWCCA 233. Examples of serious cases of offences of aggravated dangerous driving causing death include *R v Wright* [2013] NSWCCA 82 where the offence was described, at [86], as "close to the worst type of offence of its kind" and *Conte v R* [2018] NSWCCA 209 where the offending was said, at [7], to demonstrate an atrocious abandonment of responsibility and was towards the upper end of the scale.

[18-410] Licence disqualification

Last reviewed: May 2023

In all cases of dangerous driving and failing to stop and provide assistance (a "major offence" as defined in s 4 *Road Transport Act 2013*), licence disqualification is mandatory and additional to any penalty imposed for the offence: s 205 *Road Transport Act 2013*. In determining a disqualification period for these offences (pursuant to s 205(2) or (3)), the court must consider whether or not to vary the automatic disqualification period: *Pearce v R* [2022] NSWCCA 68 at [56]–[57].

Where an offender's licence has been suspended for an offence, s 206B requires a court to take into account the period of suspension when deciding the period of disqualification. Section 206B is only engaged when a court orders a period of disqualification, not where an automatic period takes effect: *Pearce v R* at [55]. Where an order is made varying a licence disqualification period, s 206B(4) requires the period of suspension to be counted towards any disqualification period: *Pearce v R* at [55].

Where an offender is sentenced to imprisonment for a major disqualification offence (defined in s 206A(1)), the specified licence disqualification period is extended "by any period of imprisonment under that sentence" so that it is served after the person is released: s 206A(2)–(4) *Road Transport Act 2013*. A "period of imprisonment" does not include any period that the person has been released on parole: s 206A(4). If a "major disqualification offence" is one of a number of offences dealt with by imposing an aggregate sentence, the sentence for the purpose of determining the period by which the disqualification is extended is the aggregate sentence: *Gray v R* [2018] NSWCCA 39 at [43]–[44]. The extension of the disqualification period is subject to any order of a court sentencing an offender: s 206A(5); *Hoskins v R* [2020] NSWCCA 18 at [23].

[18-415] Failure to stop and assist

Last reviewed: August 2023

Offences of failing to stop and assist another person after causing an accident resulting in their death or occasioning grievous bodily harm are serious offences, with maximum penalties of 10 years, when death is occasioned, 7 years, for grievous bodily harm: *Crimes Act 1900*, s 52AB(1). Section 52A(5) and (6), which prescribe the circumstances in which a vehicle is taken to be involved in an impact, apply to this section in the same way as they apply for the purposes of s 52A: s 52AB(3).

These offences are directed to a driver's obligation to assist police and the injured person including where assistance could have been of material benefit to "save a life, minimise injury, improve the prospect of recovery, alleviate suffering and preserve… dignity": Second Reading Speech quoted in *Geagea v R* [2020] NSWCCA 350 at [44].

In *Hoskins v R* [2020] NSWCCA 18 the offender struck a woman crossing the street then fled, aware she was likely dead. He was sentenced for failure to stop and assist and two summary traffic offences. The Court (Basten JA; RA Hulme and N Adams JJ agreeing) found that the maximum penalties for failure to stop offences, being the same as for dangerous driving offences, made the sentencing exercise "more than usually difficult" and that "too heavy a focus on [the maximum penalty]… is apt to lead to anomalous results": at [14]–[15]. The Court held the sentencing judge erred by imposing a sentence "within the range for an offence of causing death by dangerous driving, which is inappropriate for the lesser offence of failing to stop": at [16].

In *Geagea v R* the offender struck a man standing on a suburban street with his van and then fled. Despite being promptly assisted by local residents the victim died at the scene. The applicant was sentenced for dangerous driving occasioning death and failing to stop to render assistance. The court concluded the sentencing judge erred by assessing the failure to stop and assist offence at a higher level of objective seriousness than was warranted and gave excessive weight to the maximum penalty: at [43]. The court said at [40]:

> Where an offender is to be sentenced both for causing death by dangerous driving and for failing to stop at the scene, care is required not to give undue weight to the fact that Parliament has prescribed the same maximum penalty for each offence. Each sentence must of course take into account the prescribed maximum but at the same time the comparative length of the two sentences must be capable of being reconciled, rationally and coherently, with the very different criminality involved in each... In relation to failing to stop, the result of the offending will be highly variable. If the victim could have been saved by assistance being promptly rendered, or if his or her suffering could have been relieved, then the result of the offence may be very grave. Otherwise, as in the present case, the result may be limited to impeding a police investigation, which is obviously a much less serious matter than a death.

[18-420] Dangerous navigation

Last reviewed: May 2023

The dangerous navigation offences under s 52B(1)–(4) mirror the categories of offences and penalties for dangerous driving under s 52A(1)–(4). Further offences are created when the dangerous navigation offence causes the loss of a foetus of a pregnant woman: see ss 54A and 54B and the commentary at [18-310] above.

While "navigate" or "navigation" are not defined in the *Crimes Act 1900*, for the purpose of assessing culpability it is clear that s 52B is directed at persons driving, steering or helming vessels and there is no reason to confine the term to the person with overall responsibility for management of the vessel rather than the person physically controlling the vessel: *Small v R* [2013] NSWCCA 165 at [43].

[18-430] Application of the guideline to dangerous navigation

Last reviewed: August 2023

The guideline for dangerous driving occasioning death in *R v Whyte* (2002) 55 NSWLR 252 affords guidance in dangerous navigation cases: *Buckley v R* [2012] NSWCCA 85 at [41]. However, although it may be an appropriate "check" for sentencing in such

cases, the analogy between the offences is not perfect: *R v Eaton* [2023] NSWCCA 125 at [71] For example, dangerous driving offences are far more prevalent than s 52B offences which is relevant to the significance of general deterrence: *R v Eaton* at [71].

In *Buckley v R*, the sentencing judge had appropriate regard to relevant factors when assessing the circumstances of the dangerous navigation which resulted in the death of two people. These factors included a consideration of the defendant's level of experience, his degree of intoxication, whether persons on the vessel were wearing life jackets and could swim, together with the offender's efforts immediately after the incident to assist or obtain assistance: at [43]–[48].

In *R v Eaton*, the heavily intoxicated offender capsized a single-person kayak, drowning a four-year-old child on board. The type of vessel involved meant many aggravating features identified in *R v Whyte* were not relevant such as the number of people put at risk and the degree of speed: at [71]. The court also observed the guideline is not designed to place a straight-jacket on sentencing judges because, in this case, the offender's subjective circumstances resulted in a substantial reduction in her "moral culpability", whereas the guideline "focussed attention on the objective circumstances of the offence": [72]–[73].

[The next page is 9301]

Detain for advantage/kidnapping

[18-700] Section 86 Crimes Act 1900

The offence of kidnapping is governed by s 86 *Crimes Act 1900*. Section 86(1)–(3) creates a basic, aggravated and specially aggravated form of the offence:

> **86 Kidnapping**
>
> (1) **Basic offence**
>
> A person who takes or detains a person, without the person's consent:
>
> (a) with the intention of holding the person to ransom, or
>
> (a1) with the intention of committing a serious indictable offence, or
>
> (b) with the intention of obtaining any other advantage,
>
> is liable to imprisonment for 14 years.
>
> (2) **Aggravated offence**
>
> A person is guilty of an offence under this subsection if:
>
> (a) the person commits an offence under subsection (1) in the company of another person or persons, or
>
> (b) the person commits an offence under subsection (1) and at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.
>
> A person convicted of an offence under this subsection is liable to imprisonment for 20 years.
>
> (3) **Specially aggravated offence**
>
> A person is guilty of an offence under this subsection if the person commits an offence under subsection (1):
>
> (a) in the company of another person or persons, and
>
> (b) at the time of, or immediately before or after, the commission of the offence, actual bodily harm is occasioned to the alleged victim.
>
> A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

Section 86 extends beyond the traditional notion of kidnapping (holding a person for ransom). The gravamen of the offence is directed to interference with a person's liberty (*Davis v R* [2006] NSWCCA 392 at [56]) or the unlawful detaining of a person (*R v Newell* [2004] NSWCCA 183 at [32]; *R v Falls* [2004] NSWCCA 335 at [42]; *R v Burton* [2008] NSWCCA 128 at [95]; *Jeffries v R* (2008) 185 A Crim R 500 at [79]).

The concept of "any other advantage" under s 86(1)(c) includes psychological gratification or satisfaction: *R v Rose* [2003] NSWCCA 411; *R v Speechley* (2012) 221 A Crim R 175 at [50]–[51].

The basic form of the offence "has been marked out by the legislature as a serious offence, a maximum penalty of fourteen years imprisonment being provided. When such an offence is committed the punishment must be sufficient to punish and deter the offender from repeating the offence": *Chaplin v R* (2006) 160 A Crim R 85, McClellan CJ at CL at [31] (a case dealing with an attempt to commit the basic offence).

[18-705] Attempts to commit the offence

The fact an offender is charged with attempt does not mean the offence is necessarily less serious: *R v Newell* [2004] NSWCCA 183 at [33]. Although the seriousness of an offence may be reduced by the fact the person was not in fact detained, an attempt can nevertheless involve a serious threat which may cause the victim to be terrified: *Newell* at [33]. The seriousness of the offence is not reduced where the offender has not determined what specific advantage he/she wishes to gain from the victim's captivity: at [33]. A court need not make findings about the issue. For example, in *R v Newell*, the judge was not required to determine what the offender might have done to obtain his sexual gratification had he succeeded in detaining the child: at [33]. But where the offender has not decided at the time the victim escapes this is not to be regarded as a matter in mitigation: at [33].

[18-715] Factors relevant to the seriousness of an offence

The terms of s 86, and the cases which have applied it, inform the assessment of factors bearing upon the objective gravity of a given offence: *R v Speechley* (2012) A Crim R 175 at [105]; *Jeffries v R* [2008] NSWCCA 144 at [79]. Many factors are relevant to the assessment of the seriousness of the crime: *R v Falls* [2004] NSWCCA 335 at [42]; *Jeffries v R* at [81].

The court in *R v Newell* [2004] NSWCCA 183 at [32] identified factors relevant to the seriousness of a given offence under s 86 which include:

- the period of the detention
- the circumstances of the detention
- the person being detained, and
- the purpose of the detention.

The last factor, the nature of the advantage that the offender seeks to obtain, is not conclusive as to the seriousness of the offence: *R v Newell* at [32]; *R v Speechley* at [55]. A detention with no rational purpose is not necessarily less serious: *Diaz v R* [2018] NSWCCA 33 at [44]. Nor is the offence less serious if the relevant "advantage" is to secure the offender's self-protection: *R v Hamid* (2006) 164 A Crim R 179 at [131].

An offence which does *not* involve ransom (as referred to in s 86(1)(a)) may still be so grave as to warrant the imposition of the maximum penalty. See *R v Newell* at [32] applied in *Jeffries v R*, above, at [80]. These worst cases need not involve holding the person to ransom.

Circumstances which increase the seriousness of the offence are not confined to the period of detention or the actual use of violence. Rather, a threat of violence and the presence of a weapon are factors of aggravation even though actual injury may not be occasioned to the victim: *R v Kerr* [2008] NSWCCA 201 at [51]. In *Kerr* a very real threat of violence to the victim existed during the whole of her detention for around 36 hours. The offender's threats included sexual assault by his friends, detention in a cellar, and that the victim would be kept as a hostage for a month: at [49]. In *R v Burton* [2008] NSWCCA 128 the offence was aggravated as it extended over some hours, involved threats of violence with a weapon (including a knife and a hair comb with a metal end), and was committed in the context of the offender's violent and controlling

domestic relationship with the victim: at [95]. In *Hurst v R* [2017] NSWCCA 114, the fact the offender's motivation for the detention was that he derived pleasure from inflicting pain, humiliation and fear on the victim, causing her to genuinely fear for her life, and that the offence was committed against a background of domestic violence, resulted in the detention being categorised as very serious: *Hurst v R* at [112]–[113].

The relative brevity of the detention is of limited assistance in determining objective gravity where the victim escaped and fled his or her captor(s) rather than being released: *R v Speechley* at [106]. Although the duration of a detention may not objectively be long, the victim's perspective, his or her position relative to the offender and the purpose of the detention must be taken into account: *Hurst v R* at [114]. In *Bott v R* [2012] NSWCCA 191 at [48] the court noted the sentencing judge "correctly rhetorically asked" how long the victim might have been detained if he had not escaped by activating a car alarm. However, in *Allen v R* [2010] NSWCCA 47 at [22], the court considered it would be speculative to infer, against the applicant's interests, that he would have prolonged the detention.

The statutory scheme recognises that a kidnapping offence committed in company is more serious because of the force of numbers deployed against the victim: *R v Speechley* at [60].

An absence of injury to the victim for the basic offence does not reduce the objective gravity of an offence under s 86(2)(a). If actual bodily harm is occasioned to the victim a more serious form of the charge under s 86(2) or 86(3) would apply: *R v Speechley* at [107]. It would be wrong to have regard to the absence of an ingredient which, if it were present, would constitute a different and more serious offence under s 86(3): *R v Speechley* at [108].

A court can take into account "anguish", violence and harm inflicted, including "severe discomfiture simply by reason of the manner in which [the victim is] tied up": *R v Flentjar* [2008] NSWSC 771 at [38].

Detaining for advantage in a domestic context

See also **Domestic violence offences** at **[63-500]**ff.

"The circumstance that the offence occurred in a domestic context, as distinct from the detention of a stranger, does not lessen its gravity": *Heine v R* [2008] NSWCCA 61 at [40]; *Raczkowski v R* [2008] NSWCCA 152 at [46]; *Hussain v R* [2010] NSWCCA 184 at [68]. In *R v Hamid* at [131], Johnson J said assessing the objective seriousness of the offence in that case involved examining the immediate acts of the offender in the context of his violent control of the victim (who was his partner); see also *R v Burton* at [95].

It is an error not to have express regard to the need for general and specific deterrence and denunciation of domestic violence offences: *R v Burton* at [95], following *R v Hamid* at [86] and *Hiron v R* [2007] NSWCCA 336 at [32].

Delay in complaint, which is a distinctive feature of domestic violence, should not be held against the victim of a detain for advantage offence because it is a direct product of the offending itself: *Hurst v R* at [132]. See generally **[10-530] Delay**.

In *Jeffries v R*, a significant aggravating factor was that the s 86 offence was committed in breach of an apprehended domestic violence order (at [91]), and that

the offender's "recidivist conduct demonstrated a propensity to act violently towards his partners": at [92]. Such recidivism increases the weight to be given to retribution, personal deterrence and protection of the community: at [93]; *R v McNaughton* (2006) 66 NSWLR 566 at [26].

The court in *Burton* noted that, given victims of domestic violence often — and contrary to their interests — forgive their attackers (at [104]), a court should cautiously approach a victim's expressions of forgiveness and requests for a lenient sentence: at [102], [105].

In *Boney v R* [2008] NSWCCA 165 at [112], the court held that the judge imposed "unjustifiably high" sentences for three detain for advantage offences committed in a domestic violence context. The court held that although the detentions were "far from short" they were "far less" than the circumstances envisaged by s 86. Hulme J added at [112]:

> … it is to be borne in mind that …[the] provision covers also detention for the purposes of ransom, detention that might well extend for much longer than occurred in this case and in circumstances where a victim might be blindfolded, in an unknown location and completely out of contact with anyone not an offender.

When committed against a person with whom the offender has a domestic relationship, an offence under s 86 is a "domestic violence offence" for the purposes of recording such offences as part of an offender's prior record under the *Crimes (Domestic and Personal Violence) Act 2007*: ss 11–12.

Motivation and vigilante action

Offences under s 86 are regularly motivated by a desire to retaliate for conduct allegedly committed in the past by the victim upon the offender or a third party. It is necessary for courts to condemn such "vigilante action" and to reflect general deterrence in the sentence: *R v Speechley* (2012) A Crim R 175 at [110], [122]. However, motive may be relevant to explain why the offence was committed and to indicate a lack of need for personal deterrence where the act of retaliation is unlikely to be repeated: *Barlow v R* [2008] NSWCCA 96 at [67]–[68] and *Rayment v R* (2010) 200 A Crim R 48 at [108], both citing principles from *R v Swan* [2006] NSWCCA 47 at [33] and *R v Mitchell* (2007) 177 A Crim R 94 at [30]–[32] which are not kidnapping cases. As punishment and humiliation are necessary elements of an offence of specially aggravated kidnapping under s 86(3), it is an error to take quasi-vigilantism into account as an additional aggravating factor: *Sorensen v R* [2016] NSWCCA 54 at [128]–[129]; *Hall v R* [2017] NSWCCA 260 at [33]–[35].

Sentences other than full-time imprisonment generally not appropriate

Non-custodial sentences will generally not be appropriate for an offence under s 86, particularly for the aggravated form of the offence: *R v Anforth* [2003] NSWCCA 222 at [48]; *R v Speechley* (2012) A Crim R 175 at [116]. In *Anforth*, the court held that suspended sentences were a manifestly inadequate punishment for two counts of aggravated kidnapping and failed "to demonstrate the community's abhorrence of offences of [such a] violent and sadistic nature": at [48]. Suspending a sentence of imprisonment may deprive the punishment of much of its effectiveness and fail to reflect the objective gravity of the offence: *R v Speechley* at [124]. Similarly, for an offence of aggravated kidnapping under s 86(2), where actual bodily harm

and psychological trauma is inflicted, an intensive correction order (ICO) is not an appropriate form of punishment as it fails to sufficiently address the issue of general deterrence: *R v Ball* [2013] NSWCCA 126 at [117].

Reliance on statistics

Offences under s 86 are very fact specific and not sufficiently homogenous so as to make reference to statistics of much assistance: *R v Newell* [2004] NSWCCA 183 at [43]; *Jeffries v R* [2008] NSWCCA 144 at [82], [85]; *Homsi v R* [2011] NSWCCA 164 at [116], [124]; *Hurst v R* at [120]; *Diaz v R* at [49]–[51]. Similarly, in *Heine v R* [2008] NSWCCA 61, it was observed that "the offence is one that is committed in a wide range of circumstances, which makes the statistics of less assistance than is the case with some [other] offences": at [34]. In *Jeffries* the court noted that, while the sentence imposed was comparatively lengthy "in mathematical terms", courts should not sentence offenders by reference to the statistical median range of sentences handed down over a period of time: at [86]; *R v AEM* [2002] NSWCCA 58 at [116].

[18-720] Elements of offence and s 21A factors not to be double counted

Where an offender is to be sentenced for an aggravated offence (s 86(2)) or a specially aggravated offence (s 86(3)), the aggravating elements of the offence — the infliction of actual bodily harm and/or being in company — are not to be further considered as aggravating features under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (s 21A(2)): *R v Davis* [2004] NSWCCA 310 at [19]; *R v VL* [2005] NSWCCA 301 at [30]. On the other hand, actual or threatened violence is not an element of the offence under s 86 and therefore may be taken into account as an aggravating factor: *R v VL*, above, at [32]–[34].

[18-730] Joint criminal enterprise and role

Last reviewed: August 2023

Where the basis of an offender's liability for kidnapping is joint criminal enterprise and the participants assault the victim, the criminality of the person who did not strike the majority of the blows should not necessarily be assessed as significantly less: *R v Turner* [2004] NSWCCA 340 at [24]–[26]; see also *Rahman v R* [2023] NSWCCA 148 at [77]–[80].

However, the lesser role of an offender when compared with co-offenders may warrant a degree of amelioration of the sentence: *Bajouri v R* [2009] NSWCCA 125 at [47], [50]; cf *Charlesworth v R* (2009) 193 A Crim R 300 at [80]. In *Bajouri*, although the offender actively participated in detaining the victim (at [9]), he was not involved "until the last minute and had no part in the planning or preparation". This reduced the seriousness of the offence.

See also **Co-offenders with joint criminal liability** at **[10-807]**.

[The next page is 9481]

Drug Misuse and Trafficking Act 1985 (NSW) offences

[19-800] Introduction

The *Drug Misuse and Trafficking Act 1985* prohibits the cultivation, manufacture, supply, possession and use of certain drugs. The Court of Criminal Appeal has said many times that the need for general deterrence is high in cases involving dealing in and supplying prohibited drugs: *R v Ha* [2004] NSWCCA 386 at [20]. The court has also said "[t]he social consequences of the criminal trade in prohibited drugs are very substantial indeed, including corruption, the undermining of legitimate businesses and a serious level of violence …": *R v Colin* [2000] NSWCCA 236 at [15], quoted with approval in *R v Sciberras* (2006) 165 A Crim R 532 at [48].

The most common offences dealt with on indictment are under s 23, the cultivation of prohibited plants; s 24, the manufacture of prohibited drugs; and s 25, supply. Section 25A creates the offence of supplying prohibited drugs on an ongoing basis.

Unless otherwise specified, references to sections below are references to sections of the *Drug Misuse and Trafficking Act*.

[19-810] Offences with respect to prohibited plants

The cultivation, supply or possession of prohibited plants is an offence under s 23(1) which carries a penalty (on indictment) of 10 years imprisonment and/or 2,000 penalty units where the offence involves less than a commercial quantity and relates to cannabis plant/leaf. In other cases not relating to cannabis plant/leaf, the penalty is 15 years and/or 2,000 penalty units: s 32(1).

The cultivation, supply or possession of not less than the commercial quantity is an offence under s 23(2) which carries a penalty of 15 years imprisonment and/or 3,500 penalty units where the offence relates to cannabis plant/leaf. In other cases, the penalty is 20 years and/or 3500 penalty units: s 33(2). Where not less than a "large commercial quantity" is involved the penalty is 20 years imprisonment and/or 5,000 penalty units where the offence relates to cannabis plant/leaf. In other cases, the penalty is life imprisonment and/or 5,000 penalty units: s 33(3).

Offences under s 23(2) that involve not less than a large commercial quantity, and committed on or after the commencement of the *Crimes (Sentencing Procedure) Amendment Act 2007* (1 January 2008) have a standard non-parole period of 10 years: Pt 4 Div 1A *Crimes (Sentencing Procedure) Act 1999*.

Cultivation by "enhanced indoor means"

Section 23(1A), which was inserted into the *Drug Misuse and Trafficking Act* by the *Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Act 2006*, effective 14 July 2006, prohibits the cultivation of prohibited plants by enhanced indoor means. According to the Second Reading Speech, the amendment is "directed towards organised commercial production using residential premises". Section 23A creates an additional offence where children under the age of 16 are exposed to that cultivation

process, with higher maximum penalties outlined in s 33AD. The commercial and large commercial quantities set for indoor cannabis production are lower than those for outdoor cultivation to reflect the higher yields produced by this method. For indoor production, the commercial quantity is between 50 and 199 plants, and the large commercial quantity is 200 or more plants.

Marijuana not to be regarded as a "recreational drug"

Any assumption in former years that marijuana was a "recreational drug", with lower addictive qualities and fewer potential health dangers has been called into serious question: *R v Nguyen* [2006] NSWCCA 389. McClellan CJ at CL said at [54]:

> It is now recognised that marijuana can have very serious consequences for users with destructive potential for the lives of young persons. The legislature has recognised this damaging potential by providing a maximum penalty of twenty years for the present offence [under s 25(2)(a)].

Cultivation for profit

The cultivation of cannabis for profit will usually attract a term of imprisonment, unless there are exceptional circumstances: *R v Godden* [2005] NSWCCA 160 at [28]; *R v Puke* (unrep, 12/9/97, NSWCCA).

The profit sought to be made is highly relevant to the assessment of an offender's criminality in a case of cultivation. While an offender might intend to sell the plants when they matured, rather than at the time of his arrest, the criminal activity was being conducted with a view to making a profit: *Nguyen v R* [2007] NSWCCA 94 at [19]–[21]; *Gattellari v R* [2007] NSWCCA 5 at [7].

Stage of cultivation

An offender arrested at an early, rather than a late stage of cultivation is not entitled to any particular mitigation as a result: *R v Barbara* (unrep, 24/2/97, NSWCCA); *R v Field* (unrep, 2/5/96, NSWCCA). In *Nguyen v R* [2007] NSWCCA 94 the size of the plants ranged from 15 to 40 cm. The court inferred that the applicant intended "to cultivate the plants to as profitable a stage as possible": *Nguyen v R* at [21].

Growing plants for personal use

A finding of fact at sentence that the cultivation was for personal use rather than for profit generally reduces the objective seriousness of the offence: *R v Seman* (unrep, 12/5/92, NSWCCA). A proposition that the cultivation was for a commercial or other purpose must be proven beyond reasonable doubt by the Crown. In *R v Seman*, the Crown failed to negative the applicant's claim that 137 plants (less than a commercial quantity) were for personal use. Wood J, as he then was, concluded that a custodial sentence nevertheless remained appropriate.

A finding that cultivation was for personal use is not itself an answer to the offence: *R v Emerton* (unrep, 26/6/96, NSWCCA). The court found in *R v Seman* that:

> In the existing state of the law it was not an answer that the applicant was growing the plants purely for his own use; nor were the objective circumstances mitigated by the fact that the applicant had become unwilling to pay the market price for the drug which it was his custom to use. Those who elect to dabble in drugs whether as growers, users or otherwise must expect punishment which contains a deterrent element.

In *R v Emerton* the applicant successfully argued that 321 plants, amounting to a commercial quantity, were grown for his personal use. Priestley JA noted the unusual subjective circumstances in the case, and cautioned:

> Of course, in most cases, the cultivation of a quantity no less than a commercial quantity of cannabis is very likely to lead, correctly, to the inference that the grower or the cultivator was intending to make commercial use of the product of the growing.

Where it is accepted that cultivation is for personal use, the quantity of plants cultivated is significant. In *R v Dopson* (2003) 141 A Crim R 302 at [30], the offender cultivated more than double the commercial quantity of cannabis plants. This invited the consideration that even if it was not the offender's intention to disseminate the drugs into the community, there was a risk that such dissemination would occur.

Horticultural skills

The horticultural skills provided by an offender are also relevant to assessing objective seriousness: *R v Mangano* [2006] NSWCCA 35. In that case, the respondent helped to clear the crop site, provided advice on preparation of the soil and assisted with cloning "mother" plants. His primary role was to supply food and materials to other workers. Basten JA (Howie and Hall JJ agreeing) said at [26]:

> [T]he Respondent was more than a farm labourer and played a significant horticultural role, not only in the plantation the subject of the primary charge, but also in helping to establish the [other] plantations.

Use of statistics and prior decisions

Sentencing statistics are of limited usefulness in cultivation cases, as there is no distinction drawn between those minor cases where a few plants are grown for private use and those cases where there is cultivation for profit: *R v Edwards* [1999] NSWCCA 411. The court in *R v Godden* [2005] NSWCCA 160 at [22] said that prior decisions of the Court of Criminal Appeal provide some guidance in appeal cases in determining "whether or not … there was a legitimate exercise of sentencing discretion".

R v Godden has since taken on some significance. Hall J at [22] reviewed the sentencing statistics applicable to the offence and a number of prior authorities. The court reduced Godden's sentence to two years and two months with a non-parole period of 15 months. The crime involved cultivating 319 plants (varying between seedlings and some 1.5 metres high) and was described as a highly professional hydroponic cultivation. The pattern of sentencing identified in *R v Godden* was at least part of the reason the court formed the view that the sentence imposed in *Quan v R* [2006] NSWCCA 382 was manifestly excessive: see [6]–[8]. In *Nguyen v R* [2007] NSWCCA 94, *R v Godden* was relied upon by the applicant for the same purpose. The court distinguished *R v Godden*, with Hulme J querying its overall correctness at [24]–[25]:

> to punish deliberate criminality yielding a crop with a street value of over half a million dollars with a penalty of only that imposed on the Applicant [30 months] is not calculated to inspire confidence in the sentencing process and makes unsurprising the fact that sentences to date do not seem to have operated as a major deterrent to the cultivation of marijuana.
>
> If the effect of *R v Godden* is to deny the logic and consequences of the above approach then, with respect to the experienced judges who decided it, one would have to query

> its correctness and, possibly, that of the decisions on which it was based. The same observation may be made in respect of the decision of *Quan v R* [2006] NSWCCA 382 to which the Court was also referred.

McClellan CJ at CL (Hislop J agreeing) said at [1]: "[i]n my opinion the analysis which Hulme J undertakes in this matter is not relevantly inconsistent with the approach of this Court in *R v Godden* [2005] NSWCCA 160 or *Quan v R* [2006] NSWCCA 382".

[19-820] Manufacture

Section 24 — Manufacture and production of prohibited drugs

It is an offence under s 24(1) to manufacture, produce, or knowingly to take part in the manufacture or production of a prohibited drug which carries a penalty (on indictment) of 15 years and/or 2,000 penalty units where the offence involves less than a commercial quantity: s 32(1).

To manufacture, produce, or knowingly to take part in the manufacture or production of not less than the commercial quantity of a prohibited drug is an offence under s 24(2) which carries a penalty of 20 years and/or 3,500 penalty units: s 33(2). Where not less than a "large commercial quantity" is involved the penalty is life imprisonment and/or 5,000 penalty units: s 33(3).

An offence under s 24(2) has a standard non-parole period of 10 years for less than the large commercial quantity of a prohibited drug (not cannabis leaf) and 15 years for not less than the large commercial quantity of a prohibited drug (not cannabis leaf): Pt 4 Div 1A *Crimes (Sentencing Procedure) Act 1999*.

Section 24(1A) and (2A) create offences, with greater maximum penalties outlined in s 33AC, of exposing a child to the manufacture or production of prohibited drugs.

The manufacture of drugs is a serious offence, involving a high degree of criminality which calls for condign punishment: *R v Reardon* (1996) 89 A Crim R 180 at 194. In *Walsh v R* (2006) 168 A Crim R 237, Grove J said at [63]:

> Whilst it is frequently the case that crimes of drug trafficking involve numbers, even sometimes large numbers, of participants in various phases, it is obvious that the chemist who brings a drug into existence is culpable to a high degree…

Section 24A — Possession of precursors for manufacture or production of prohibited drugs

It is an offence under s 24A to possess precursors intended for use in the manufacture or production of prohibited drugs. The penalty for this offence is 10 years imprisonment and/or a fine of 2000 penalty units: s 33AB(1). In *R v Cousins* (2002) 132 A Crim R 444 at [34], Giles JA noted that "[i]n making specific provision for the offence in question the legislature showed by the maximum sentence that a serious view is to be take of the commission of the offence". There is no graded scale of quantities required for the specification of this charge, but quantity remains relevant to the offence, in that the element of intended use brings, "particular regard to what would come from the intended use ": at [35].

[19-830] Supply

Section 25 — Supply of prohibited drugs

Supplying or knowingly taking part in the supply of prohibited drugs is an offence under s 25(1) which carries a penalty of 10 years imprisonment and/or 2000 penalty units where the offence involves less than a commercial quantity and relates to cannabis plant/leaf. In other cases not relating to cannabis plant/leaf, the penalty is 15 years and/or 2000 penalty units: s 32(1).

Supplying or knowingly taking part in the supply of not less than a commercial quantity is an offence under s 25(2) which carries a penalty of 15 years imprisonment and/or 3,500 penalty units where the offence relates to cannabis plant/leaf. In other cases, the penalty is 20 years and/or 3,500 penalty units: s 33(2). Where not less than a "large commercial quantity" is involved the penalty is 20 years imprisonment and/or 5,000 penalty units where the offence relates to cannabis plant/leaf. In other cases, the penalty is life imprisonment and/or 5,000 penalty units: s 33(3).

The threshold for the large commercial quantity of methylamphetamine was halved (from 1 kilogram to 500 grams) by the *Drug Misuse and Trafficking Amendment (Methylamphetamine) Regulation 2015* which commenced on 1 September 2015. The amendment reflects Parliament's intention that sentences imposed on persons supplying methylamphetamine between 500g and 1kg should be increased: *Chong v R* [2017] NSWCCA 185 per Basten JA at [18], [31], Schmidt J at [106]. However, caution must be applied to the use of cases decided before *Muldrock v The Queen* (2011) 244 CLR 120 and prior to the threshold amendment. When such comparisons are sought to be drawn, the wide range of gravity, objective circumstances and differences in the subjective circumstances of the respective offending must also be borne in mind: *Chong v R* per Schmidt J at [107]; *Toole v R* (2014) 247 A Crim R 272 at [78].

An offence under s 25(2) has a standard non-parole period of 10 years for less than the large commercial quantity of a prohibited drug (not cannabis leaf) and 15 years for not less than the large commercial quantity of a prohibited drug (not cannabis leaf): Pt 4 Div 1A *Crimes (Sentencing Procedure) Act 1999*.

It is a specific offence under s 25(1A) and (2A) for a person of or above the age of 18 to supply, or knowingly take part in the supply of, a prohibited drug to a person under the age of 16. The penalties for these offences are the penalties that would otherwise be imposed but increased by one-fifth, or as otherwise outlined in s 33AA.

Defining "supply" and "deemed supply"

Section 3 *Drug Misuse and Trafficking Act* defines "supply":

> "supply" includes sell and distribute, and also includes agreeing to supply, or offering to supply, or keeping or having in possession for supply, or sending, forwarding, delivering or receiving for supply, or authorising, directing, causing, suffering, permitting or attempting any of those acts or things.

Section 29 sets out when possession will be deemed to be for supply as follows:

> A person who has in his or her possession an amount of a prohibited drug which is not less than the traffickable quantity of the prohibited drug shall, for the purposes of this Division, be deemed to have the prohibited drug in his or her possession for supply, unless:
>
> (a) the person proves that he or she had the prohibited drug in his or her possession otherwise than for supply, or
>
> (b) except where the prohibited drug is prepared opium, cannabis leaf, cannabis oil, cannabis resin, heroin or 6-monoacetylmorphine or any other acetylated derivatives of morphine, the person proves that he or she obtained possession of the prohibited drug on and in accordance with the prescription of a medical practitioner, nurse practitioner, midwife practitioner, dentist or veterinary surgeon.

Where it is accepted that an offender has drugs in his possession for personal use only, a conviction for "deemed supply" is a miscarriage of justice within the terms of s 6(1) *Criminal Appeal Act 1912*: *R v Masri* [2005] NSWCCA 330.

Attempting to supply

In *R v Nassif* [2005] NSWCCA 38 at [30] the court stated:

> an attempt to receive drugs for supply is not necessarily to be categorised as less objectively serious than an offence of supply constituted, for example, by an agreement to supply the same quantity of drugs.

Rather, this assessment will depend on the facts of the case: at [30].

A mere temporary transfer of the physical control of the drugs from the owner, with intent to return it to the owner, does not fall within the statutory definition of deemed supply: *R v Carey* (1990) 50 A Crim R 163; cf *R v Blair* (2005) 152 A Crim R 462.

Offering or agreeing to supply

The definition of "supply" in the *Drug Misuse and Trafficking Act* includes offering or agreeing to supply. The objective seriousness of any activity falling within "supply" must depend on the particular evidence in the case, in the absence of a general "hierarchy of seriousness attaching to one or other of the activities that may constitute a 'supply'": *Vu v R* [2006] NSWCCA 188 at [87]–[89], citing with approval *R v Nassif* [2005] NSWCCA 38 at [30]; *McKibben v R* [2007] NSWCCA 89 at [16]. There is no reason in principle why a genuine agreement to supply drugs should be regarded as any less serious than a proven act of supply: *R v Smith* [2002] NSWCCA 378 at [16].

Hall J concluded in *Vu v R* at [88] that "… agreements to supply or offers to supply prohibited drugs each constitute transactional activities that play an important and essential role in the chain of drug trafficking". No generalised statement can be made about the relative seriousness of differing forms of supply: *McKibben v R* at [16].

In *Vu v R*, Hall J set out at [89] the following factors relevant to determining the objective seriousness of an offence under s 25(2) involving an offer to supply:

- The terms of the offer, in particular, as to the quantity of a drug, its price, etc.
- Whether a particular offer is an isolated one or whether it occurs in the context of an ongoing supply of prohibited drugs.
- Whether, and if so, the extent to which the offer is motivated by reasons of commercial gain or greed.

- Whether the offeror at all material times had the intention to fulfil the offer.
- Whether the offeror had the capacity to fulfil the offer to supply.
- Whether the offeror attempts to fulfil the offer. If not, whether any failure to perform was the result of a decision by the person concerned not to supply or whether it was due to some intervening or extraneous circumstances.

In *R v Kalpaxis* (2001) 122 A Crim R 320, the offender offered to supply a commercial quantity of cocaine but the sentencing judge found that the offer was not genuine, that no supply took place and that the offender did not have the ability to supply the drug. The court held it was an "exceptional and extraordinary" case that fell within the less serious spectrum of an offence under s 25 and dismissed a Crown appeal against a suspended sentence.

Drug "rip-offs"

Although the criminality for drug "rip-offs" purporting to be actual drug deals may be less than where there is a genuine plan to supply drugs, drug rip-offs are regarded by the courts as objectively serious and remain subject to the penalties applicable to an offence contrary to s 25: *R v Kijurina* [2017] NSWCCA 117 at [99]; *R v Yaghi* (2002) 133 A Crim R 490 at [16]–[18]. This is partly because, unlike most fraud or false pretences, the victim of a drug rip-off is unlikely to report the matter to police and as a result, subject to any violent retribution, the offender is likely to escape without punishment. There is a significant community interest in not allowing the drug trade to be used as a vehicle for fraudulent activities of this kind, and also in deterring the kind of violent response which such conduct can provoke: *R v Yaghi* at [17]–[18]. It is therefore of utmost importance that courts impose sentences of sufficient severity to ensure others who may be tempted to engage in drug rip-offs are dissuaded. It is only in exceptional cases that a non-custodial sentence will be appropriate: *R v Kijurina* at [103].

[19-835] Supply and the imposition of full-time custody

Sentencing offenders charged with drug supply offences must now be undertaken in accordance with the guidance provided by the five-judge bench decision in *Parente v R* (2017) 96 NSWLR 633 which is discussed in further detail below. In summary, the judgment in *Parente v R* reminds sentencing courts to approach the task of sentencing offenders charged with drug supply offences in accordance with ordinary sentencing principles and not by starting from the assumption that a sentence of full-time imprisonment is required.

In *Robertson v R* [2017] NSWCCA 205, Simpson JA (Harrison and Davies JJ agreeing) cast significant doubt on the proposition, derived from *R v Clark* (unrep, 15/3/90, NSWCCA), that drug trafficking to a substantial degree ordinarily required a sentence of full-time imprisonment unless there were exceptional circumstances. Simpson JA observed that the peremptory terms in which *R v Clark*, and the cases following had been expressed, may be incompatible with the proper exercise of a judicial sentencing discretion and a number of statements made by the High Court but that was a matter to be decided by a bench of five judges of the CCA or the High Court: *Robertson v R* at [101].

A five-judge bench was convened in *Parente v R* to consider the correctness of the "principle" in *R v Clark*. The court concluded the principle should no longer be applied in sentencing for drug supply cases: *Parente v R* at [106].

The court held in *Parente v R* at [107], that sentencing in drug supply cases should be approached consistently with general sentencing principles (discussed at [93]–[103]) and, at [107]–[115], emphasised the following relevant matters to which sentencing courts must have regard:

- The purposes of sentencing in s 3A *Crimes (Sentencing Procedure) Act* which include reference to deterrence (in s 3A(b)) and protection of the community (in s 3A(c)). The importance of general deterrence in drug supply cases means a consistent message of deterrence from sentencing judges is necessary.
- Further, protection of the community will usually be a significant factor, having regard to the social impact of drug use, particularly as an underlying cause of other criminal offending.
- The maximum penalty and any standard non-parole period, which are legislative guideposts, are set at a high level for drug supply offences: *Markarian v The Queen* (2005) 228 CLR 357 at [31].

Importantly, the court at [112], approved the following statement by Simpson JA in *Robertson v R* at [50]:

> [I]t may be accepted that examination and analysis of sentencing practices establishes that, where the facts of an offence demonstrate drug dealing "to a substantial degree", a sentence of imprisonment will ordinarily be imposed. Moreover, recognition of the serious social implications of drug dealing (reflected, if in nothing else, in the maximum prescribed sentences) suggests that, in the ordinary case, a sentence other than imprisonment will fail to meet sentencing objectives.

A judge must not sentence an offender to imprisonment unless satisfied that, having considered all possible alternatives, no other penalty is appropriate: *Parente v R* at [113]; s 5(1) *Crimes (Sentencing Procedure) Act*. This involves consideration of the possibility of options such as a fine and other sentencing options [such as, since 24 September 2018, conditional release orders or community corrections orders], rather than of possible alternative ways to serve a sentence of imprisonment: *Parente v R* at [113]. Full-time custody is therefore the last choice, not the starting point for the imposition of a sentence: *West v R* [2017] NSWCCA 271 at [60]–[61]. Nothing in s 5 directs a sentencing court which has decided no alternative to imprisonment is viable, to then exclude from consideration any non-custodial means by which the sentence might be served: *Robertson v R* at [97]; *Parente v R* at [113]. The approach endorsed in cases such as *R v Zamagias* [2002] NSWCCA 17 at [22]–[29] and *Douar v R* (2005) 159 A Crim R 154 at [70]–[72] should be taken. See further **Imprisonment as a sanction of last resort** at **[3-300]**.

Intensive correction orders may be significantly more onerous than the predecessor of periodic detention: *Parente v R* at [89]. An ICO should be given full, fair and genuine consideration by the court in sentencing for drug supply cases: *Robertson v R* at [38] applying *EF v R* [2015] NSWCCA 36. A failure of legal representatives to consider and bring to the attention of the court alternatives (to full-time custody) "may be the cause of injustice": *EF v R* at [13].

[19-840] Section 25(2) — The standard non-parole period

An offence under s 25(2) has a standard non-parole period of 10 years for less than the large commercial quantity of a prohibited drug (not cannabis leaf) and 15 years for not less than the large commercial quantity of a prohibited drug (not cannabis leaf): Pt 4 Div 1A *Crimes (Sentencing Procedure) Act 1999*. See further **Standard Non-Parole Period Offences** at **[7-890]**ff. Cases such as *R v Shi* [2004] NSWCCA 135, which applied *R v Way* (2004) 60 NSWLR 168, are no longer good law. The statements in *R v Sciberras* (2006) A Crim R 532 at [56]–[57] of Hulme J that there was a "strong argument that the legislature intended that the severity of sentences should increase" and Howie J in *R v Burgess* [2006] NSWCCA 319, at [52] that the "standard non-parole period in respect of this type of offence must have the consequence of increasing the range of sentences [from] that which existed before the provision was introduced" have to be read in light of *Muldrock v The Queen* (2011) 244 CLR 120 at [31]. The latter court stated that the effect of the introduction of standard non-parole periods will generally be an upward movement in the length of sentences for offences to which they apply. See further **Move upwards in the length of non-parole periods?** at **[7-990]**.

In *R v Blair* (2005) 152 A Crim R 462 the court confirmed that the role of the offender was germane to an assessment of the objective seriousness of the offence and the notional range of seriousness. The sentencing judge failed to make an explicit finding as to the applicant's role.

[19-850] Ongoing supply

Section 25A — Offence of supplying prohibited drugs on an ongoing basis

A person who, on three or more separate occasions during any period of 30 consecutive days, supplies a prohibited drug (other than cannabis) for financial or material reward commits an offence under s 25A. It is not necessary for the same prohibited drug to be supplied on each of the occasions: s 25A(2). The maximum penalty for this offence is imprisonment for 20 years and/or 3500 penalty units.

An offence under s 25A is generally considered to be more serious than an offence under s 25: *Reed v R* [2007] NSWCCA 457 at [35]; *R v CBK* (2002) 135 A Crim R 260 at [56].

In *Fayd'herbe v R* [2007] NSWCCA 20, Adams J reviewed the authorities regarding s 25A, citing the following passage from *R v CBK* at [18] where Wood CJ at CL said at [57]:

> An offender charged with a s 25A offence cannot rely upon an argument that the act of supply was an isolated event. Nor can [he] expect to receive a sentence of the kind which may be appropriate for a single offence of supply. Significant sentences must be imposed in such cases in order [to] give effect to the clear legislative intention to discourage the ongoing trade in drugs, which depends entirely upon the availability of a person such as the present applicant.

Assessing objective seriousness under s 25A

The quantity of drugs is not an ingredient of a charge under s 25A. The section is directed to repetition, system and organisation, that is, the business operation

of supplying prohibited drugs: *R v Giang* [2005] NSWCCA 387 at [18]–[19]. The objective criminality of any offence under s 25A is determined by reference to those features, not merely the number of instances of supply, nor the individual quantities supplied: *R v Hoon* [2000] NSWCCA 137 at [16]. The quantity of the drug is not irrelevant, nor are repetition, system and organisation of greater importance — they take their place beside the number and quantities of individual incidences of supply: *R v MRN* [2006] NSWCCA 155 at [142]–[145].

Although quantity is not the only factor involved in assessing the objective seriousness of the offence, it remains significant: *R v Smiroldo* (2000) 112 A Crim R 47 at [14]; *Smith v R* [2007] NSWCCA 138 at [53]. In *Mirza v R* [2007] NSWCCA 248, an unusually large amount of drugs was involved for an offence under s 25A. This was an important fact in determining the seriousness of the crime: *Mirza v R* at [12]. Howie J stated at [11]:

> It may well be the case that the seriousness of this type of offence will not be diminished simply because the overall amount of drug supplied is small. But it does not follow that the amount of drug supplied is an irrelevant matter in determining the seriousness of the particular offence.

He added at [12] that, "[t]here will clearly be cases where the amount of the drug supplied is determinate of the sentence".

It is relevant to consider the magnitude of the operation. Subject to the principle in *De Simoni v The Queen* (1981) 147 CLR 383 the court may anticipate that most offenders charged with this offence will have been involved in the supply of a greater quantity of drugs than that which was the subject of the charge.

R v Kairouz [2005] NSWCCA 247 concerned a highly organised drug supply operation in which the applicants played a leading role. Emphasising the seriousness of the case, Wood CJ at CL said at [90]:

> The seriousness of the offence of supplying drugs on an ongoing basis has also been confirmed in other decisions of this court, for example, *R v Shi* [2004] NSWCCA 135, and more recently *R v Le* [2005] NSWCCA 162 and in *R v Preston* [2005] NSWCCA 177. In the present context the further acts of supply which followed those that gave rise to Count 1, which were a continuation of the highly organised and active operation, which the syndicate had established, and of which the Applicants were principals from the outset, were also very serious objectively. In these circumstances heavily deterrent sentences were called for, as appears from the decision of this court in *R v Cheikh and Hoete* [2004] NSWCCA 448, a case with some similarities in so far as it involved persons well entrenched in an organised distribution network (at least in relation to *Cheikh*).

Section 25A — General sentencing pattern

Offences under s 25A will also attract a full-time custodial sentence unless there are exceptional circumstances: *Fayd'herbe v R* [2007] NSWCCA 20 at [18].

In *R v Cheikh* [2004] NSWCCA 448 Giles JA included in his judgment a schedule setting out sentences imposed between 2000 and 2004 involving multiple supply of amphetamine and similar drugs, as distinct from cocaine and heroin. However, after observing that a brief indication as to the sentence can be misleading because of the

mix of offences and offences taken into account (and that each sentence turns on its own particular facts), Giles JA added at [64] that he doubted the existence of a general sentencing pattern:

> save in general terms such that lesser criminality brings a lesser sentence and greater criminality brings a greater sentence, and a pattern is difficult to discern when in every case there are many sentencing considerations additional to the level of criminality.

In *R v Gidaro* [2005] NSWCCA 18, Bell J similarly noted at [28] that care "needs to be taken in extrapolating from material contained in a table of comparative sentences."

[19-855] Section 26 — Conspiracy offence

It is an offence under s 26 to conspire with another person or persons to commit an indictable offence under Pt 2 Div 2.

In *Diesing v R* [2007] NSWCCA 326, 4 offenders were charged with a range of drug offences including conspiracy to manufacture a commercial quantity of a prohibited drug under ss 24(2) and 26. The court confirmed that the standard non-parole period relevant to an offence under s 24(2) is not applicable to the conspiracy offence: at [53].

In *Diesing v R* at [77], it was noted that the principles applicable to sentencing for a conspiracy were recently revisited in *Tyler v R* (2007) 173 A Crim R 458. The sentence should reflect the organisational nature of a conspiracy in sentencing rather than confining the sentencing discretion to the identification of the role of an offender by specific reference to the physical acts that he or she undertook. Simpson J said in *Tyler v R* at [83]:

> It would be quite artificial, and contrary to the very concept of a conspiracy, to dissect with precision the physical acts of each of the conspirators, and to sentence that conspirator for those acts alone.

The court emphasised in *Diesing v R* at [80] that their findings:

> do not seek to punish the applicant for offences with which he was not charged … They reflect upon the degree of the criminality involved in the applicant's participation as a principle in a conspiracy, extending over five months and constituting a large-scale commercial operation spanning two states.

[19-860] Supplying to undercover police

While it is relevant to take into account the fact that drugs supplied to undercover police will not be disseminated into the community, "[o]f itself this is usually unlikely to lead to other than a very minor diminution of culpability": *R v Chan* [1999] NSWCCA 103 at [21]. Where a charge of supplying drugs has arisen out of circumstances in which the drug has been acquired by a person cooperating with police, it is open to a sentencing judge to give no weight or very slight weight to the consideration that the supplied drugs have not been disseminated into the community: *Taysavang v R* [2017] NSWCCA 146 at [50]; *Truong v R* [2006] NSWCCA 318 at [26]. The prevailing consideration, where drug supply has been foiled, is that the offender fully intended the drugs would be disseminated and it was no act of the offender which stood in the way of such dissemination: *Taysavang v R* at [49]; *Hristovski v R* [2010] NSWCCA 129 at [41]; *R v Achurch* (2011) 216 A Crim R 152 at [97]. The weight to be given in such circumstances will vary from cases to case: *Taysavang v R* at [51]; *R v Achurch* at [97].

However, compare the earlier case of *R v DW* (2012) 221 A Crim R 63, where RS Hulme J (Hall J agreeing) did not accept that the impact of this factor upon sentence should be slight or very minor: at [115]–[117].

In *R v Gao* [2007] NSWCCA 343 the court emphasised that it is not a matter of principle that supplying drugs to undercover operatives always involves a diminution of culpability: at [22], [47]. There may be cases assessed within the mid-range of objective seriousness despite a guilty plea and supply to undercover operatives: at [22].

Considerable caution is required in attempting to apply the mitigating factor in s 21A(3)(a) *Crimes (Sentencing Procedure) Act 1999* (the injury, emotional harm, loss or damage caused by the offence was not substantial) to drug supply offences: *Taysavang v R* at [50]; *Truong v R* at [26]. In *Taysavang v R*, the court said at [49]:

> If significant weight should be given to the mitigating circumstance prescribed by s 21A(3)(a) in a case where the supplied drugs fall into the hands of a police officer who poses as a purchaser, it is difficult to see why that statutory consideration should have any less weight where the supplied drugs are kept from dissemination because they are seized at the point of arrest in cases not involving police participation in the transaction. To mitigate penalty on that basis would be absurd.

In *AB v R* [2013] NSWCCA 273, the court held that the sentencing judge was very generous to find, as a mitigating factor under s 21A(3)(a), no substantial harm was caused. If the drugs had been disseminated into the community, it would have constituted a significant aggravating factor on sentence, however, the absence of an aggravating factor does not translate into a mitigating factor. Where, because of a police operation, drugs are not actually disseminated into the community, the moral culpability of an offender is not thereby reduced: *AB v R* at [92]; *Giang v R* [2017] NSWCCA 25 at [24].

An offence may still be regarded as one committed without regard for public safety under s 21A(2)(i) *Crimes (Sentencing Procedure) Act 1999* where the drugs have been supplied to an undercover operative: *R v Way* (2004) 60 NSWLR 168 at [172]. In *R v Way*, the offender:

> undertook the transaction expecting a considerable personal profit, and in the understanding that the drugs would be resold, heedless of the consequences to those who purchased and consumed them, or of the fact that users commonly resort to property offences to feed a habit, leaving other victims in their wake.

[19-870] Other factors relevant to objective seriousness

Quantity and purity of drug

Section 4 the *Drug Misuse and Trafficking Act* provides that:

> In this Act, a reference to a prohibited drug includes a reference to any preparation, admixture, extract or other substance containing any proportion of the prohibited drug.

While the purity of a drug is directly related to quantity and, therefore, to the applicable statutory maximum penalty for an offence in Commonwealth legislation, in relation to offences under the *Drug Misuse and Trafficking Act* the reference in s 4 to a "substance containing any proportion of the prohibited drug" indicates that there is no such nexus. Instead, purity is one of the factors considered when determining whether an offence falls into the mid-range of seriousness: *R v Blair* (2005) 152 A Crim R 462 at [56].

The fact a drug is of low purity does not require a sentencing judge to assess the objective seriousness of the offence as below mid-range. Other factors are also relevant in determining the objective seriousness of the offence: *Fato v R* [2017] NSWCCA 190 at [44], [46]. If judicial notice is to be taken of drug purity levels they must be beyond argument: *Ma v R* [2007] NSWCCA 240 at [54].

In *R v Shi* [2004] NSWCCA 135 the sentencing judge found that the unusually high level of purity of the drug methylamphetamine — 84.5% — was an aggravating factor under s 21A(2)(i) of the *Crimes (Sentencing Procedure) Act 1999*, as it had considerable destructive potential and the offence was accordingly one committed without regard for public safety.

The quantity of drugs is not the sole, or principal, determinant for sentencing in relation to drug offences. More important is the role of the offender and the level of his or her participation in the offence. This is subject to the fact that there is a gradation of seriousness related to quantity reflected by the increase in penalty as the quantity of the drug becomes commercial or large commercial quantities: *R v Macdonnell* (2002) 128 A Crim R 44 at [33].

In *Markarian v The Queen* (2005) 228 CLR 357 the High Court held that the Court of Criminal Appeal erred in placing too great an emphasis upon the quantity of drug involved, without regard to the facts of the case. Gleeson CJ, Gummow, Hayne and Callinan JJ said at [33]:

> A serious fallacy in his Honour's reasoning is that it assumes that any case involving more than 250 grams of heroin is likely to be a worse case than any case involving only 250 grams or less. That cannot be so in the virtually absolute terms in which his Honour puts it. Little imagination is required to envisage a case involving a relatively small quantity of heroin, as being of very great seriousness, for example, supply to create an addiction in an infant.

Type of drug

The *Drug Misuse and Trafficking Act* adopts a quantity-based penalty regime in Schedule 1. It makes no other distinction between drug types. Since *R v Nai Poon* (2003) 56 NSWLR 284 there is no longer any judicially constructed gradation of penalties based on the perceived harm caused by different types of drugs. It was said in *R v Dang* [2005] NSWCCA 430 at [29] that the Court of Criminal Appeal:

> no longer approaches the evaluation of the seriousness of a particular supply offence by distinguishing between different types of drugs according to the perceived dangerousness of the drug being supplied. Rather the Court has stressed that the appropriate consideration is the relevant statutory regime and the maximum penalty prescribed for the offence: cited with approval in *R v Des Rosiers* (2006) 159 A Crim R 549 at [23].

This approach has also been adopted at the federal level in *Adams v The Queen* (2008) 234 CLR 143 at [10] see [65-130].

Role of offender and level of participation

The offender's role and the level of criminality involved is more important in determining a sentence than the quantity of drugs involved, which is not the sole or even principal determinant: *Melikian v R* [2008] NSWCCA 156 at [42]; *R v MacDonnell* (2002) 128 A Crim R 44 at [33]. For supply offences an offender's role is not to

be determined by the use of short hand labels but rather by assessing what his or her involvement was in the steps taken to effect supply: *Paxton v R* (2011) 219 A Crim R 104 at [135] applying *The Queen v Olbrich* (1999) 199 CLR 270 at [14]. General descriptions of types of participation must not obscure the assessment of what the offender did: *The Queen v Olbrich* at [19]. In some cases it will be difficult for a court to determine an offender's role for lack of evidence: *Paxton v R* at [135]. Where the offender's role is not known the court is not obliged to find facts favourable to the offender or to accept his or her version of events: *The Queen v Olbrich* at [27]–[28].

The term "principal" is often used to describe an offender's role. Simpson J, in *Nguyen v R* (2011) 208 A Crim R 432 (Davies J agreeing at [18]), in the context of an offence cultivating a large commercial quantity of cannabis, said of the definition of principal at [4]:

> the indicator of the role of an offender as "principal" involves at least some of the following characteristics:
>
> - contributing financially to the cost of setting up the operation;
> - standing to share in the profit (as distinct from receiving payment);
> - having some hand in the management of the operation (although it is well recognised that principals will, so far as possible, distance themselves from the day to day operation, they nevertheless maintain considerable control over the enterprise);
> - having some decision making role (which may not be different from the item above).
> - This does not purport to be anything like an exhaustive list. There may well be other features that indicate that an offender ought to be characterised as a principal.

An offender who combines the role of a principal and leader of an extensive and well organised network, distributing large commercial quantities of prohibited drugs, exhibits criminality of a high order: *R v Kalache* (2000) 111 A Crim R 152.

In *R v Shi* [2004] NSWCCA 135 Wood CJ at CL, with whom Spigelman CJ and Simpson J agreed, emphasised at [34] the importance of giving consideration to:

> the well-recognised principle that the culpability of those who engage, at any level, in drug supply networks is significant, and that deterrent sentences are necessary, since absent the involvement of couriers, warehousemen and so on, these networks, whether established for the purposes of importation or subsequent distribution, would simply collapse: *R v Le Cerf* (1975) 13 SASR 237 and *R v Laurentiu and Becheru* (1992) 63 A Crim R 402.

The court in *R v Shi* concluded that the role of the offender is germane to the assessment of the objective seriousness of the offence: see also *R v Blair* (2005) 152 A Crim R 462.

Where the offender "flagrantly ignores previous and extant sentences", any leniency that may be afforded to him or her in recognition of a lesser role in the supply chain, may be of less importance than personal deterrence and the protection of society from an otherwise continuing disobedience of the law: *Young v R* [2007] NSWCCA 114 at [23].

In *R v Giammaria* [2006] NSWCCA 63, in the context of "seriously culpable" conduct by two non-principals in cultivation offences, Sully J said at [15]:

> [I]t needs to be remembered clearly, and to be given serious effect in the ultimate sentencing outcome, that while a non-principal will normally be dealt with as being less

> objectively culpable than a principal in a flagrant and systematic flouting of the anti-drug laws of this State, it does not at all follow that a non-principal will receive, more or less as of course, a dramatically more lenient sentence.

[19-880] Subjective factors

Good character

Good character also carries less weight in offences involving drugs than many other offences: *R v Cheikh* [2004] NSWCCA 448 at [50]; *R v Leroy* [1984] 2 NSWLR 441. This principle is usually of more relevance in relation to drug couriers. Street CJ (Glass JA and Yeldham J agreeing) said in *R v Leroy* at 446–467:

> Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their lifestyles are not such as to attract suspicion. It is this, in particular, which has led the courts to take in the case of drug trafficking, a view which does not involve the same degree of leniency being extended to first offenders.

However, caution is required before adopting the statement in *R v Leroy* as a general principle: *Chong v R* [2017] NSWCCA 185 per Basten JA at [28]. In *Chong v R* there was no suggestion that the offender was "selected" by the organisers of the criminal activity due to his lack of a prior record. What may be highly relevant with respect to drug importations may be of less relevance to drug supply internally, when the mode of travel is unlikely to attract attention to the individual traveller: *Chong v R* at [28].

Prior character is, however, relevant to prospects of rehabilitation. An offender's prior good character and lack of criminal history are to be taken into account on sentencing, although they have significantly less weight where the offence involves deliberate and planned criminality: *Ha v R* [2008] NSWCCA 141 at [43].

The relevance of addiction

An offender who is not a drug user but supplies drugs out of greed was placed in the worst category of suppliers: *Nguyen v R* [2007] NSWCCA 15 at [46]; *R v Liang* (unrep, 2/6/95, NSWCCA); *R v Ramos* (2000) 112 A Crim R 339; *R v Kalache* (2000) 111 A Crim R 152. (The appropriate terminology following *The Queen v Kilic* (2016) 259 CLR 256 must be "worst case": see **[10-005] Cases that attract the maximum**.)

However, addiction to drugs is generally not, of itself, a matter of mitigation at sentence: *R v Henry* (1999) 46 NSWLR 346 at [178], applied in *Ma v R* [2007] NSWCCA 240 at [79]; *R v Vu* [2006] NSWCCA 188 at [73]. The relevant principles identified in *R v Henry* at [273] are:

- **(a)** the need to acquire funds to support a drug habit, even a severe habit, is not an excuse to commit an armed robbery or any similar offence, and of itself is not a matter of mitigation;
- **(b)** however the fact that an offence is motivated by such a need may be taken into account as a factor relevant to the objective criminality of the offence in so far as it may throw light on matters such as:
  - (i) the impulsivity of the offence and the extent of any planning for it …;
  - (ii) the existence or non-existence of any alternative reason that may have operated in aggravation of the offence, for example, that it was motivated to fund some other serious criminal venture or to support a campaign of terrorism;

> (iii) the state of mind or capacity of the offender to exercise judgment, for example, if he or she was in the grips of an extreme state of withdrawal of the kind that may have led to a frank disorder of thought processes or to the act being other than a willed act …

In *R v Tulloh* (unrep, 16/9/93, NSWCCA) Hunt CJ at CL held that a user/dealer who sells primarily to feed his or her own habit is at a lower level of criminality than a trafficker motivated by greed. The weight to be attributed to an offender's drug addiction is diminished when considering operations above street level: *R v Bernath* [1997] 1 VR 271 per Callaway JA, with whom Winneke P and Brooking JA agreed; applied in *R v Haidar* [2004] NSWCCA 350.

However, Wood CJ at CL stated in *R v Kairouz* [2005] NSWCCA 247 at [98] that the decision in *R v Tulloh* does not provide support for the bald proposition that an offender's motivation to participate in drug trafficking, arising from the need to feed a drug habit, rather than greed, placed him at the lower level of criminality. In *R v Tulloh* Hunt CJ at CL noted that every case depends on its circumstances and that, irrespective of whether the motivation for trafficking is need or greed, the overriding principle is that a custodial sentence is normal for trafficking to any substantial degree, regardless of whether or not a profit has been obtained.

In *R v Dang* [2005] NSWCCA 430 Howie J, with whom Studdert and Whealy JJ agreed, found that the offender had been motivated by his addiction to cocaine, even though he had become addicted as a matter of choice. His Honour noted at [32] that the offender's role was that of a middleman who was to receive money and drugs, and:

> Even though his judgment might have been clouded by his use of cocaine, that can have little mitigation of the objective seriousness of the offence because it was self-induced by his abuse of drugs.

Nevertheless, the offence fell below the mid range of objective seriousness, as the offender was not a principal and only became involved in a single instance of supply because of his addiction to cocaine.

Vulnerability

While drug addiction per se is not a mitigating factor, a drug addict may demonstrate vulnerability, when addiction, coupled with other factors, is taken into account. In *Postlewaight v R* [2007] NSWCCA 230 at [16], the offender's addiction made him particularly vulnerable to being utilised by his co-offender. The sentencing judge's acceptance that the applicant's addiction was directly related to his offending should have meant that she assessed the offence at the lower end of criminality. The vulnerability of the offender in *R v Shi* [2004] NSWCCA 135 due to his age, background and drug addiction was also taken into account.

Assistance to authorities

Assistance to authorities, while relevant in many sentencing contexts, is of particular importance in sentencing drug offenders. In *R v Perrier* (1990) 59 A Crim R 164, McGarvie J at 171 referred to comments of Stewart J in the *Report of the Royal Commission of Inquiry into Drug Trafficking*, 1983, where his Honour expressed the

view (at 562) that the most effective means of destroying drug trafficking enterprises is to obtain information from minor figures that will lead to the detection of principals. McGarvie J said at 171:

> It is in the community interest in sentencing couriers that the objective of securing their co-operation to implicate principals should substantially prevail when that objective runs counter to the objective of deterring people from acting as couriers by imposing heavy sentences. It should substantially prevail, because it is more likely in the long run to disrupt and break up drug trafficking.

See further **Power to Reduce Penalties for Assistance to Authorities** for constraints on the application of the discount for such assistance at [12-220].

[19-890] Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999

See *Double counting* in **Limitations on the use of s 21A(2) factors** at [11-040], particularly *Kassoua v R* [2017] NSWCCA 307 at [14].

Section 21A(2)(g) — Substantial injury, emotional harm, loss or damage caused by offence

In *R v Hockey* [2006] NSWCCA 146, Adams J suggested at [15] that s 21A(2)(g) cannot be given any additional significance as an aggravating factor in the absence of any evidence that particular harm was caused, although he notes that his view is "apparently inconsistent" with *R v Way* (2004) 60 NSWLR 168. McClellan CJ at CL and Johnson J reserved their position on this issue.

Section 21A(2)(i) — Offence committed without regard for public safety

Price J said in *Mansour v R* (2011) 209 A Crim R 275 at [49]–[50]:

> failure to have regard for public safety is an inherent characteristic of the offence of ongoing supply of cocaine. I also think that it is an inherent characteristic of the offence of actual supply and deemed supply of that prohibited drug.
>
> … the sentencing judge could not take into account this inherent characteristic as an aggravating factor unless its nature or extent went beyond what ordinarily might be expected.

Section 21A(2)(i) cannot be taken into account as an aggravating factor for the offences referred to above unless its nature or extent in the particular case is unusual or "exceeds the norm": *Mansour* at [51]; *R v Elyard* [2006] NSWCCA 43 at [14]–[16] applied.

Previous authorities on this subject, such as *R v Way* (2004) 60 NSWLR 168 at [172]; *Ward v R* (2007) 168 A Crim R 545 at [28] (which applied *R v Way*); *R v Lilley* (2004) 150 A Crim R 591 at [53]; and *R v Aslan* [2005] NSWCCA 121 at [16], are no longer good law.

Section 21A(2)(l) — Vulnerability of victim

In *R v Ancuta* [2005] NSWCCA 275, a case where the offender was convicted of supply of a commercial quantity of drugs, the sentencing judge erred in holding that the potential heroin users were vulnerable victims within the terms of s 21A(2)(l). Brownie AJA said at [13]:

> it is possible to think of potential heroin users as being victims, and as being vulnerable … but, once again, a conviction for an offence for supplying heroin, or of being deemed to have supplied heroin, carries this concept with it, so that it is not correct to hypothesise

> about potential victims, and of their being vulnerable, and then to treat this hypothesis as constituting an aggravating factor, so far as concerns the particular sentence to be imposed for a particular offence.

Here, the police took possession of the heroin before the applicant had an opportunity to resell it, so that there was no victim of the particular offence with which the offender was charged.

Section 21A(2)(m) — Multiple victims or series of criminal acts

An offence may be aggravated under s 21A(2)(m) where the offence involves a number of allegations of criminal acts that are part of a single course of criminal conduct, such as multiple instances of supplying drugs over a lengthy period of time charged as one offence under s 25 *Drug Misuse and Trafficking Act*: *R v Tadrosse* (2005) 65 NSWLR 740 at [29].

An element of an offence under s 25A is that it involves multiple acts of criminality: *R v Tadrosse* at [29] and "[w]hen sentencing for such an offence, the court must bear in mind the prohibition against taking into account as a matter of aggravation that which is an element of the offence charged". It remains open to a judge sentencing for an offence under s 25A to take into account as an aggravating factor under s 21A(2)(m) that supply took place on significantly more than three occasions: *Smith v R* [2007] NSWCCA 138 at [40].

Tadrosse was applied in *Cicciarello v R* [2009] NSWCCA 272 where multiple criminal acts were the foundation for the more serious offence with which the appellant was charged: at [19]. When such a series of criminal acts leads to a more serious criminal charge being properly laid against an offender, the prohibition against double counting contained in s 21A is undermined if the same series of criminal acts is taken into account as an additional aggravating factor under s 21A(2)(m): *Cicciarello* at [19].

Section 21A(2)(n) — Planned or organised criminal activity

The seriousness of a drug offence may be aggravated where the amount of planning involved exceeds that ordinarily expected of an offence of that kind: *Stokes v R* [2008] NSWCCA 123 at [32]; *Fahs v R* [2007] NSWCCA 26 at [21]–[22]; *Hewitt v R* (2007) 180 A Crim R 306 at [24], [42]; *R v Yildiz* (2006) 160 A Crim R 218 at [37]. In *Hewitt v R*, Hall J reviewed the relevant authorities at [25]; see further at [11-190]. For an offence of knowingly take part in the supply of a large commercial quantity of a prohibited drug, it is almost inevitably the case that inherent characteristics of that class of offence are a level of planning and financial gain: *Wat v R* [2017] NSWCCA 62 at [44]. These inherent characteristics are not to be treated as aggravating factors unless such financial gain and planning is significant, that is, more than might be expected in the lowest level of offending for this type of offence: *Wat v R* at [44]; *Prculovski v R* [2010] NSWCCA 274 at [43]; *Farkas v R* (2014) 243 A Crim R 388 at [62].

The court applied *Fahs v R* in *Reaburn v R* (2007) 169 A Crim R 337 at [44] and held that the relatively low level of planning in the supply offences would not meet the description in s 21A(2)(n). In *R v Kazzi* [2008] NSWCCA 77 the sentencing judge declined to find that the offences were aggravated by s 21A(2)(n) on the ground that planning was inherent in the offences involving the supply of commercial or large commercial quantities of drugs. It was open to his Honour to consider that the degree of planning was not so unusual as to amount to an aggravating factor: at [46].

In *Stokes v R* at [34]–[36] the offence involved more extensive organisation and planning since the offender was not dealing at a level necessary to fund his own habit, he supplied a range of drugs and he made provisions for supply while he was absent. In *Hutton v R* [2008] NSWCCA 99 at [22]–[23] the degree of planning also exceeded that normally expected for an offence of this kind. Planning included the organisation of interstate flights, the booking of the hotel room, contact with co-offenders, coded telephone conversations and the concealment of drugs on the offender. Similarly, in *Wat v R* the sentencing judge did not err by taking into account that the offence was aggravated under s 21A(2)(n) in circumstances where the level of planning was elaborate; the whole operation was sophisticated, well-organised and conducted by a transnational crime syndicate: *Wat v R* at [46].

Section 21A(2)(o) — Offence committed for financial gain

Financial gain can be an element of an offence against the Act (for example, s 25A) or an inherent characteristic (as for s 25(2)): for the latter, see *Wat v R* [2017] NSWCCA 62 at [44]. Since financial gain is an ingredient of an offence of ongoing supply under s 25A, it is a double counting error to further apply s 21A(2)(o): *Bowden v R* [2009] NSWCCA 45 at [65]. However, where the financial gain is significant, that is, more than might be expected in the lowest level of offending for that type of drug supply offence, it may be taken into account as an aggravating factor under s 21A(2)(o): *Prculovski v R* [2010] NSWCCA 274 at [43] applied in *Wat v R* at [44], [48]; *Farkas v R* (2014) 243 A Crim R 388 at [62].

In *Kassoua v R* [2017] NSWCCA 307 at [13], Basten JA (Price J agreeing) emphasised that the "unremarkable point" of Howie AJ in *Prculovski v R* at [43] was made in the context of an offence under s 25A(1) where "financial or material reward" was an element of the offence. In these circumstances, it is still possible to take financial gain into account so long as it was a "significant" level of gain or reward for the purpose of assessing the objective seriousness of the offending. However, Basten JA cautioned against generalising Howie AJ's observation and applying it in cases where financial reward is *not* an element of the offence. Basten JA said at [13]:

> it would be wrong to rewrite s 21A(2)(o) so that the phrase "for financial gain" was read as if it said "for a financial gain which exceeded that which might be expected in the lowest level of offending for this type of offence". To impose such a constraint would be wrong and would tend to overcomplicate the sentencing process.

Basten JA concluded that in determining the objective seriousness of the offence the judge had, correctly, paid specific regard to a range of factors one of which was the inference of financial reward: *Kassoua v R* at [15]. Walton J (Price J agreeing) held that the sentencing judge did not have regard to "financial gain" as an aggravating factor and the finding that the offender had an expectation of substantial financial gain was one of a number of factual findings informing the judge's assessment of the relative seriousness of the offence pursuant to s 21A(1)(c) *Crimes (Sentencing Procedure) Act* and did not constitute a finding of aggravation: *Kassoua v R* at [60].

These principles were also discussed in *Huang v R* [2017] NSWCCA 312 but in that case the court concluded that given the paucity of evidence regarding financial gain, it was an error for the judge to find the financial reward went beyond what was inherent in the offence: *Huang v R* at [60]–[61].

Section 21A(3)(d) — Offender acting under duress

See discussion at **Section 21A(3)(d) — the offender was acting under duress** at [11-240].

[The next page is 9505]

Fraud offences

[19-930] Summary of relevant considerations

Last reviewed: May 2024

- Fraud offences are governed by NSW and Commonwealth legislation. See **[19-935]** and **[20-045]** respectively. It is common to have a mix of both Commonwealth and State fraud offences in one sentence proceeding and it is important to differentiate between the different schemes.
- State fraud offences in the *Crimes Act 1900* are contained in ss 192E–192H. See **[20-035]**. State identity crime offences in the *Crimes Act 1900* are contained in ss 192J–192L. See **[20-037]**. State forgery offences in the *Crimes Act 1900* are contained in ss 253–256. See **[20-038]**.
- Types of Commonwealth fraud include tax fraud, social security fraud, corporate fraud, currency fraud, offences against the financial system, and general fraud. See **[20-065]**.
- Many of the sentencing principles for State fraud offences apply to Commonwealth offences. See **[20-050]**.
- Factors of objective seriousness common to fraud offences include:
  - The amount of money involved;
  - The length of time over which the offences are committed;
  - Motive;
  - The degree of planning and sophistication;
  - An accompanying breach of trust;
  - The impact on public confidence and the victim.

  For State offences see **[19-970]**, and Commonwealth offences, see **[20-055]**.
- Aggravating and mitigating factors under s 21A *Crimes (Sentencing Procedure) Act 1999* may arise when sentencing for fraud offences. See **[19-990]** and **[20-000]** respectively.
- The offender's subjective circumstances are to be taken into account on sentence: s 16A(2)(m). See **[20-055]**.

[19-932] Introduction

Last reviewed: May 2024

Fraud offences are governed by NSW and Commonwealth legislation.

While many of the same sentencing principles apply to both jurisdictions, the statutory regimes and factors required to be taken into account under s 21A *Crimes (Sentencing Procedure) Act 1999* and s 16A *Crimes Act 1914* (Cth) differ. It is common to have a combination of Commonwealth and State offences in the one sentencing proceeding and it is important to differentiate between the two statutory schemes.

See also **[20-045] The Commonwealth statutory framework**. For commentary on Commonwealth sentencing generally, see **[16-000] Crimes Act 1914 (Cth) — sentencing Commonwealth offenders**.

The principles and cases concerning the current fraud offences in NSW are set out below at **[20-035]**–**[20-039]**. Where relevant, the sentencing principles applying to the equivalent repealed offences are included.

[19-935] The NSW statutory framework

Last reviewed: May 2024

Parts 4AA and 4AB of the *Crimes Act 1900* provide the statutory scheme for fraud and identity crimes.

All offences under Pts 4AA, 4AB and 5 of the *Crimes Act* are to be dealt with summarily unless elected otherwise: *Criminal Procedure Act 1986*, Sch 1, Table 1. When dealt with summarily in the Local Court the jurisdictional maximum of 2 years applies (*Criminal Procedure Act*, s 267(2)) and the aggregate sentence or total term of consecutive or partly consecutive sentences cannot exceed 5 years (*Crimes (Sentencing Procedure) Act*, s 58). No fraud offences have a standard non-parole period: *Crimes (Sentencing Procedure) Act*, s 54D. See also **Maximum penalties and the jurisdiction of the Local Court** in **[10-000]**; **[20-035] Fraud offences — ss 192E–192H Crimes Act 1900**.

[19-940] General sentencing principles for NSW fraud offences

Last reviewed: May 2024

General deterrence

General deterrence is an important sentencing factor for fraud offences: *R v Mungomery* [2004] NSWCCA 450 at [41]. However, it should not be regarded as the primary or pre-eminent sentencing consideration: *Totaan v R* [2022] NSWCCA 75 at [81]–[83], [90]–[91] (a decision relating to s 16A of the *Crimes Act 1914* (Cth)); *Parente v R* (2017) 96 NSWLR 633 at [101], [108]–[110] (see discussion below).

Such crimes frequently involve a serious breach of trust and are usually only able to be committed because of the previous good character of the person who has been placed in the position of trust. The difficulty in detecting and successfully prosecuting white-collar crime is another reason general deterrence is important. See for example, *R v Donald* [2013] NSWCCA 238 at [41] and *Stevens v R* [2009] NSWCCA 260 at [79], where the prevalence of identity crimes and the importance of public confidence in the electronic banking system required considerable weight to be given to general deterrence.

Although sentencing principles applied by courts with respect to repealed fraud provisions in the *Crimes Act* continue to apply, cases which state that serious fraud requires general deterrence be the primary ore pre-eminent sentencing consideration, or that a sentence of imprisonment must be imposed unless exceptional or unusual circumstances exist, need to be approached with caution following the five-judge-bench decisions of *Parente v R* and *Totaan v R*. Propositions that general

deterrence should be the primary sentencing factor find no support in the text of the legislation and are incompatible with the judicial sentencing discretion: *Totaan v R* at [81]–[83], [90]–[91]] (a decision relating to s 16A of the *Crimes Act 1914* (Cth)); *Parente v R* at [101], [108]–[110].

The same reasoning in *Totaan v R* is applicable to general deterrence in relation to NSW fraud offences and s 21A *Crimes (Sentencing Procedure) Act 1999*. The need for general deterrence in any given case must always be assessed by reference to the personal circumstances of the offending: *Totaan v R* at [98]–[100], [130]; *Kovacevic v Mills* (2000) 76 SASR 404 at [43].

Not a victimless crime

While for some fraud offences, a specific victim cannot be identified, it is wrong to regard white-collar crime as a victimless crime. For example, in respect of insider trading, McCallum J (as she then was) said in *R v Curtis (No 3)* [2016] NSWSC 866 at [24]] that the fraud harmed the community at large by damaging the integrity of the market.

Youth

The principles that apply to youth in respect of physical violence extend to "white collar" crimes and offences involving fraud and financial deception. However, in some fraud cases, the very nature of the offending will require a level of sophistication and intelligence, albeit misguided, especially where numerous acts of defalcation are involved: *Singh v R* [2020] NSWCCA 353 at [41], [55]. For example, in *Hartman v R* [2011] NSWCCA 261, the offender's youth (aged 21) and relative immaturity did not have any role to play in downgrading or lessening the importance of general deterrence because he was operating in the adult sphere of business and commerce in every respect and was educated and worldly: [93]; see also *Singh v R* at [43]–[46], [54]–[57] and **Sentencing principles applicable to children dealt with at law** at **[15-090]**; **Section 21A(3)(j) — the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability** at **[11-300]** and **Age — advanced age and youth** at **[10-430]**.

Limited utility of statistics and schedules

When sentencing for fraud offences, greater assistance is gained from general sentencing principles than reference to statistics or "schedules of fraud appeals" because of the enormous variation in objective and subjective circumstances involved: *R v Martin* [2005] NSWCCA 190; *PC v R* [2020] NSWCCA 147 at [118]. In *R v Martin*, Johnson J said at [56]:

> [R]eference to sentencing statistics is of limited value in the case of fraud offences, given the enormous variation in objective and subjective circumstances involved, and the Court has expressed concern when an attempt is made to compare sentences for a specific offence of dishonesty with other cases involving dishonesty of a different kind: *R v Hawker* [2001] NSWCCA 148 at paragraphs 17–18; Woodman at paragraphs 22–24; *R v Swadling* [2004] NSWCCA 421 at paragraphs 29, 54.

In *Tweedie v R* [2015] NSWCCA 71 at [45], where the applicant committed, inter alia, 27 offences under s 192E, the court said at [45]: "the database relied upon in relation to the fraud offences contained only five cases of sentencing in the District Court or

resentencing in this Court which makes the statistics of no use at all." See also *Scanlan v R* [2006] NSWCCA 238 at [93] in respect of the previous form of the fraud offence. See generally **Use of information about sentences in other cases** at **[10-022]** and **Use of sentencing statistics — Hili v The Queen** at **[10-024]**.

[19-970] Objective seriousness — factors of common application to fraud

Last reviewed: March 2024

Although sentencing for fraud should not be approached in a formulaic manner, the courts have recognised several factors bearing generally upon the objective seriousness of a given offence. The interplay of these factors help place the offence on a spectrum of like offences:

1. **The amount of money involved** (*R v Mungomery* [2004] NSWCCA 450 at [40]) and whether the loss is irretrievable (*R v Todorovic* [2008] NSWCCA 49 at [19]). The quantum involved represents the extent to which an offender is prepared to be dishonest (*R v Mungomery* [2004] NSWCCA 450 at [40]). In the case of a Ponzi scheme, the precise calculation of the scale and amount of the fraud is less significant than the brazen and continued conduct: see *Finnigan v R* [2013] NSWCCA 177 at [31].

2. **The length of time over which the offences are committed** (*R v Pont* [2000] NSWCCA 419 at [74], [75]; *R v Mungomery* [2004] NSWCCA 450 at [40]). The length of time can also be relevant to indicate the degree of planning and to show it was not an impulsive offence: *R v Murtaza* [2001] NSWCCA 336 at [15]. If an offence is committed over a significant period of time this may ameliorate the weight afforded to good character: *Luong v R* [2014] NSWCCA 129 at [21].

3. **The motive for the crime** (*R v Hill* [2004] NSWCCA 257 at [6]; *Cordoba v R* [2021] NSWCCA 144). If the fraud is based on greed rather than need the sentence imposed should be longer: *R v Mears* (1991) 53 A Crim R 141 at 145 at 145. In *Abellanoza v R* [2021] NSWCCA 4, the sentencing judge was not required to make a finding as to motive for the offence, whether it be gambling, greed or disgruntlement in her employment: at [3], [26]. The fact an offence is committed for a motive other than personal greed is not a matter in mitigation: *Khoo v R* [2013] NSWCCA 323 at [78].

4. **The degree of planning and sophistication** (*R v Murtaza* [2001] NSWCCA 336 at [15]; *Stevens v R* [2009] NSWCCA 260 at [59], [78]). Offences committed on impulse have been distinguished from offences where there has been planning with a degree of sophistication. The fact the offence was part of a planned or organised activity is an aggravating factor to be taken into account under s 21A(2)(n) *Crimes (Sentencing Procedure) Act 1999*: see **Aggravating factors** at **[19-990]** below. However, this would need to be proved beyond reasonable doubt: *Meis v R* [2022] NSWCCA 118 at [29], [47]; *Olbrich v The Queen* (1999) 199 CLR 270 at [27].

5. **An accompanying breach of trust** (*R v Pont*, *R v Hawkins* (1989) 45 A Crim R 430). See below.

6. The courts have also regarded **the impact on public confidence**: *R v Pont* at [74], [75] and the **impact on the victim**: at [74], [75] as relevant matters.

Breach of trust

Breach of trust can be relevant where it is either an element of an offence of fraud, or as a feature of aggravation: *R v Pont* [2000] NSWCCA 419 at [43]–[44], *R v Murtaza* [2001] NSWCCA 336 at [15]; and s 21A(2)(k) *Crimes (Sentencing Procedure) Act 1999*.

Where the breach of trust is an element of the offence, it is not to be taken into account additionally as an aggravating factor: *R v Martin* [2005] NSWCCA 190 at [40] and see **Aggravating factors** at **[19-990]** below.

What is a breach of trust? The breach of trust must be in direct contravention of what the offender was engaged to do: *R v Stanbouli* [2003] NSWCCA 355 at [35]. Hulme J said at [34]:

> The cases where, traditionally, breach of trust has been regarded as exacerbating criminality are where it is the victim of the offence who has imposed that trust — an employer defrauded by his employee, a solicitor who appropriates trust funds to his own use — or where the criminality involves a breach of that which the offender was engaged or undertook to do …

In *R v Pantano* (1990) 49 A Crim R 328, Wood J (with whom Carruthers J agreed) said at 330:

> The commercial world expects executives and employees in positions of trust, no matter how young they may be, to conform to exacting standards of honesty. Executives and trusted employees who give way to temptation cannot pass the blame to lax security on the part of management.

For a relationship of trust to exist, there must have been at the time of the offending a special relationship between the victim and offender, transcending the usual duty of care arising between persons in the community in their everyday contact, business or social dealings: In *Suleman v R* [2009] NSWCCA 70, the judge erred by finding the applicant's dealings with investors, particularly those within the Assyrian community, amounted to a breach of trust: [22], [27].

Those placed in a special position of trust by the law and the community, such as solicitors and other professionals, who abuse that trust, call their profession into question and merit sentences which ensure other professionals are left in no doubt that serious consequences will follow: *R v Pont* at [47]. Other professionals may include accountants, executives or directors, and has extended to art dealers (see *Coles v R* [2016] NSWCCA 32), senior employees (*R v Pantano* (1990) 49 A Crim R 328 at 338), and nursing home operators (*R v Boian* (1997) 96 A Crim R 582, *R v Giallussi* [1999] NSWCCA 56).

[19-980] Section 21A Crimes (Sentencing Procedure) Act 1999

Last reviewed: March 2024

The limitations on applying aggravating and mitigating factors in accordance with s 21A *Crimes (Sentencing Procedure) Act 1999* is discussed in detail in **Limitations on the use of s 21A — aggravating and mitigating circumstances** at **[11-040]**.

A key limitation is that factors which are elements integral to the offence are not to be taken, of themselves, as aggravating features because this would constitute

impermissible "double counting": *R v Martin* [2005] NSWCCA 190; *R v Wickham* [2004] NSWCCA 193 at [22]–[23]. While such factors cannot be taken into account as aggravating factors they can be taken into account as circumstances of the offence: *Arvinthan v R* [2022] NSWCCA 44 at [39]. See also **[11-000] Section 21A factors "in addition to" any Act or rule of law**.

[19-990] Aggravating factors

Last reviewed: March 2024

Breach of trust under s 21A(2)(k)

A sentencing court may only have "additional regard" to abuse of a position of trust as an aggravating factor under s 21A(2)(k) where it is not an element of the offence.

In *R v Martin* [2005] NSWCCA 190, the judge erred by having "additional regard" to s 21A(2)(k) when "abuse of authority or a position of trust" was an element of the offence committed, (trustee fraudulently disposing of property under s 172 *Crimes Act 1900* (rep)). While mention of the abuse of trust is permissible characterising the offence's objective gravity, paying "additional regard" to it under s 21A constitutes impermissible "double counting": *R v Wickham* [2004] NSWCCA 193 at [22]–[23].

In *Martin* the court said at [40]:

> With respect to general fraud or dishonesty offences, where breach of trust is not an essential element of the offence, common law sentencing principles have recognised that abuse of a position of trust, where it exists on the facts of a particular case, is an aggravating factor on sentence. Examples of this include the following:
>
> (a) larceny as a servant contrary to s 156 *Crimes Act 1900* by a senior accounts clerk: *R v Pantano* (1990) 49 A Crim R 328 at 330;
>
> (b) fraudulently omitting to account contrary to s 178A *Crimes Act 1900* by a real estate agent: *R v Woodman* [2001] NSWCCA 310 at paragraphs 14-15;
>
> (c) making false accounting entries contrary to s 158 *Crimes Act 1900* and using a false instrument to the prejudice of another contrary to s 300 *Crimes Act 1900* by a bank employee: *R v El-Rashid* (CCA(NSW), 7 April 1995, BC9504681 at page 4;
>
> (d) defrauding the Commonwealth Bank contrary to s 29D *Crimes Act 1914* (Cth) by a bank loans manager: *R v Chaloner* (1990) 49 A Crim R 370 at 375; and
>
> (e) offences by a solicitor comprising forging of documents contrary to s 67B *Crimes Act 1914* (Cth), defrauding the Commonwealth contrary to s 29D *Crimes Act 1914* (Cth), forging and uttering bills and notes contrary to s 273 *Crimes Act 1900*, fraudulent misappropriation contrary to s 178A *Crimes Act 1900*: *R v Hawkins* (1989) 45 A Crim R 430 at 436.
>
> In cases such as these, where breach of trust is not an element of the offence, there is scope for s 21A(2)(k) to permit a court to have "additional regard" to the abuse of a position of trust or authority in relation to the victim as an aggravating factor on sentence. This reflects the position at common law.

In *Lu v R* [2014] NSWCCA 307, the judge did not err in finding the aggravating factor under s 21A(2)(k) established. Although it was an element of the offence under s 176A *Crimes Act 1900* (rep) that the offender be a director of a company, "not all company directors accept other peoples' money for the purpose of investment", which was the essence of the position of trust abused in that case: [21].

See also **Section 21A(2)(k) — abuse of a position of trust or authority** at **[11-160]**.

Vulnerability of victims as a class under s 21A(2)(l)

Section 21A(2)(l) of the *Crimes (Sentencing Procedure) Act 1999* is relevant where a victim is vulnerable, for example, very young, very old, has a disability, or is so by virtue of occupation (such as taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

The aggravating feature is concerned with the vulnerability of a particular class of victim and is not directed to vulnerability in a general sense: *R v Tadrosse* (2005) 65 NSWLR 740. In *Tadrosse*, it was impossible to know whether s 21A(2)(l) should apply to all, or only some of the offences, and if so, which ones. The court concluded there was no evidence any of the victims fell within the categories under s 21A(2)(l): *Tadrosse* at [24].

See also **Section 21A(2)(l) — the victim was vulnerable** at **[11-170]**.

Multiple victims or a series of criminal acts under s 21A(2)(m)

The aggravating factor in s 21A(2)(m) *Crimes (Sentencing Procedure) Act 1999* is concerned with the situation where a single offence contains multiple criminal acts or victims. For example, in *Johnston v R* [2017] NSWCCA 53, when considering the question of manifest excess it was relevant that the plea was to a "rolled up count" involving 156 fraudulent transactions, meaning the criminality involved was greater than a charge involving only one episode of criminal conduct: at [68]–[70].

However, s 21A(2)(m) is not concerned with offenders who are being sentenced for a series of offences, separately charged, even when committed against multiple victims because that would constitute "double counting": *R v Tadrosse* (2005) 65 NSWLR 740 at [28]–[29]; *R v Kilpatrick* [2005] NSWCCA 351; *Clinton v R* [2018] NSWCCA 66 at [27]–[29]. Such factors can be taken into account as a circumstance of the offending: *Clinton v R* at [37]–[39]. In *Clinton*, while the agreed facts revealed uncharged criminal acts were involved in the commission of each fraud offence, s 21A(2)(m) did not apply because the acts were not particularised in the offences: [38]–[40].

See also **Section 21A(2)(m) — the offence involved multiple victims or a series of criminal acts** at **[11-180]**.

Part of a planned or organised criminal activity under s 21A(2)(n)

An offence involving systematic dishonesty accompanied by planning, sophistication and repetition will constitute an aggravating factor under s 21A(2)(n) on sentence: *R v Pont* [2000] NSWCCA 419 at [43]–[44]. Impulsive offences have been distinguished from those with sophisticated planning: *R v Pont* at [43]–[44]; *R v Murtaza* [2001] NSWCCA 336 at [15].

The aggravating factor was established in *Yow v R* [2010] NSWCCA 251 as the nine offences of making and using a false instrument were committed in the context of an organised criminal syndicate where the applicant arrived in Australia with the sole purpose of using counterfeit credit cards to obtain goods to on-sell: at [13]–[14].

See also **Section 21A(2)(n) — the offence was part of a planned or organised criminal activity** at **[11-190]**.

Offence committed for financial gain under 21A(2)(o)

Committing a fraud for financial gain, will sometimes constitute an aggravating factor on sentence, but care must be taken to ensure there is no "double counting". In *Whyte v R* [2019] NSWCCA 218, the judge erred by taking into account financial gain under s 21A(2)(o), when financial gain was an element of the offences of obtaining financial advantage by deception under ss 178BA (rep) and 192E and the financial gain was not present to an unusual extent: *Whyte v R* at [30]–[34]. See also *Clinton v R* [2018] NSWCCA 66 at [10], [12], [20]–[22].

Financial gain is not an inherent characteristic of identity fraud and may constitute an aggravating factor in some cases: *Lee v R* [2019] NSWCCA 15 at [83]; see also **[20-037] Identity crime offences — ss 192J–192L *Crimes Act 1900***.

[20-000] Mitigating factors

Last reviewed: March 2024

Mental condition

This sentencing factor is discussed in more depth and with reference to High Court decisions in **Mental health or cognitive impairment** at **[10-460]**. Generally, see *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *R v Donald* [2013] NSWCCA 238 at [75].

In cases of fraud, care must be taken where an offender has claimed a mental condition and the offence has involved deception over a long period of time. The court must take particular care in determining whether there is a causal connection between the offender's mental condition and the commission of the offence(s). See for example:

- *R v Hinchliffe* [2013] NSWCCA 327, where there was no causal connection between the offences and the respondent's bipolar disorder: [246].
- *De Angelis v R* [2015] NSWCCA 197, where the narcissistic personality disorder was neither causally connected to the offending nor of sufficient severity to warrant significant amelioration of sentence: [62].
- *Hartman v R* [2011] NSWCCA 261, where a nexus was established between the offences and the applicant's psychiatric condition: [80].
- *R v Donald* [2013] NSWCCA 238, where the respondent's moral culpability was moderately reduced, however there remained a significant role for general deterrence: [76].
- *R v Joffe* [2015] NSWSC 741, where the respondent's mental condition reduced moral culpability and the need for denunciation: [121].
- *Subramaniam v R* [2013] NSWCCA 159, where the applicant's personality disorder was a complex issue, and a causal relationship lay between her condition and the offending as far as her compromised intellectual and emotional restraints, such that the applicant's moral culpability was moderately reduced: [58].

Absence of criminal record under s 21A(3)(e) and prior good character under s 21A(3)(f)

Prior good character is a mitigating factor to be taken into account under s 21A(3)(e) and (f). However, in the case of fraud, where the offender has been appointed to a

position of trust because of their good character, and it is abused, general deterrence will become a major consideration and good character will be of less relevance: *R v Gentz* [1999] NSWCCA 285 at [12].

Where there are repeated offences over a period of time, or the offender has engaged in a course of conduct to avoid detection, prior good character will carry less weight: *R v Smith* [2000] NSWCCA 140 at [20]–[24]; *R v Phelan* (1993) 66 A Crim R 446; *R v Houghton* [2000] NSWCCA 62 at [18].

An offender's lack of a previous criminal record will not be accorded the significance it might have had where a large number of offences were committed over a long period of time: *R v Chan* [2000] NSWCCA 345 at [20] (a two-judge bench decision).

See also **Section 21A(3)(e) — the offender does not have any record (or any significant record) of previous convictions** at **[11-250]**.

Remorse demonstrated by making reparation of loss under s 21A(3)(i)

Section 21A(3)(i) *Crimes (Sentencing Procedure) Act 1999* provides that remorse demonstrated by making reparation for loss is a mitigating factor. Remorse will only be relevant as a mitigating factor where the offender has provided evidence that he or she has accepted responsibility for their actions, and has acknowledged any injury, loss or damage caused by their actions or made reparation for such injury, loss or damage (or both).

See also **Section 21A(3)(i) — remorse shown by the offender** at **[11-290]**.

Restitution can be a mitigating factor where it involves a degree of sacrifice. It can also indicate a degree of remorse where it occurs, after the offender becomes aware of the full consequences of their criminality: *R v Phelan* (1993) 66 A Crim R 446; *R v Giallussi* [1999] NSWCCA 56 and *R v Strano* [2002] NSWCCA 531 at [76]. See also *Subramaniam v R* [2013] NSWCCA 159 at [53]–[54].

In *R v Woodman* [2001] NSWCCA 310 (a two-judge bench decision) Wood CJ at CL said at [32]:

> The offer by the applicant to make reparation was of limited value to him, particularly in the absence of any earlier attempt to do so. It is not the case that an offender found guilty of fraud offences can purchase mitigation by way of a voluntary repayment. While the degree of sacrifice involved can be taken into account it cannot be overlooked that an order for compensation … does no more than require the return of illgotten gains to which the offender had no entitlement.

In *Upadhyaya v R* [2017] NSWCCA 162, the judge did not err by not taking the compensation direction under s 97(1) *Victims Rights and Support Act 2013* into account as a mitigating factor: [68]. Under the common law, confiscation orders and the like could only be taken into account in mitigation in exceptional circumstances, and even then, not when the order was to forfeit the proceeds, or was in the nature of a pecuniary order reflecting the benefit derived from committing the offence: *Upadhyaya v R* at [64]; *R v Brough* [1995] 1 NZLR 419; *R v Kalache* [2000] NSWCCA 2 at [76]. A direction under s 97(1) is in the nature of a claw-back or disgorgement of an offender's "ill-gotten gains", and therefore by definition does not operate in mitigation of sentence: *Upadhyaya v R* at [65]–[66].

Guilty plea under s 21A(3)(k)

The statutory framework which provides the mandatory discounts for guilty pleas to offences dealt with on indictment is contained in Pt 3, Div 1A *Crimes (Sentencing Procedure) Act 1999*. See **[11-515] Guilty plea discounts for offences dealt with on indictment**. For fraud offences dealt with summarily to which the common law still applies, see **[11-520] Guilty plea discounts for offences dealt with summarily and exceptions to Pt 3 Div 1A**.

The length and complexity of a prospective fraud trial is a matter relevant to the utilitarian discount for a plea of guilty: *R v Todorovic* [2008] NSWCCA 49 at [24].

See also **Guilty pleas** at **[11-500]**. Note that the position in relation to Commonwealth offences is different: see **[16-010] General sentencing principles applicable at plea of guilty: s 16A(2)(g)**.

Delay

Delay in having the matter finalised leaves the offender in a position of uncertainty and can be taken into account: *R v Houlton* [2000] NSWCCA 183 at [23], [41]–[42]. It is not every case where delay has occurred in the prosecution of an offender that a reduced sentence results, since each case depends upon its own particular circumstances: *Coles v R* [2016] NSWCCA 32 at [20]. Delay is not uncommon in complex fraud cases because of the difficulty in detection, investigation and proof. Consequently, delay will have less significance where the offender has engaged in complex fraud and made conscious and deliberate attempts to avoid detection: *R v Houlton*; *Miller v R* [2014] NSWCCA 34 at [183]–[186]; see also *R v Zerafa* [2013] NSWCCA 222 at [88]–[89]; *Giourtalis v R* [2013] NSWCCA 216 at [1791]–[1793]; *R v Donald* [2013] NSWCCA 238 at [41]–[57] in the context of Commonwealth fraud.

Where delay is taken into account, it is preferable that is done so in the overall assessment of sentence rather than as a quantified reduction on the sentence imposed: *R v Boughen* [2012] NSWCCA 17 at [105].

See also **Subjective matters at common law** at **[10-530]**.

Hardship to third parties

See **[10-490] Hardship to family/dependants**.

[20-010] The relevance of a gambling addiction

Last reviewed: March 2024

It is common for fraud offenders to suffer from a gambling addiction: *R v Todorovic* [2008] NSWCCA 49 at [12]–[13], [62].

The Court in *Johnston v R* [2017] NSWCCA 53 extensively reviewed the authorities on relevance of a gambling addiction. It has been consistently held that the fact offences were committed to feed a gambling addiction will not generally be a mitigating factor at sentence: *Johnston v R* at [36]; *R v Molesworth* [1999] NSWCCA 43 at [24], [30]; *Le v R* [2006] NSWCCA 136 at [32]; *Assi v R* [2006] NSWCCA 257 at [27]; *R v Huang* [2007] NSWCCA 259 at [42]; *R v Todorovic* at [62]; *Marks v R* [2009] NSWCCA 24 at [29]. Even when the gambling addiction is pathological, it will rarely mitigate penalty: *Johnston v R* at [36] citing *Assi v R* at [27].

A gambling addiction will not generally reduce the offender's moral culpability where the offence is committed over an extended period, because the offender has had a degree of choice as to how to finance their addiction: *Johnston v R* at [38].

A gambling addiction will not often be connected to the commission of the offence but merely provide a motive or explanation for its commission and is therefore only indirectly responsible for the offending conduct: *Johnston v R* at [38] quoting the Victorian Court of Appeal decision of *R v Grossi* (2008) 183 A Crim R 15 at [56]–[57].

In cases where general deterrence is important, it is inappropriate to treat an underlying explanation that the motive was gambling as a mitigating circumstance or factor reducing moral culpability, particularly where the frauds are perpetrated and skilfully executed over an extended period: *Johnston v R* at [38]. A gambling addiction may explain why an offender has committed an offence(s) but it has been treated by the courts similarly to a drug addiction.

In the guideline judgment of *R v Henry* (1999) 46 NSWLR 346 at [203], Spigelman CJ expressly rejected the proposition that an addiction to gambling is a matter in mitigation. Spigelman CJ and Wood CJ at CL stated that addiction (including in relation to drugs or gambling) is not of itself a mitigating circumstance: *Johnston v R* at [40] citing *R v Henry* at [178]–[203], [273].

The remarks of Wood CJ at CL in *R v Henry* at [273], concerning the commission of robbery offences to feed a drug addiction apply equally to fraud offences committed to feed a gambling addiction: *Johnston v R* at [40]–[41]. (These remarks of *R v Henry* at [273] are extracted in **Drug addiction** at **[10-485]**.) A gambling addiction may be an important consideration in the assessment of the offender's prospects of rehabilitation and likelihood of re-offending: *Luong v R* [2014] NSWCCA 129 at [23], [24]; *Hartman v R* [2011] NSWCCA 261 at [52].

[20-020] Totality

Last reviewed: March 2024

The majority of fraud cases involve multiple offences and consequently most sentences imposed will be aggregate sentences under s 53A *Crimes (Sentencing procedure) Act 1999*: see **Aggregate sentences** at **[7-505]**ff.

The totality principle is to be applied, and in the case of imprisonment, this may involve fixing an appropriate sentence for each offence and then considering matters of accumulation or concurrency: *Pearce v The Queen* (1998) 194 CLR 610 at [45]. This task requires consideration of the fact the offender is being sentenced for multiple offences and to ensure the ultimate sentence imposed is appropriate to the totality of the applicant's offending and their personal circumstances: *Stratford v R* [2007] NSWCCA 279 at [29]. See also *R v Chan* [2000] NSWCCA 345 at [26].

However, the application of the totality principle must not result in a "blanket assessment" of each offence. In *Subramaniam v R* [2013] NSWCCA 159, the judge erred by imposing indicative sentences of two years, one month for each of the 23 fraud offences and three money laundering offences. This was notwithstanding significant variations in the amounts of money the subject of the deceptions in each offence and the fact the fraud offences carried a maximum penalty of 5 years while money laundering offences carried a maximum of 15 years: [29]. The sentencing judge in *Suleman v R*

[2009] NSWCCA 70 fell into similar error by treating all 14 counts of s 178BB as possessing the same level of criminality regardless of the amount invested or lost: at [38].

See further **Concurrent and Consecutive Sentences** at **[8-200]**–**[8-230]** and *R v Tadrosse* (2005) 65 NSWLR 740; *R v Finnie* [2002] NSWCCA 533.

[20-035] Fraud offences — ss 192E–192H Crimes Act 1900

Last reviewed: March 2024

Sections 192B, 192C and 192D are definition provisions, and appear in Div 1 of Pt 4AA. The offence provisions appear in Div 2 of Pt 4AA.

Section 192E provides a person who, by any deception, dishonestly obtains property belonging to another or obtains any financial advantage or causes any financial disadvantage, commits the offence of fraud. While actual dishonesty, not reckless dishonesty, is required, a deception may operate either by recklessness or intent, and the two concepts must not be confused: *Bazouni v R* [2021] NSWCCA 256 at [87] and [90]; see also *Selkirk v DPP* [2020] NSWSC 1590 at [57]. The deception need not operate on the mind of a natural person, and may be proved by inference circumstantially, without calling evidence from a witness as to the deception: *R v SKL; R v JY; R v XGL* [2019] NSWCCA 43.

The maximum penalty is 10 years imprisonment. (This represents an increase from some of the repealed offences, for example, the 5-year maximum penalty which was applicable to obtaining money by deception under s 178BA (rep).)

It should be borne in mind that, for s 192E offences, they can be constituted by defalcations in the millions of dollars: *Matthews v R* [2014] NSWCCA 185 at [21]. In that case, despite unsophisticated deceptions amounting to just over $1,200, there was a need for deterrence in credit card fraud cases which required the imposition of a custodial sentence: at [21]. The offender received two years, three months imprisonment, with a non-parole period of one year, three months.

The disparity in amounts involved in s 192E offences may be demonstrated by contrasting *Matthews v R* with *Zhao v R* [2016] NSWCCA 179, where a single count of s 192E related to a fraudulent benefit of US$730,773.39, with a fraud offence involving an additional US$190,224.28 taken into account on a Form 1: *Zhao v R* at [10]. The offender in *Zhao* received a sentence of three years imprisonment with a non-parole period of one year, eight months.

In *Whiley v R* [2014] NSWCCA 164, the court held that a starting point of 4 years for each of two offences against s 192E represented a far greater proportion of the 10-year maximum penalty than justified given the objective circumstances of the offences: at [40]. In each offence, the applicant had purchased a vehicle using a fraudulent cheque and a false name, but returned the vehicles shortly after, undamaged with the keys and a note apologising to each victim: at [39].

In *Clinton v R* [2018] NSWCCA 66 uncharged criminal acts were relevant to the determination of the objective seriousness of the applicant's offending and his moral culpability, but they could not also be taken into account as an aggravating factor under s 21A(2)(m): [38]–[40]; see also **Multiple victims or a series of criminal acts under**

s 21A(2)(m) above at **[19-990]**. Likewise, financial gain is an inherent characteristic of s 192E(1)(b) offences and cannot be taken into account as an aggravating feature under s 21A(2)(o) unless there is something unusual about this aspect of the offending: *Clinton v R* at [10], [12], [20]–[22]; see also *Whyte v R* [2019] NSWCCA 218 at [44], [67], [76]; see also **The offence was committed for financial gain under s 21A(2)(o)** above at **[19-990]** .

In *McLaren v R* [2021] NSWCCA 12 the offender was sentenced to an aggregate sentence of 12 years with a non-parole period of nine years for 17 offences against s 192E(1)(b) and one against s 193B(2) (deal with proceeds of crime) following his successful sentence appeal for operating a $7.6 million "Ponzi scheme" involving 15 victims. The court acknowledged this was a "grave example of fraud" because of the amount of money, planning, and the fact it was committed over an extended period of time with devastating consequences for the victims. The judgment helpfully reviews sentences for a number of similar cases at [83]–[96]. See also *Singh v R* [2020] NSWCCA 353 where the offender was sentenced to 6 years imprisonment with a non-parole period of 4 years for three offences against s 192E(1)(b), with three other s 192E(1)(b) offences taken into account on a Form 1. The offender, a 23-year-old assistant accountant, defrauded an advertising agency of $3,286,125 over a three-year period.

See also *Kapua v R* [2023] NSWCCA 14 and *Whyte v R* [2019] NSWCCA 218.

Section 192G makes it an offence to dishonestly make or publish, or concur in making or publishing, any statement that is misleading in a material particular intending to obtain property belonging to another or obtain a financial advantage or cause a financial disadvantage. The maximum penalty is five years imprisonment, the same maximum applicable to the predecessor offence under s 178BB.

For an example of a sentencing decision on s 192G, see *Edelbi v R* [2021] NSWCCA 122.

There are also fraud offences relating to the destruction of accounting records (s 192F) and concerning fraudulent offending by officers of an organisation (s 192H) which carry maximum penalties of imprisonment of 5 years and 7 years respectively.

Equivalent offences under previous statutory scheme

Directors etc cheating or defrauding — s 176A Crimes Act 1900 (repealed)

"Defraud" has been taken to require a loss to the victim of something of value. The loss may be intangible, but must at best involve prejudice to the victim's "proprietary rights": *Baldini v R* [2007] NSWCCA 327 at [42]–[46]; *Bikhit v R* [2007] NSWCCA 202 at [49].

In *Stratford v R* [2007] NSWCCA 279 at [43] the Court set out a number of decisions regarding s 176A or a similar offence.

Fraudulently misappropriate money collected/received — s 178A Crimes Act 1900 (repealed)

Decisions regarding an offence under s 178A include: In *R v Higgins* [2006] NSWCCA 38, which involved 15 counts and misappropriation of $1.7 million from a significant number of victims, and *Assi v R* [2006] NSWCCA 257.

Obtain money or valuable thing by deception — s 178BA Crimes Act 1900 (repealed)

The courts have made a number of important observations concerning credit card fraud under the previous form of the offence.

For example, in *Yow v R* [2010] NSWCCA 251 at [30], Fullerton J (Hodgson JA and Price J agreeing) made the following remarks:

> The cost to the community of syndicated credit card fraud is not only that it undermines consumer confidence. The losses generated by frauds of this magnitude are invariably passed on to the consumer ... The general public who increasingly use credit cards as a convenient substitute for cash on a daily basis, and the financial institutions that offer and provide a secure range of credit card facilities to both traders and consumers, are entitled to expect that the perpetrators of fraudulent schemes of the kind with which the applicant was involved are appropriately punished ...

See also *Cranshaw v R* [2009] NSWCCA 80.

[20-037] Identity crime offences — ss 192J–192L Crimes Act 1900

Last reviewed: March 2024

Part 4AB contains a series of identity fraud offences to address the theft and misuse of personal identification information.

It is an offence to either deal in (s 192J), or possess (s 192K), identification information intending to commit or facilitate the commission of an indictable offence. The maximum penalty for the s 192J offence is 10 years imprisonment, and 7 years imprisonment for the s 192K offence. The terms "deal" and "identification information" are defined in s 192I. A person who possesses equipment, material or a thing which is capable of making identification documents, intending to use it to commit an offence, commits an offence contrary to s 192L. The maximum penalty is 3 years imprisonment.

Identity crimes have an aggravated effect on victims and the community generally, compared with other forms of obtaining benefit by deception, so the application of sentencing practices for repealed offences (s 178BA) should be approached with care: *Stevens v R* [2009] NSWCCA 260 at [2]. The "ease with which identity crimes can be committed has expanded well beyond the traditional means of stealing mail or eavesdropping to obtain personal data" and the "significance of general deterrence in the exercise of the sentencing discretion will remain a matter to which particular weight must be given": *Stevens v R* at [6]–[7], applied in *Krol v R* [2011] NSWCCA 175 at [81] and *Lee v R* [2019] NSWCCA 15 at [83].

The need for both personal and general deterrence, and the imposition of severe punishment, in cases of identity fraud was reiterated by the Court of Criminal Appeal in *Thangavelautham v R* [2016] NSWCCA 141 at [37], [104]–[105]. Such offences "not only have the potential to cause serious financial hardship and embarrassment to a large number of consumers but also have the capacity to undermine confidence in the country's financial system": *Thangavelautham v R* at [86].

For examples of sentencing decisions for such offences, see *Chen v R* [2015] NSWCCA 277, *Islam v R* [2020] NSWCCA 236 and *Lou v R* [2021] NSWCCA 120.

The fact an offender commits an offence of dealing with identification information contrary to s 192J for financial gain can be taken into account as an aggravating factor pursuant to s 21A(2)(o) of the *Crimes (Sentencing Procedure) Act 1999*. Financial gain is not an inherent characteristic of the offence. It is not uncommon for false identity documents to be created for purposes unrelated to financial gain: *Lee v R* [2019] NSWCCA 15 at [55]–[56], [61], [63].

[20-038] Forgery offences — ss 253–256 Crimes Act 1900

Last reviewed: March 2024

It is an offence for a person to make (s 253) or knowingly use (s 254) a false document intending it to be used to induce some person to accept it as genuine and, because of that acceptance, to obtain another person's property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty. The maximum penalty for offences against ss 253 and 254 is 10 years imprisonment. An offence is committed if a person possesses a false document knowing it is false, with the intention to induce another to accept it as genuine, and in so doing to obtain property, a financial advantage, or to influence exercise of a public duty: s 255. An offence is committed if a person possesses equipment, material or a thing, designed to make a false document, knowing it so designed and intending it will be used to commit forgery: s 256(1). The maximum penalty for offences against s 255 or s 256(1) is 10 years imprisonment.

For an example of a sentencing decision for such an offence, see *R v Grover* [2013] NSWCCA 149.

Equivalent offence under previous statutory scheme

Make or use false instrument — s 300 Crimes Act 1900 (repealed)

In *O'Keefe v R* (1992) 60 A Crim R 201 at 204, a case involving nine charges under s 300(1) (rep) and nine under s 300(2) (rep), Lee AJ (Gleeson CJ and Priestly JA agreeing), said:

> It is of the utmost importance that employers carrying on business and entrusting members of their staff with control of money as must be done, should be entitled to maximum honesty in that activity and the courts play an important role and must play an important role in imposing sentences in cases of this nature which are often called white collar crimes — which will operate effectively as a deterrent to others.

In *R v Tadrosse* (2005) 65 NSWLR 740, the offender was convicted of multiple counts under ss 300, 302, 178B and 178BA where more than $200,000 was defrauded using false documents and he was sentenced to 6 years imprisonment with a non-parole period of 3 years 6 months.

[20-039] Larceny by clerk or servant — s 156 Crimes Act 1900

Last reviewed: March 2024

Section 156 *Crimes Act 1900* provides:

> Whosoever, being a clerk, or servant, steals any property belonging to, or in the possession, or power of, his or her master, or employer, or any property into or for which it has been converted, or exchanged, shall be liable to imprisonment for ten years.

For examples of sentencing decisions for such offences, see *Itaoui v R* [2005] NSWCCA 415 and *R v Swadling* [2004] NSWCCA 421.

[20-045] The Commonwealth statutory framework

Last reviewed: March 2024

The Criminal Code (Cth) contains offences of fraudulent conduct (Pt 7.3), false or misleading statements (Pt 7.4) and forgery (Pt 7.7). The general fraud provision in s 134.2(1) Criminal Code covers a wide range of criminal conduct including tax evasion, Medicare and social security fraud as well as Commonwealth employees fraudulently diverting payments. There are additional federal fraud offences and fraud-related offences in other legislation, including the *Corporations Act 2001* (Cth), the *Customs Act 1901* (Cth), and the *Crimes (Currency) Act 1981* (Cth). The more common federal fraud offences are dealt with in more detail in **Types of Commonwealth fraud** at **[20-065]** below.

The *Crimes Act 1914* (Cth) contains matters of general application to federal offences including summary/indictable disposal, time limits, powers of arrest, search and seizure and sentencing. Generally, Commonwealth fraud offences are indictable but many offences may be dealt with summarily in accordance with s 4J of the *Crimes Act 1914*. Section 4J(4) also provides for the summary disposal of offences relating to property valued at $5,000 or less, upon the request of the prosecutor.

A federal offender must be sentenced in accordance with Part IB *Crimes Act 1914* (Cth). In particular, a court must impose a sentence of a severity appropriate in all the circumstances taking into account any "relevant and known" matters listed in s 16A(2): see **General sentencing principles applicable: s 16A** at **[16-010]**. There are also specific provisions in the *Crimes Act* in relation to the imposition of sentences of imprisonment, including that imprisonment is a sentence of last resort and is only available in "exceptional circumstances" for certain minor property offences: see **Sentences of Imprisonment** at **[16-040]**.

For commentary on Commonwealth sentencing generally, see **[16-000] Crimes Act 1914 (Cth) — sentencing Commonwealth offenders**.

Common law principles also apply to the sentencing of federal offenders: *Aboud v R* [2021] NSWCCA 77 at [87]. For example, even though there is no specific reference to delay in the factors listed in s 16(A)(2), it remains a relevant sentencing consideration: *Aboud v R* at [92].

[20-050] Relevance of NSW fraud principles and comparative cases for federal matters

Last reviewed: March 2024

While specific sentencing principles have been developed in respect of Commonwealth fraud offences, many of the principles that apply to State fraud offences also apply: see *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [297]; *Scook v R* [2008] WASCA 114 at [16]. For example, the scale and complexity of the offence, the level of sophistication and planning involved, the way in which and time over which the fraud was pursued and implemented, the offender's role and any detailed knowledge of the relevant

system defrauded, general deterrence, the possibility of detection and the amount defrauded are relevant to sentencing for Commonwealth fraud: *Dickson v R* [2016] NSWCCA 105 at [166]–[167]. See also **[19-940] General sentencing principles for NSW fraud offences** and **[19-970] Objective seriousness — factors of common application to fraud**.

Reference can also be made, in some circumstances, to State comparative cases where the same maximum penalty applies and there is similar criminal conduct: *Nakash v R* [2017] NSWCCA 196 at [18]; *R v Cheung* [2010] NSWCCA 244 at [129]–[131].

Care should be taken when sentencing for a mixture of Commonwealth and State fraud offences. Aggregate sentences are available for sentences of more than one Commonwealth offence, applying *Crimes (Sentencing Procedure) Act 1999*, s 53A: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [146], [210]. However, a single aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26]; *Burbridge v R* [2016] NSWCCA 128 at [12]–[16]; *DPP (Vic) v Swingler* [2017] VSCA 305 at [78]–[86]; *Crimes Act* (Cth), s 19AJ. See also **Fixing non-parole periods and making recognizance release orders** at **[16-050]**.

[20-055] Statutory factors under s 16A(2) Crimes Act 1914 (Cth)

Last reviewed: March 2024

Section 16A *Crimes Act 1914* (Cth) contains a list of diverse sentencing factors that must be taken into account where "relevant and known": see **General sentencing principles applicable: s 16A** at **[16-010]**. Care must be taken to ensure that sentencing principles developed in respect of s 16A do not fetter the sentencing court's discretion: *Totaan v R* [2022] NSWCCA 75 at [98] (five-judge bench decision). Section 16A is to be applied according to its terms and unwarranted judicial glosses should not be placed on the simple language of the section: *Totaan v R* at [78], [82]. Principles elucidated in the earlier judgments and discussed in this section, need to be understood in light of *Totaan v R*. See **General deterrence and the inevitability of imprisonment** at **[19-940] General sentencing principles for NSW fraud offences**, and below at **General deterrence — s 16A(2)(ja)**.

The s 16A(2) sentencing factors that have been extensively considered in the context of federal fraud prosecutions include general deterrence (s 16A(2)(ja)) and prior good character (s 16A(2)(m)). Also, it is common for charges to be "rolled up" when an offender pleads guilty to fraud. For example, in *R v Donald* [2013] NSWCCA 238, 30 separate transactions were rolled into one offence of dishonestly using a position to gain advantage contrary to s 184(2) of *Corporations Act 2001* and the judge was obliged to consider "the series of criminal acts of the same or a similar character" under s 16A(2)(c) in determining an sentence appropriate in all the circumstances. See also **Offence consists of a series of criminal acts of the same or a similar character: s 16A(2)(c)** at **[16-010]**.

General deterrence — s 16A(2)(ja)

General deterrence may be a significant sentencing consideration in serious Commonwealth frauds. Such frauds may not be easy to detect and may produce great

rewards. General deterrence may also be more effective in the case of white-collar criminals: *R v Boughen* [2012] NSWCCA 17 at [59]–[91], [96]–[98]; *Aitchison v The Queen* [2015] VSCA 348 at [66]; *DPP (Cth) v Gregory* (2011) 34 VR 1 at [15]; *Milne v R* [2012] NSWCCA 24 at [296]–[297]; *Keefe v R* [2014] VSCA 201 at [77]; and *Zaky v R* [2015] NSWCCA 161 at [49].

However, care must be taken not to give general deterrence pre-eminent or primary significance over and above other sentencing factors, s 16A does not fetter discretion and establish a hierarchy of sentencing considerations, and the need for general deterrence in any given case must always be assessed by reference to the personal circumstances of the offending and which may have operated on the offender: *Totaan v R* at [98]–[100], [130]. See also *Kovacevic v Mills* (2000) 76 SASR 404 at [43]; *R v Newton* [2010] QCA 101 at [7]–[8], [29], [38]; and **[19-940] General sentencing principles for NSW fraud offences**.

Despite the recognised significance of general deterrence, white collar crime has traditionally been treated more leniently than other forms of criminality: *DPP (Cth) v Gregory* [2011] VSCA 145 at [53]–[56]; *R v Nguyen* [1997] 1 VR 386 at 389–390. There is a tendency to place a disproportionate emphasis on a dollar value concept of the loss and effect on the personal circumstances of the offender and their family, sometimes resulting in a lack of deterrence and proportionality: *DPP (Cth) v Gregory* at [55].

Character, antecedents, age, means and physical or mental condition of the person — s 16A(2)(m)

For white collar offences, such as those against the *Corporations Act 2001* (Cth), less weight is attached to prior good character where it facilitates the offender committing the offence: *R v Rivkin* (2004) 59 NSWLR 284 at [410]; *R v Boughen* [2012] NSWCCA 17 at [73]; *Merhi v R* [2019] NSWCCA 322 at [52]–[53]; *Elomar v R* [2018] NSWCCA 224.

While the presumed anxiety or distress of standing twice for sentence cannot be read into s 16A(1), actual mental distress can be taken into account under s 16A(2)(m): *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638 at [20]–[23]. See also **Character, antecedents, age, means and physical or mental condition: s 16A(2)(m)** in **[16-010] General sentencing principles applicable**.

[20-060] General sentencing principles for federal offending

Last reviewed: March 2024

General common law principles that have developed in respect of federal fraud regarding breach of trust and delay are set out below. In addition, many of the NSW fraud principles may also be applicable: see *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [297]; *Scook v R* [2008] WASCA 114 at [16]; see **[19-940] General sentencing principles for NSW fraud offences** and **[19-970] Objective seriousness — factors of common application to fraud**. Reference can also be made, in some circumstances, to State comparative cases where the same maximum penalty applies and there is similar criminal conduct: *Nakash v R* [2017] NSWCCA 196 at [18]; *R (Cth) v Cheung* [2010] NSWCCA 244 at [129]–[131].

Breach of trust

There is no principle or precedent which limits a finding of a breach of trust to offences which happen during the period when the offender is employed. Not only current employees but also former employees should be trusted with the knowledge and confidential information they gain through their employment: *Merhi v R* [2019] NSWCCA 322 at [32], [39]; *R v Standen* [2011] NSWSC 1422; *Suleman v R* [2009] NSWCCA 70. In *Merhi v R*, a tobacco revenue fraud case, the judge found the fact the offender was using information and knowledge she had obtained while previously employed by the Australian Border Force aggravated the offence: at [33], [38]–[39].

In *Ridley v R* [2008] NSWCCA 324, the offender committed a number of Commonwealth dishonesty offences by falsely claiming goods and services tax refunds in activity statements submitted to the Australian Taxation Office. Allsop P noted the self-assessment system relies on "the honesty of individual taxpayers" and said the primary judge's finding that the offence involved a breach of trust and fraud on all members of the community who pay their taxes was an entirely legitimate consideration. The Tax Commissioner's reliance on information the taxpayer has provided, and that the taxpayer has made a reasonable and honest attempt to meet their obligations, is in terms a kind of trust. Members of the community rely on each other for honesty for the operation of the tax system: at [83]–[85].

Breach of trust is not made out simply because the victim trusted the offender for some reason or other, for example because of the offender's standing in the community or because they appeared to be a successful businessman. Nor is it made out because the offender dealt with "commercially naïve people". There must be, at the time of the offending, a particular relationship between the offender and the victim that transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings. It is not enough that the two persons are involved in a commercial relationship: *Suleman v R* at [22], [25] (a NSW fraud case). See also **Breach of trust under s 21A(2)(k)** at **[19-990] Aggravating factors** above.

Delay

While delay is not a specific s 16A(2) factor, it may be taken into account in mitigation on sentence in some circumstances: see also **Delay** at **[10-530]**; also **List of factors under s 16A(2) is not exhaustive** in **[16-010]**.

In cases involving complex financial transactions, the difficulty of detection and proof must be taken into account when considering delay: *R v Zerafa* [2013] NSWCCA 222 at [89]–[92]; *R v Kearns* [2003] NSWCCA 367 at [68].

See also the discussion above in **General sentencing principles for NSW fraud offences** at **[19-940]** and **Fixing non-parole periods and making recognizance release orders** at **[16-050]**.

Relevance of civil penalties to sentence

Receiving criminal and civil penalties in separate proceedings does not amount to double jeopardy: *Adler v R* [2006] NSWCCA 158 at [52]–[54]. In *Adler v R* the offender's conduct was not a standalone offence under s 184(2) but rather a deliberate fraud causing a succession of other deliberately and intentionally fraudulent acts: at [87]. The severe criminal fraud warranted a sentence very much towards the top rather than the mid-point of the sentencing range: at [89].

[20-065] Types of Commonwealth fraud

Last reviewed: March 2024

Tax fraud

Protecting the Australian taxation system from loss by fraud is important to maintaining public confidence in the taxation system. Tax fraud offences which are not prosecuted by the Australian Taxation Office (ATO) are generally dealt with under s 134.1(1) Criminal Code (dishonestly obtaining Commonwealth property), s 134.2(1) (obtain financial advantage by deception) and s 135.4(3) (dishonestly cause a loss to the Commonwealth). While the ATO is the ostensible victim, serious tax fraud will inevitably have a flow on effect to the honest taxpayer: *R v Liddell* [2000] VSCA 37 at [74]; *Hili v The Queen* (2010) 242 CLR 520 at [63].

In *DPP (Cth) v Goldberg* [2001] VSCA 107 the Court discussed the nature of tax fraud at [32]:

> Tax evasion is not a game, or a victimless crime. It is a form of corruption and is, therefore, insidious ... Tax evasion is not simply a matter of failing to pay one's debt to the government. It is theft and tax evaders are thieves.

The Court also said at [51]:

> The maintenance and integrity of the revenue collection systems, upon which the administration of government and the provision of a wide range of necessary services to the community are dependent, is vitally important to the proper functioning of our society.

While many cases suggest serious tax fraud should ordinarily attract imprisonment unless there are exceptional circumstances, ss 16A(1) and 17A of the *Crimes Act 1914* are inconsistent with such statements and more recent case law: see *Sabbah v R (Cth)* [2020] NSWCCA 89 at [2]–[10]; *Kovacevic v Mills* (2000) 76 SASR 404 at [43]; *Totaan v R* [2022] NSWCCA 75 at [90]–[100] and *Hili v The Queen* (2010) 242 CLR 520 at [36]–[38], [41]; see also **General deterrence and the inevitability of imprisonment** at **[19-940] General sentencing principles for NSW fraud offences**.

Although general deterrence may be an important sentencing consideration in taxation offences, it should not be the primary or pre-eminent consideration: *Totaan v R*; see also above **[20-055]** at **General deterrence — s 16A(2)(ja)**.

Courts have observed that Commonwealth tax fraud has not always been sufficiently reflected in the sentence imposed, compared to other forms of criminality: *R v Nguyen* [1997] 1 VR 386 at 389–390; *DPP (Cth) v Gregory* [2011] VSCA 145 at [54]–[55]. The consequences of discovery and punishment and the havoc a custodial sentence usually wreaks on the lives of white-collar criminals and their families, may distract attention from the importance of general deterrence: *DPP (Vic) v Bulfin* [1998] 4 VR 114 at 131–132.

Persistent offending over a long period of time in disregard to warnings by the ATO and attempts to hamper ATO investigations will increase the gravity of the offence. For example, see *Noble v R* [2018] NSWCCA 253, and for comparable cases, *Hughes v R* [2011] NSWCCA 226; *Edwards v R* [2013] NSWCCA 54; *R v Hawkins* [2013] NSWCCA 208; and *Dickson v R* [2016] NSWCCA 105.

Social security fraud

Persons who abuse the system of social welfare must expect to face heavy penalties: *Zaky v R* [2015] NSWCCA 161 at [43]; *R v Winchester* (1992) 58 A Crim R 345; *R v White* [2001] NSWCCA 343 at [36]. Like other Commonwealth fraud, general deterrence and punishment are important considerations when sentencing for social security fraud offences: *Dagher v R* [2017] NSWCCA 258 at [31]; *Crimes Act 1914*, ss 16A(2)(ja), (k).

Although general deterrence may be an important sentencing consideration in social security fraud, it should not be the primary or pre-eminent consideration: *Totaan v R* [2022] NSWCCA 75 at [98]–[99]; see also **General deterrence and the inevitability of imprisonment** at **[19-940]** and **[20-055]** above at **General deterrence — s 16A(2)(ja)**.

The amount of money dishonestly obtained is also a relevant factor: *R v Hawkins* (1989) 45 A Crim R 430 at 435. The amount is indicative of the extent to which an offender is prepared to be dishonest for the purposes of advancing their own purposes. Offending that is isolated or spontaneous will, as a general proposition, be regarded as less serious than that which involves a repetitive course of conduct which continues over an extended period of time: *Tham v R* [2020] NSWCCA 338 at [50]–[51]; *R v De Leeuw* [2015] NSWCCA 183 at [116]. The use to which the dishonestly appropriated funds were put should also be taken into account. For example, whether it is because of a need or greed: *Dagher v R* [2017] NSWCCA 258 at [17]. Moreover, because offending of this nature is easy to commit but difficult to detect, the fact that such offending only ceased after detection will also be relevant, as will any breach of trust: *Tham v R* at [52], [54]; *R v Lopez* [1999] NSWCCA 245 at [17]–[18].

See also *R v White* [2001] NSWCCA 343.

Like other fraud, the period of time over which the offences were committed is relevant: *R v Hawkins* (1989) 45 A Crim R 430 at 435; *R v Delcaro* (1989) 41 A Crim R 33 at 38.

Disparity between sentences for tax fraud and social security fraud

A review of the case law on social security fraud (see *R v Boughen* [2012] NSWCCA 17 at [60]–[65]) suggests that statements of principle on fraud are applied less rigorously in tax cases so that tax offenders are treated more leniently than social security offenders: *R v Boughen* at [66], [91]. It has been observed that the frequency of Crown appeals in tax cases (including *DPP (Cth) v Goldberg* [2001] VSCA 107, *DPP (Cth) v Gregory* [2011] VSCA 145 and *R v Jones; R v Hili* [2010] NSWCCA 108) reflects that "sentencing judges find it difficult to impose sentences that reach the high level which they have, in theory, accepted as being appropriate": *R v Boughen* at [69]. Social security offenders are "almost universally less privileged, less prosperous, less educated, in possession of fewer resources, intellectual and otherwise" whereas tax offenders are often "middle aged men, intelligent, professionally successful, financially secure, prosperous": *R v Boughen* at [76], [96].

Corporate fraud

Section 184 of the *Corporations Act 2001* (Cth) provides the offences of director or other officer of a corporation failing to exercise power in good faith in the best interests of a corporation (s 184(1)); a director, officer or employee of a corporation recklessly

or dishonestly using their position with intent to gain an advantage (s 184(2)) and a person recklessly or intentionally dishonestly using information obtained because they are a director, officer or employee of a corporation with intent of gaining an advantage (s 184(3)). The maximum penalty is 15 years imprisonment and/or a fine of 4,500 penalty units for an individual. The *Corporations Act* also contains other forms of corporate fraud, including engaging in dishonest conduct in relation to providing financial services contrary to s 1041G(1).

For examples of sentencing decisions for such offences, see *Sigalla v R* [2021] NSWCCA 22, *R v Donald* [2013] NSWCCA 238, *R v Glynatsis* [2013] NSWCCA 131, *Nakhl v R (Cth)* [2020] NSWCCA 201, and *R v Silver* [2020] QCA 102.

There is an inherent leniency in suspended sentences and it has been repeatedly observed that the real bite of general deterrence takes hold only when a full-time custodial sentence is imposed: [84], [86]; *R v Boulden* [2006] NSWSC 1274 at [51].

In the *DPP (Cth) v Northcote* [2014] NSWCCA 26 the Court held an intensive correction order was manifestly inadequate and offensive to the administration of justice and a sentence of 3 years 6 months imprisonment was substituted: [117].

Currency fraud and offences against the financial system

Additional fraud offences in the context of currency, and the federal banking system, may be prosecuted under other specific Commonwealth enactments. In *Hayward v R (Cth)* [2021] NSWCCA 63, the offences included uttering and possessing counterfeit currency contrary to ss 7(1) and 9 of the *Crimes (Currency) Act 1981* (Cth) and presenting false identification documents to banks, and receiving banking services using a false name, contrary to ss 137(1) and 140 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth). Over 3 months, in various places across Australia, bank accounts were opened in false names with false passports to deposit counterfeit Euros and thereby obtain Australian currency. The counterfeit Euros totalled $306,162.57. Counterfeit money offences undermine community confidence in currency and its place in the banking system: *Hayward* at [63]; *R v Institoris* [2002] NSWCCA 8 at [38]. The quantity and quality of counterfeit notes uttered was a significant factor on sentence, as was the value of the proceeds derived from the uttering offences: at [66]; *R v Institoris* at [78]; *R v Gittani* [2002] NSWCCA 139 at [22]–[23]. For further commentary on **Money laundering** more broadly, see **[65-200]**.

General fraud

Last reviewed: August 2024

General fraud includes frauds against the Commonwealth benefit or assistance schemes such as Medicare fraud, child care benefit fraud, identity fraud and fraud-related money laundering. The majority of these frauds are prosecuted under s 134.2 of the Criminal Code (Cth) (obtain a financial advantage by deception), s 135.1 (general dishonesty offences) and s 135.4 (defraud the Commonwealth). Reference should be made to the sentencing principles set out in **[19-940] General sentencing principles for NSW fraud offences** and **[20-055] Statutory factors under s 16A(2) Crimes Act 1914** above.

Other useful references — Commonwealth DPP, *Sentencing of federal offenders in Australia: a guide for practitioners*, 7th edn, July 2024, accessed 22/7/2024.

[The next page is 9541]

Offences against justice/in public office

[20-120] Introduction

Part 7 *Crimes Act 1900* (NSW) is headed "Public justice offences". Division 2 deals broadly with interference in the administration of justice. Division 3 provides offences for interfering with participants in the criminal justice process. Division 4 provides offences for perjury and other false acts.

The seriousness with which the community regards offences against justice can be gauged from the Second Reading Speech for the Crimes (Public Justice) Amendment Bill (Legislative Assembly, *Hansard*, 17 May 1990) which inserted Pt 7 into the *Crimes Act*: *Marinellis v R* [2006] NSWCCA 307 at [10]; *Richards v R* [2006] NSWCCA 262 at [68].

The then Attorney-General, the Hon John Dowd MLA said at p 3691:

> Offences that damage the administration of justice strike at the very heart of our judicial system. It is fundamentally important that confidence is maintained in our system of justice, and to this end must be protected from attack. Those who interfere with the course of justice must be subject to severe penalties. Not only do offences concerning the administration of justice affect individuals, but the community as a whole has an interest in ensuring that justice is properly done.

Other offences involving the administration of justice are found in Pt III *Crimes Act 1914* (Cth), the *Jury Act 1977*, the *Independent Commission Against Corruption Act 1988* and the *Police Act 1990*. There are also a number of residual common law offences for bribery and contempt.

[20-130] Purposes of punishment — general deterrence and denunciation

Section 3A *Crimes (Sentencing Procedure) Act 1999* sets out the purposes for which a sentence may be imposed, including s 3A(b): "to prevent crime by deterring the offender and other persons from committing similar offences"; and s 3A(f) "to denounce the conduct of the offender".

The Court of Criminal Appeal has consistently held that offences against justice require strong deterrent sentences and must be severely punished whenever detected: *Marinellis v R* [2006] NSWCCA 307 at [10]; *R v Taouk* (1992) 65 A Crim R 387.

The purpose of an appropriate sentence for an offence such as perjury is not only to punish the offender, but to deter others and make plain that the commission of this type of offence will be visited with serious punishment: *R v Bulliman* (unrep, 25/2/93, NSWCCA); *R v Aristodemou* (unrep, 30/6/94, NSWCCA).

In *Harrigan v R* [2005] NSWCCA 449 at [47], the court endorsed the statement of McClellan J (as he then was) in the two-judge bench decision of *R v Giang* [2001] NSWCCA 276. In relation to an act intending to pervert the course of justice, McClellan J stated at [21]:

> In every case the court has been concerned to emphasise the need to impose a sentence which not only punishes the offender but will deter others from a similar course of action.

The court has also emphasised the importance of general deterrence in relation to bribery offences: *R v Pangallo* (1991) 56 A Crim R 441 at 443.

The court has also held that denunciation is to be given greater importance in sentencing for an offence against justice committed by those directly involved in the administration of justice: *R v Nguyen* [2004] NSWCCA 332 at [43].

[20-140] Offences against justice committed by public officials

Where an offence against justice is committed by a public official, the Court of Criminal Appeal has consistently held that the offender's position is generally a significant matter in aggravation. In *Retsos v R* [2006] NSWCCA 85 at [31], Sully J (with Howie and Simpson JJ agreeing) stated:

> Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly.

In *R v Nguyen* [2004] NSWCCA 332 at [38], Spigelman CJ (with Barr and Hoeben JJ agreeing) explained: "The fact that the offence of perverting the course of justice is committed by a person directly involved in the administration of justice is a relevant consideration, even if the conduct does not occur in the course of that person's official duty". See also *R v Chapman* (unrep, 21/5/98, NSWCCA).

Denunciation is to be given greater importance in sentencing for an offence of attempting to pervert the course of justice committed by someone involved in the justice system: *R v Nguyen* at [43].

Breaching a position of trust is a matter of aggravation: see generally **Objective factors at common law** at **[10-060]**.

Police officers

In *R v Nguyen* [2004] NSWCCA 332, Spigelman CJ at CL stated at [39]:

> There is authority in this Court to the effect that it is relevant that a person who commits an offence with respect to the administration of justice is a police officer.

Spigelman CJ quoted from *R v Chapman* (unrep, 21/5/98, NSWCCA), where Simpson J said:

> Those concerned in the administration of the law must be taken to appreciate the supreme importance of truthful evidence being given in judicial proceedings. The respondent did not cease being a police officer, or carrying out the duties and responsibilities, and having the privileges of that office, because these events arose out of recreational and not professional activities. He must be taken to have known, better than most, how important the curial procedure is, and with what respect it must be treated.

Earlier, in *R v Nomchong* (unrep, 10/4/97, NSWCCA), McInerney J (with Hunt CJ at CL and Sully J agreeing) stated:

> The crime of bribery by a police officer, therefore, must be severely punished whenever detected. The police are in constant contact with members of the public and the opportunity for bribery is always great. Those circumstances themselves mean that the element of general deterrence is always a matter that must be kept very much in the

> forefront of the mind of a sentencing judge when a police officer is charged with an offence such as this. It is important to deter other police officers who may be inclined to similar conduct.

See also *R v O'Mally* [2005] NSWCCA 166 at [15].

R v Nomchong involved a senior sergeant attempting to corrupt a junior officer under his supervision. McInerney J endorsed the trial judge's statement that:

> The inevitable consequence of the conviction of a police officer for the offence of attempting to pervert the course of justice would in most cases be a fulltime custodial sentence.

In *R v Hilder* (unrep, 13/5/93, NSWCCA) the police officer was convicted of "seriously corrupt conduct … in the performance of his duties". Wood J (as he then was) concluded: "That kind of conduct must attract a significant custodial sentence …" However, Wood J noted that "[i]t remains, of course, appropriate in any case involving a person holding public office to take into account the loss of reputation, and employment and also where appropriate, the loss of a pension or superannuation benefits".

The rank of the police officer, and the corruption of other officers, is relevant to the seriousness of the offence: *R v Irwin* [1999] NSWCCA 361 at [47]; *R v Nomchong*.

In the context of corruption offences, less weight can be given to evidence of good character as a police officer: *R v Chad* (unrep, 13/5/97, NSWCCA); see also *R v Farquhar* (unrep, 29/5/85, NSWCCA) in relation to judicial officers.

Solicitors

The fact that an offender who bribes or attempts to bribe a police officer is a solicitor is an aggravating feature, whether the bribe is large or small: *R v Pangallo* (1991) 56 A Crim R 441. In *Pangallo*, Lee CJ at CL explained at 443–444:

> The police are in constant contact with members of the legal profession, both barristers and solicitors, and the opportunities for bribery are great and those circumstances of themselves mean that the element of deterrence is always a matter which must be kept very much to the forefront of the mind of a sentencing judge when a solicitor appears before him on a charge such as the present one. Solicitors as part of the legal profession, are expected to conduct themselves towards their clients with honesty … and that high standard of honesty is also expected of them in their dealings with the police, the courts and indeed also with other public authorities.

Judicial officers

In a case of attempting to pervert the course of justice, a custodial sentence will be imposed where the offender is a judicial officer: *R v Farquhar* (unrep, 29/5/85, NSWCCA). The court stated at pp 30–31:

> Where, as here, the offence is committed by a person holding judicial office in the judicial hierarchy of the State the attempt to commit the offence strikes at the very core of the integrity of the administration of justice. Such a person is in a commanding position to attempt to pervert the course of justice and when he seeks to abuse his position to achieve that end, public confidence in the judicial system will be lost unless it is made clear that such conduct will bring a prison sentence.

The court made clear that since the public is entitled to expect a judicial officer will be of good character and integrity, previous good character or reputation of a judge

convicted of attempting to pervert the course of justice will be of far less weight than in a different type of offence: *R v Farquhar* at p 31. In *Einfeld v R* (2010) 200 A Crim R 1 at [81], Basten JA said:

> … it is beyond question that for a senior legal practitioner and former judge of a superior court to commit offences against the administration of justice is apt to give rise to public disquiet about the integrity of the judicial system. These were offences to which the present status of, and the offices formerly held by, the applicant were of great significance.

There is "a risk that judges will deal more harshly than some would think appropriate with those from within their own ranks": *Einfeld v R* at [82]. Notwithstanding that danger, it is accepted that an offender's status as a senior legal practitioner and former judge rendered perjury and perverting the course of justice more serious than they would otherwise have been: *Einfeld v R* at [82]. Basten JA also stated at [83] (Latham J agreeing at [196]; RS Hulme J agreeing at [195]) that the applicant's former positions removed:

> … an element of ignorance which might otherwise have diminished the degree of culpability. It was not merely a matter of knowing that it is a crime to lie on oath or seek to pervert the course of justice: it was a matter of understanding the significance accorded to such conduct by the law and the heightened seriousness of offences when committed by a person with the applicant's background and experience.

Politicians

In *R v Jackson and Hakim* (unrep, NSWSC, 2/9/87), the Minister for Corrective Services of NSW was sentenced to a term of sentence of 7 years 6 months, with a non-parole period of 3 years 9 months, for the common law offence of conspiracy. He had conspired to receive money corruptly in exchange for the early release of prisoners on administrative licence. Roden J stated:

> The true measure of his criminality, however, is not to be found solely in how much or little he gained, or in how much or how little society may have suffered through the early releases of prisoners he procured. Its true measure lies in the undermining of the institutions and the principles on which we depend.

A Crown appeal asserting that the sentence was manifestly inadequate was upheld (Lee J; with Finlay J agreeing, Street CJ dissenting): *R v Jackson and Hakim* (unrep, NSWCCA, 23/6/88). The court resentenced Jackson to 10 years imprisonment, with a non-parole period of 5 years. Lee J observed at p 1:

> We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex.

The fact that Jackson was not the instigator of the scheme, was addicted to gambling and had previously been of good character counted for little. In relation to the last matter, Lee J explained at p 3:

> … as was pointed out in *R v Farquhar* … the good character of a person holding high office who commits a crime relating to the performance of his office cannot form a basis

> for the same mitigation of sentence as in the case of an ordinary citizen committing crime, for the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office.

[20-150] Interference in the administration of justice: Pt 7 Div 2 *Crimes Act 1900*

Section 314 — False accusations etc

Section 314 states: "A person who makes an accusation intending a person to be the subject of an investigation of an offence, knowing that other person to be innocent of the offence, is liable to imprisonment for 7 years".

It is appropriate in assessing the objective criminality of an offence under s 314 to identify a critical respect in which the police investigation was diverted: *R v Richards* [2006] NSWCCA 262 at [70]. Where an offender under s 314 stands to gain more than co-offenders, his or her objective criminality will be greater: *R v Richards* at [75].

Section 315 — Hindering investigation etc

Section 315(1)(a)–(c) prohibits any conduct that is intended in any way to hinder the investigation of, discovery of evidence in relation to, or apprehension of another for, a serious indictable offence.

Range of offending

Hindering an investigation under s 315(1)(a) is capable of encompassing a wide range of objective criminality: *R v Mobbs* [2005] NSWCCA 371 at [48]. It is appropriate to take into account the seriousness of the "serious indictable offence", the investigation of which was hindered by the offender: *R v Mobbs* [2005] NSWCCA 371 at [49]; *R v Lawrence* [2004] NSWCCA 404 at [21].

It is also relevant to consider the extent to which the investigation is hindered and the conviction of a person for the related "serious indictable offence" is made more difficult. In some cases, the hindering will be relatively unsuccessful. For example, in *R v Lawrence*, the applicant maintained statements exculpating her de facto partner of an assault, despite police arresting him and finding evidence linking him to the crime. Howie J at [22] contrasted the case with *R v Derbas* [2003] NSWCCA 44, where an offender organised other persons to degrease a vehicle used in connection with a homicide and make it appear stolen.

Similarly in *R v Richmond* [2000] NSWCCA 173, the court took particular note of the actual impact on the investigation. Smart AJ explained at [24]: "While the police were subjected to additional expense and there was probably some delay in the investigation, it could not be said that Mr Richmond's criminality extended to other than making a false statement which was not accepted". In *Sampson v R* [2014] NSWCCA 19, the fact police were not hindered in their investigation by the offending conduct was a factor taken into account by the sentencing judge in finding the offence was "in the lower part of the middle range" of objective seriousness: *Sampson v R* at [11]–[12].

In some circumstances where a person hinders an investigation, the fact that the person who committed the "serious indictable offence" is eventually convicted will be of no significant weight. In *R v Derbas*, the killer was only convicted by the fortuitous circumstance of another person coming forward: *R v Derbas* at [10]–[11].

The statutory hierarchy of offences in Part 7 and the De Simoni principle

Care must be taken not to infringe the *De Simoni* principle (see discussion at [1-500]) when sentencing an offender for an offence under Pt 7 of the *Crimes Act 1900*. See generally **Fact Finding at Sentence** at [1-500]. In *R v Mobbs* [2005] NSWCCA 371 at [31]–[32], Johnson J stated that:

> The offence under s 319 [perverting the course of justice — 14 years] is regarded by the legislature as being more serious than an offence under s 315 [hindering investigation — 7 years]. As Howie J observed in *R v Hamze* [2005] NSWSC 136 at paragraph 24, insofar as the maximum penalty for a s 315 offence reflects Parliament's assessment of the conduct giving rise to the offence, a maximum penalty of seven years is "a relatively modest one". In passing sentence for a s 315 offence, it is necessary to keep in mind the different elements and penalties referable to offences under ss 315 and 319. A sentencing judge must not attribute to an offender conduct which would constitute a more serious offence [than] that for which he is to be sentenced: *De Simoni*; *R v El-Zeyat* [2002] NSWCCA 138 at paragraph 46.
>
> … A finding that, but for the actions of a s 315 offender, another person would have been prosecuted for a more serious offence appears to me to move beyond the elements of a s 315 offence to a s 319 offence so as to infringe the *De Simoni* principle.

Motive

A decision to hinder an investigation based on threats may be relevant to sentencing, but such a claim must be supported by evidence: *R v Derbas* [2003] NSWCCA 44 at [15]–[16].

An offence motivated by loyalty is not necessarily less serious than conduct motivated by reward. The former is part of the evil against which s 315 is directed. Although a motivation of reward may be thought to be more deserving of censure, the need for general deterrence of offenders motivated by loyalty is likely to be greater: *R v Derbas* at [28].

Offending committed on the spur of the moment must be distinguished from the more serious scenario of conduct which, although not premeditated, is nevertheless ongoing and organised: *R v Derbas* at [17].

Other factors

Factors relevant to sentencing an offender under s 315 were discussed by Johnson J in *R v Mobbs* [2005] NSWCCA 371 at [49]–[51]. The applicant was a passenger in a car driven by Richards which was involved in a fatal head-on collision. The applicant agreed with Richards that he would claim to be the driver:

> There had been a tragic collision causing the death of one person and serious injury to a number of people. For a period of about 24 hours, the Applicant hindered the police investigation. He told a number of people that he was the driver and he placed his P plates on Richards' vehicle. These were aggravating features of this offence.
>
> There are other factors, however, which bear upon an assessment of the objective criminality of the offence. The fact that the offence is committed on the spur of the moment, without planning or premeditation, is relevant … The length of time during which the hindering is maintained is also relevant … The motive of the offender in committing the offence is relevant … General deterrence is significant …
>
> This was not an offence where the Applicant stood to gain or receive any benefit for himself. Indeed, an admission that he was the driver of a motor vehicle which had just

> been involved in such a catastrophic collision could only be regarded as an admission attracting substantial detriment to the Applicant. This is a most unusual feature of this case. The Applicant's hindering of the investigation of the offence attracted investigation by police of himself for serious offences. [Citations omitted.]

Similarly, Howie J enumerated a number of factors relevant to the objective seriousness of an offence under s 315 in *R v Hamze* [2005] NSWSC 136 at [21]–[24].

Section 316(1) — Concealing serious indictable offence

It is an offence for a person, knowing or believing that a serious indictable offence has been committed, to fail without reasonable excuse to give information which might be of material assistance to police: s 316(1). A person who solicits or agrees to accept a benefit in consideration for doing anything that would be an offence under s 316(1) is also guilty of an offence: s 316(2).

The seriousness of the "serious indictable offence" which is concealed is relevant to the objective seriousness of an offence under s 316: *R v Crofts* (unrep, 10/3/95, NSWCCA).

In *Crofts*, Meagher JA observed:

> The section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words "without reasonable excuse", difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.

Gleeson CJ added: "… depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was 'without reasonable excuse'".

The NSW Law Reform Commission concluded in *Review of Section 316 of the Crimes Act 1900 (NSW)*, Discussion Paper 39, 1997 at [4.40] that the wide scope for prosecution under s 316(1) was unsatisfactory:

> Section 316 has a valid social purpose of encouraging members of the public who have information about serious crimes to report that information to the police and other appropriate authorities. However, the technical application of s 316(1) to information acquired in the course of confidential relationships, including relationships between law enforcement agencies and informants, health care professionals and patients and researchers and research subjects inhibits participation in these relationships. This problem outweighs the social utility of s 316(1).

In 1997, Parliament introduced s 316(4)–(5), which provides:

> (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.
>
> (5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

In the subsequent report, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report 93, 1999, the NSW Law Reform Commission stated at [3.1]:

> The Commission has concluded that the amendments to s 316 which came into force in March 1998 do not adequately address the problems with the section identified in the Discussion Paper. The Commission recommends that s 316(1) should be repealed. This is a unanimous recommendation. A minority of Commissioners favours the substitution of a new provision, somewhat analogous, but, in the minority's view, adequate to overcome the grave problems created by the present subsection. The Commission also considers that the compounding offence contained in s 316(2) should be slightly amended.

Section 319 — Perverting the course of justice

Section 319 provides: "A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years".

Objective seriousness of offence

The high maximum penalty recognises the importance of protecting the integrity of the criminal justice system: *R v Purtell* [2001] NSWCCA 21 at [12]. Offences of perverting the course of justice are singled out as offences of the most serious kind: *Taylor v R* [2007] NSWCCA 99 at [23]. They strike at the very heart of the justice system and must be severely punished wherever detected: *Marinellis v R* [2006] NSWCCA 307 at [10]; citing *R v Pangallo* (1991) 56 A Crim R 441 at 443.

Strongly deterrent sentences are required in sentencing for an offence under s 319: *Taylor* at [23]; *Marinellis* at [10]; *Harrigan v R* [2005] NSWCCA 449 at [47]; *R v Giang* [2001] NSWCCA 276 at [21]; *Church v R* [2012] NSWCCA 149 at [46].

In *Harrigan*, James J said at [48]–[50]:

> It seems to me that an offence under section 319 has some affinity with an offence of bribing a police officer, in that each offence is an interference with the criminal justice system.
>
> In *R v Duong* (1999) 109 A Crim R 60, a case in which one of the offences was an offence of offering a bribe to a police officer, Wood CJ at CL said … "save in the most exceptional circumstances, such an offence will call for a significant term of imprisonment to be imposed cumulatively or at least substantially cumulatively upon the sentence for the primary offence in respect of the detection or prosecution of which the bribe was offered."
>
> In my opinion, her Honour was required to make the sentences she imposed at least substantially cumulative on each other.

The fact that an attempt to pervert the course of justice did not succeed or was doomed to failure is of far less significance than in the case of sentencing for an attempt to commit some other substantive offence: *Taylor v R* [2007] NSWCCA 99 at [25]; *Marinellis v R* [2006] NSWCCA 307 at [8]; *R v Taouk* (1992) 65 A Crim R 387 at 392. It is, therefore, an error to take into account the fact the acts were unsuccessful when assessing the objective seriousness of an offence of perverting the course of justice: *R v PFC* [2011] NSWCCA 117 at [66]–[67], applying *Taylor v R*. It is the tendency of the conduct which is decisive and it is irrelevant whether the conduct does or does not bring about a miscarriage of justice: *Marinellis v R* at [8].

In *R v Nomchong* (unrep, 10/4/97, NSWCCA) McInerney J (with Hunt CJ at CL and Sully J agreeing), endorsed the trial judge's reasoning that "… the inevitable consequence of the conviction of a police officer for the offence of attempting to pervert the course of justice would in most cases be a full-time custodial sentence". The case involved a senior police officer attempting to corrupt a junior officer under his supervision.

In the two judge-bench of *R v Giang* [2001] NSWCCA 276, McClellan J (as he then was) stated at [26]–[27]:

> There can be little doubt that when the offender is the instigator of the act which is intended to compromise the integrity of the curial process and benefits or intends to benefit from the doing of the agreed act, extraordinary circumstances will be required before a custodial sentence is not appropriate.
>
> The situation may be different when the offender, although a willing participant, neither initiates or stands to benefit from the offence.

The use of intimidation or threatened violence as part of conduct intended to pervert the course of justice increases the seriousness of the offence: *R v Mrish* [2000] NSWCCA 17 at [13].

Motive

It has been accepted that the fact a person is protecting a family member is a relevant consideration when sentencing for a s 319 offence: *Podesta v R* [2009] NSWCCA 97 per McClellan CJ at CL at [21]. However, in *R v Nguyen* [2004] NSWCCA 332, Spigelman CJ held at [55]:

> … personal advantage can take many forms. Greed may be regarded as a less worthy motive than protection of a family member. The latter is no less a form of personal gain to an offender and, often, is a more powerful motive. Protection of the system of criminal justice should not be significantly less vigilant where its perversion is attempted for reason of family ties, rather than the expectation of monetary gain.

The more serious the offence, the less weight should be given to motive as a mitigating factor: *R v Mitchell* [2007] NSWCCA 296 per Howie J at [31]–[32].

In *R v Moore* [2012] NSWCCA 3, the respondent forged a letter from his employer in support of an application for bail variation with the intended purpose of enabling him to attend a weekend vocational course without breaching bail conditions. In the course of dismissing the Crown's appeal against sentence, the court noted (per Simpson J at [35]) that "when consideration is given to the other purposes for which an offence of this kind is sometimes committed — for example, unwarranted acquittal on a serious charge — this offence may be seen in its proper perspective on the scale of objective gravity".

Relevance of the principal charges being no billed or dropped

In *R v Marinellis* [2001] NSWCCA 328, the applicant asked a number of acquaintances to provide an alibi for an alleged sexual assault. The sexual assault charges were ultimately not proceeded with, although the applicant was committed for trial. In rejecting his sentence appeal in relation to perverting the course of justice, McClellan J (with Studdert J agreeing in a two-judge bench), stated at [38]–[39]:

> I do not accept that the applicant's culpability should be reduced by reason of the fact that the charges of aggravated sexual assault were not proceeded with. The Court is not aware

> of the circumstances which motivated that decision and is unable to form any conclusion about the strength or otherwise of the Crown case. However, it is apparent that the applicant was committed for trial. The fact that the applicant believed it necessary to procure others to give false alibi evidence on his behalf suggests a belief in him that, unless this was done, he was at risk of being convicted.
>
> In these circumstances, even if it be relevant, there was no basis for his Honour to conclude that the motive for the offence was to achieve a just result. I do not accept that even if the court was to assume that the applicant was the subject of false allegations, this was a significant mitigating feature. A result obtained by perjured evidence could not be described as just.

In *Church v R* [2012] NSWCCA 149, the applicant perverted the course of justice by failing to contradict, in sentence proceedings for an assault occasioning actual bodily harm, an assertion by her solicitor that she was suffering from cancer. On appeal against the sentence imposed for the perversion offence, the court found it was not an error for the sentencing judge to consider the hypothetical sentencing outcome had the course of justice not been perverted: *Church v R* at [23]. The finding that the applicant evaded imprisonment for 12 months, which would have been the appropriate sentence for the assault offence, was an important part of assessing the objective seriousness of the perversion offence: *Church v R* at [23], [26].

Level of interference in the justice process — stage of proceedings

The offence of perverting the course of justice is not confined to legal proceedings already in existence but can extend to acts done with intent to frustrate or deflect the course of judicial proceedings that the accused contemplates may be instituted: *The Queen v Beckett* (2015) 256 CLR 305 at [7].

In *R v Finnie and Finnie* [2007] NSWCCA 38 at [64], Sully J (with Simpson and Latham JJ agreeing) endorsed the sentencing judge's approach that an offence intended to influence the grant of bail is not generally as serious as an intended perversion of trial or sentencing proceedings.

In *R v Purtell* [2001] NSWCCA 21 at [11], Giles JA accepted the Crown's submission that intending to influence sentencing proceedings was as serious as interference with trial proceedings.

In *R v Karageorge* (1998) 103 A Crim R 157 at 175, although the court allowed a conviction appeal and ordered a new trial, Levine J, with Sully and Simpson JJ agreeing, expressed a view that:

> For myself, I would not regard the obtaining of an adjournment as a perversion of a relatively minor kind: the course of justice must include the efficient management of the Court's business in respect of which great reliance is placed upon the conduct of the profession. A trial adjourned is, of course, a trial delayed thereby depriving both the Crown and the accused of that which the law strives to attain, namely finality. It prejudices people waiting for their cases to be listed. The course of justice in relation to a particular matter adjourned on the false basis here predicated may cause immense prejudice arising not merely from the fact of delay but its effect upon the memories of all those to be called to give testimony.

In *R v Nguyen* [2004] NSWCCA 332 at [54], Spigelman CJ rejected the respondent's submission that encouraging an innocent person to plead guilty could be assessed as a "low" level of seriousness:

> Encouraging a person to plead guilty to an offence, which that person did not commit, and thereby allowing a citizen to acquire a criminal record and to suffer criminal punishment is, in my opinion, a significant form of the offence of perverting the course of justice.

See also *R v Meissner* (unrep, 27/11/92, NSWCCA), where Allen J (with Sully and Ireland JJ agreeing) endorsed the trial judge's comment: "… to directly interfere with a person's right to plead not guilty to a criminal charge is to cut the 'golden thread'. It is to interfere with the most fundamental right that any person has under the law, the right to defend a criminal charge relying upon the presumption of innocence".

In *Allen v R* [2008] NSWCCA 11, the applicant had been charged with sexually assaulting his former girlfriend. Emails and a video containing sexually explicit images of the complainant were later sent to a number of people. The applicant said he could stop the circulation of the images if the complainant made a statement that she wanted the charges dropped. The applicant's counsel argued on appeal that higher sentences for perverting the course of justice should be reserved for those who interfere with justice officials such as judges or police officers. Grove J rejected the submission at [25]:

> Each case needs to be assessed in its particular circumstances and, as a generality, the attempt to suborn a complainant, who may succumb, could very well be misconduct more serious than an attempt directed at those whose callings make it more likely that they would not only resist the attempt but report it to authority and thereby ensure that the offender is called upon to answer.

In *R v Egan* [2013] NSWCCA 196, the respondent was charged with sexual offences and used the complainant's email address to send emails to himself in an attempt to damage her credibility. The first trial date was vacated while the integrity of the emails was investigated. The court found it was not open to the sentencing judge to regard the offence as "at the low end of the range" given its intention to bring about a miscarriage of justice for the respondent's own benefit in his trial for serious offences: *R v Egan* at [74].

[20-155] Common law contempt of court

Forms of contempt

The common law offence of contempt is broadly aimed at preventing interference in the administration of justice: *Director of Public Prosecutions v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 739. Contempt may involve, amongst other things:

- interference by publication (sub judice contempt)
- misconduct by participants in the proceedings
- breach of orders or undertakings
- refusal to attend on subpoena or give evidence.

Contempt may also be classified as occurring "in the face of the court": see *Civil Trials Bench Book*, **Contempt in the face of the court** at [10-0000]. See further *Civil Trials Bench Book*, **Contempt generally** at [10-0300] and the *Criminal Trial Courts Bench Book*, **Contempt, etc** at [1-250]ff.

The NSW Law Reform Commission reviewed sub judice contempt in *Contempt by Publication*, Report 100, 2003. For a discussion of the history and various species of contempt, see a paper by the Honourable Justice Whealy, "Contempt: some contemporary thoughts", 2007.

Contempt may be classified as either civil or criminal, although the distinction has been criticised as "unsatisfactory" and "illusory": *Australasian Meat Industry Employees Union Ltd v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109; *Witham v Holloway* (1995) 183 CLR 525 at 534. Notwithstanding what was said in *Witham v Holloway*, the court in that case were at pains to make clear that proceedings on a charge of contempt were not to be regarded as the equivalent of a criminal trial and do not attract the criminal jurisdiction of a court: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [43], [59]. The contempt proceeding in Boral's case arose in the course of a civil proceeding between Boral and the appellant, and was commenced and pursued under the civil procedure rules: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* at [41]–[42], [66].

The "companion principle" — that the prosecution cannot compel the accused to assist it to discharge its onus is a "companion" of the accusatorial nature of criminal trials, and does not apply in contempt proceedings: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* at [36], [46]–[47], [62]–[64]. There are important distinctions between contempt proceedings and criminal proceedings.

Contempt must be proved beyond reasonable doubt: *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69 at [72], [101], [179]. The rules of court do not distinguish between civil and criminal contempt and the "punishment" that can be imposed applies regardless of whether a contempt is characterised as civil or criminal: *Pang v Bydand Holdings Pty Ltd* at [70].

Referrals by the Local Court to the Supreme Court and procedural fairness

In *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277, the Court of Appeal held that before the Local Court could exercise its power of referral under s 24(4) *Local Court Act 2007*, the principles of natural justice apply — procedural fairness requires the magistrate to inform the respondent of the two options available ie to deal with the alleged contempt summarily or to refer the matter under s 24(4). An alleged contemnor should be given an opportunity to make submissions on the question of referral and must be afforded procedural fairness: *Prothonotary of the Supreme Court of NSW v Dangerfield* at [77]. In *Prothonotary of the Supreme Court of NSW v Chan (No 23)* [2017] NSWSC 535, the defendant was unrepresented. There was no adjournment so he could receive advice, nor was he given, as he had to be, an explanation of the options open to the Local Court under s 24, or their consequences. Justice required the matter be referred back to the Local Court to determine how the defendant's contempt should be further dealt with, after the defendant has been given the procedural fairness that s 24 required: *Prothonotary of the Supreme Court of NSW v Chan (No 23)* at [75].

Penalty for contempt

The provisions of the *Crimes (Sentencing Procedure) Act 1999* apply when sentencing an offender to imprisonment for contempt: *Principal Registrar of the Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at [38]–[45]; confirmed in *Attorney-General for NSW v Whiley* (1993) 31 NSWLR 314 at 320–321.

As a common law offence, there is no specific maximum penalty for contempt. As Hunt CJ at CL described it in *Wood v Galea* (1997) 92 A Crim R 287 at 290: "Punishment is said to be 'at large', subject only to the restriction in the *Bill of Rights* 1688 (UK) upon cruel punishments. [*Smith v The Queen* (1991) 25 NSWLR 1 at 15–18]". The Supreme Court Rules 1970, Pt 55, r 13 provides:

> (1) Where the contemnor is not a corporation, the Court may punish contempt by committal to a correctional centre or fine or both …
>
> (2) Where the contemnor is a corporation, the Court may punish contempt by sequestration or fine or both.
>
> (3) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security.

The rule merely confirms the court's sentencing power and does not exhaust it: *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314; *Whiley* at 320; *Jando* at [37]. The sentencing principles for contempt were helpfully summarised by Wilson J in *In the Matter of Steven Smith (No 2)* [2015] NSWSC 1141 at [36]–[41].

Part 55, r 14 confers power on the Supreme Court to "revisit and review" a decision to imprison a person for contempt. It permits the contemnor to have the court review the question of punishment and sentencing in light of some change in the relevant circumstances: *Menzies v Paccar Financial Pty Ltd* (2016) 93 NSWLR 88 at [17]–[20]. It confers power in circumstances where the court fixing punishment by a term of imprisonment might otherwise be functus officio. The rule is clearly designed to permit discharge short of the service of a specified term: *Menzies v Paccar Financial Pty Ltd* at [16]; Y*oung v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 282–283.

Discharge is to permit the convicted contemnor to ask for clemency, demonstrate contrition, and establish that the punishment suffered already is enough to vindicate the authority of the court: *Menzies v Paccar Financial Pty Ltd* at [18].

An offender dealt with in the District or Local Courts for contempt in the face of the court may receive a fine not exceeding 20 penalty units or imprisonment not exceeding 28 days: s 199(7) *District Court Act 1973*; s 24(1) *Local Court Act 2007*; see further *Civil Trials Bench Book*, **Contempt in the face of the court** at [9-0000].

Maximum penalties for statutory offences that are similar to common law contempt charges may provide some guidance. In *Whiley*, the offender threatened violence in an attempt to influence Children's Court proceedings involving his infant son. The Court of Appeal accepted that the 10 year maximum penalty under s 322 of the *Crimes Act 1900* reflected the seriousness with which such conduct is regarded by the legislature and the community: *Whiley* at 319.

Range of seriousness — technical to contumacious contempt

The "nature of the contempt itself and its consequences vary … greatly in different cases": *Wood v Galea* at 277.

In *Maniam (No 2)* (1992) 26 NSWLR 309 at 314, Kirby P identified classes of cases relevant to sentencing an offender guilty of contempt:

> For the purposes of punishment, various classes of contempt have been identified in the cases. They include technical, wilful and contumacious contempt. For technical contempts, the Court will usually accept an apology from the contemnor. It may order that the contemnor pay the costs of the proceedings brought to uphold the authority of the courts of law … A similar approach is sometimes taken to contempts which are more than technical and which, although wilful, are not found to have been deliberate …

In relation to the most objectively serious form of contempt, Kirby P continued:

> The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt …This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a court order … In cases where such a measure of wilfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both. In such a case the elements necessary to establish wilfulness, carrying as they do the potential of penal consequences, must all be proved to the criminal standard.

This approach was followed in *Jando* at [15].

Contempt by publication (sub judice contempt)

In *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616, the NSW Court of Appeal (in a five-judge bench) found then Premier Wran and Nationwide News Pty Ltd guilty of contempt. In sentencing proceedings, the court said:

> … it has long been established that it is a serious contempt of court to make public assertions about the guilt or innocence of an accused which have a tendency to prejudice the fair conduct of an impending trial. It does not matter whether the assertion is of innocence or guilt. Either is capable of affecting a potential juror's mind and of defeating the fair trial which it is the fundamental purpose of our system of criminal justice to secure …
>
> It must be made plain in particular that the courts will not tolerate the deliberate intervention of those in positions of authority who deploy their power and prestige in support of assertions of that kind.

In the South Australian case of *Director of Public Prosecutions v Francis (No 2)* (2006) 95 SASR 321, Bleby J reviewed a number of sentences involving contempt by media organisations and commentators, from NSW and other jurisdictions. His Honour said at [60]:

> … the penalty for this kind of contempt must give significant recognition to the seriousness of the offending and must be such as to act as a deterrent both to the offender and to others. The vice in this type of contempt is the denigration of and the undermining of confidence in the administration of justice.

Bleby J referred at [57] to *Gallagher v Durack* (1983) 152 CLR 238 at 243, where the High Court considered factors relevant to contempt involving imputations against the court or judges:

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment "is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable".

See also *DPP (Cth) v Besim (No 2)* [2017] VSCA 165.

Breach of orders or undertakings

The High Court in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 112–113 has noted that "lying behind punishment for a contempt which involves wilful disobedience to a court order, is the very substantial purpose of disciplining the defendant and vindicating the authority of the court".

Not every intentional disobedience of a court order involves a conscious defiance of the authority of the Court, but wilful contempt in defiance of the court is contumacious contempt: *DB Mahaffy & Associates v Mahaffy* [2015] NSWSC 1959 at [25].

In *The Prothonotary of the Supreme Court of NSW v Battye* [2017] NSWSC 48, the defendant solicitor transferred shares to a third party in breach of a District Court order. Given the defendant's status as an officer of the court and the fact it left open no doubt as to his understanding of the contempt involved, the court concluded that the seriousness of the offence, as a wilful and contumacious contempt, precluded disposal of the offence by way of a s 10 non-conviction order under the *Crimes (Sentencing Procedure) Act 1999*: *Prothonotary v Battye* at [25], [46]–[47]. A term of imprisonment would have been the only appropriate sentence had the shares not been finally transferred to the intended recipient under the court order: at *Prothonotary v Battye* at [53].

Misconduct against judicial officers by participants in proceedings

In *Prothonotary v Wilson* [1999] NSWSC 1148, Wilson threw two bags of yellow paint at the trial judge after he received an advance ruling. Wood CJ at CL explained at [21] that in the case of a contempt in the face of the court involving a reprisal against a judge:

> The gravamen of the offence lies not in protecting the personal dignity of the judge who may be the object of an assault or personal attack but of protecting the public from the mischief that will incur if the authority of the courts is undermined or impaired.

An appeal against sentence was allowed on the basis of fresh evidence: *Wilson v Prothonotary* [2000] NSWCA 23.

Several cases and sentences involving reprisals against judges are referred to in *Principal Registrar of Supreme Court of NSW v Drollet* [2002] NSWSC 490 at [19]–[25], and also discussed in the paper by the Honourable Justice Whealy, "Contempt: some contemporary thoughts", 2007, see above under Forms of Contempt

at [20-110]. See also *R v Dent* [2016] NSWSC 444 at [56] where the offender was sentenced for three serious examples of contempt involving "wilful and extreme defiance and disregard for the authority of the court".

Refusal to attend on subpoena or give evidence

In *Registrar of the Court of Appeal v Raad* (unrep, 9/6/1992, NSWCA), Kirby P stated at p 14:

> The refusal to answer questions which are relevant and admissible strikes at the very way in which justice is done in the courts of this country. It undermines the rule of law observed in our society. As this Court said in *Gilby*, the refusal to be sworn, or once sworn to give evidence, is a failure to discharge the obligation which the person owes as a member of the community or because he or she is within it. It is a concomitant of a society ruled by law and not by brute force that a person competent to do so should, where required, be sworn or affirmed to give truthful evidence and that he or she should give evidence when called upon to do so in the courts in answer to questions lawfully addressed.

A refusal to be sworn or affirmed, or to answer questions, has been identified as "very serious" contempt: *Principal Registrar of the Supreme Court of NSW v Jando* at [19], *R v Razzak* [2006] NSWSC 1366 at [39]–[44]; *In the Matter of Steven Smith (No 2)* [2015] NSWSC 1141 at [49]. It is not unusual for persons who wilfully disobey a subpoena to attend court as a witness to receive a custodial sentence, especially in criminal proceedings: *Registrar of the Court of Appeal v Maniam (No 2)* at 315.

The Court of Appeal in *Field v New South Wales Crime Commission* [2009] NSWCA 144 at [21] considered *Registrar of the Court of Appeal v Gilby* (unreported, NSWCA 20 August 1991) which identified the following factors to be taken into account when punishing for a contempt in the context of a deliberate refusal to give evidence:

- the objective seriousness of the contempt
- whether the contemnor was aware of the consequences of what he or she proposed to do
- whether the contempt was committed in the context of serious crime
- whether the contempts were motivated by fear of harm should evidence be given
- whether the contemnor had received a benefit by indicating an intention to give evidence.

In *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 at 185, Dunford J identified similar factors, as well as a number of additional factors, which may be relevant when sentencing for contempt involving a refusal to give evidence. These factors have been referred to and applied in subsequent cases involving the refusal to give evidence: *Principal Registrar of Supreme Court of NSW v Drollet* at [17] and *Anderson v Hassett (No 2)* [2007] NSWSC 1444 at [6].

The contemnor in *Field v NSW Crime Commission* twice refused to submit to an examination before the Supreme Court under ss 10 and 12 *Criminal Assets Recovery Act 1990*. The Court of Appeal characterised the conduct as "a contumacious contempt in circumstances where the appellant was fully aware of the possible consequences". A sentence of a fixed term of imprisonment of 4½ years was held not to be excessive in the circumstances: at [20], [27].

No tariff of sentences for contempt

Heydon JA remarked in *Wilson v The Prothonotary* [2000] NSWCA 23 at [42]: "there is little point in comparing sentences in a field of criminal conduct which is rarely committed".

In *Principal Registrar of the Supreme Court of NSW v Jando*, Studdert J had been referred by counsel to a schedule of contempt cases and penalties but concluded at [56]:

> I have considered those various cases but I do not propose to review them in the course of this judgment. The penalties varied significantly from case to case. That is by no means surprising because it has to be recognised that what penalty is appropriate in a particular case is so dependent upon the assessment of all its features, including the nature of the particular contempt and its consequences.

Similarly in *R v Razzak*, Johnson J said at [89]:

> I do not consider that sentences for contempt, in other cases, provide a safe guide to the proper tariff or punishment for contempt of court given that the nature of the contempt itself, and its consequences, vary so greatly between the cases …

In *Principal Registrar of Supreme Court of NSW v Tran* [2006] NSWSC 1183 at [38], the court acknowledged the vast range of criminality encompassed by contempt. The case has a schedule attached containing 15 contempt cases and the penalties imposed. A summary of penalties imposed in contempt cases up to 2007 can also be found in the Honourable Justice Whealy's paper, "Contempt: some contemporary thoughts", 2007, see **Forms of Contempt** at [20-155].

[20-158] Disrespectful behaviour in court

From 1 September 2016, an accused person, defendant, party to, or person called to give evidence in proceedings before the court is guilty of an offence if they intentionally engage in behaviour in the court during the proceedings and that behaviour is disrespectful to the court or presiding judge: *Local Court Act 2007*, s 24A; *District Court Act 1973*, s 200A; *Supreme Court Act 1970*, s 131; *Land and Environment Court Act 1979*, s 67A; *Coroners Act 2009*, s 103A. The offence was introduced to bridge the gap between contempt and community expectations of behaviour in court (Second Reading Speech, Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016, NSW, Legislative Council, *Debates*, 11 May 2016, p 9).

The offence is punishable by 14 days imprisonment or 10 penalty units, or both. Proceedings for the offence are to be dealt with summarily before the Local Court (or the Supreme Court in its summary jurisdiction, where the offence is committed in the Supreme Court: *Supreme Court Act*, s 131(4)).

The new offence does not affect any power with respect to contempt. Proceedings for contempt may be brought in respect of behaviour that constitutes a "disrespectful behaviour" offence, but a person cannot be prosecuted for both contempt and the offence in respect of essentially the same behaviour.

[20-160] Interference with judicial officers, witnesses, jurors etc: Pt 7 Div 3 Crimes Act 1900; s 68A Jury Act 1977

Section 323 — Influencing witnesses and jurors

Section 323(a) provides a maximum penalty of seven years for, inter alia, intending to cause a witness in any judicial proceeding to give false evidence, withhold true evidence, not to attend as a witness, or not to produce anything in evidence pursuant to a summons or subpoena. The essence of a s 323(a) offence is that it strikes at the integrity of the justice system and so some form of custodial sentence is normally appropriate: *Warby v R* [2007] NSWCCA 173 at [25]; *R v Burton* [2008] NSWCCA 128 at [101]; *Asplund v R (Cth)* [2014] NSWCCA 237 at [62].

Section 323(b) provides a maximum penalty of seven years for intending to influence the conduct of a juror in any judicial proceedings.

Section 324 is an aggravated form of ss 321–323, punishable by a maximum of 14 years, where the offence is committed with the intent of procuring a conviction or acquittal for a "serious indictable offence".

It is an error to sentence an offender, who pleads guilty to an offence under s 323(a), for the more aggravated offence under s 324. Section 324 "constitutes a distinct and greater offence which must be specifically alleged in the indictment": *Warby v R*, above, at [18].

But, in assessing the objective seriousness of an offence under s 323(a), it is an error to have regard to the absence of a fact which, if it were present, would constitute a different and more serious offence, such as an offence of threatening or intimidating a juror under s 322(a): *R v Burton*, above, at [89].

Where an offence under s 323(a) is committed in the context of domestic violence by an offender who wants to dissuade criminally the victim from giving evidence, there is a need for a significant element of general deterrence: *R v Burton* at [105]. A correct exercise of sentencing discretion required the court to have express regard to the need for general and specific deterrence and denunciation of domestic violence offences: *R v Burton* at [107], *Hiron v R* [2007] NSWCCA 336 at [32], *R v Hamid* [2006] NSWCCA 302 at [86]. Additionally, given that victims of domestic violence often — and contrary to their interests — forgive their attackers (at [104]), a court should cautiously approach a victim's expressions of forgiveness and requests for a lenient sentence: at [102], [105].

In *Asplund v R (Cth)*, there was an added element of seriousness to an offence under s 323(a) where the witness influenced by the offender was his 17-year-old son, as such offending had a traumatic effect on the witness and constituted a breach of trust: *Asplund v R (Cth)* at [62].

In sentencing for an offence under s 323(b), it is relevant to consider the nature of the intention to influence a juror. In the unusual case of *R v Sultan* [2005] NSWCCA 461, the applicant approached the husband of a juror during his trial for a break and

enter offence. He asked that the juror "listen to the evidence carefully". Grove J (with Sully and Howie JJ agreeing) accepted that the applicant's conduct was merely "an exhortation to perform the duty of the juror": at [17]. Grove J observed at [16]:

> The intention of the legislature in enacting s 323(b) was clearly to proscribe any act intended to influence a jury in any way whether benign or not. But it does not derogate from acknowledgement of that intention to assess the seriousness of an offence against the presence or absence of sinister connotation.

See also s 68A *Jury Act 1977* below; *R v Laws* (2000) 50 NSWLR 96.

Section 326 — Reprisals against judges, witnesses, jurors etc

Section 326(1) provides a maximum penalty of 10 years for threatening or causing injury or detriment to a person on account of anything lawfully done as a witness, juror, judicial officer or other public justice official. A similar offence applies where an offender threatens, does or causes injury or detriment believing the person will or may be called as a witness or serve as a juror: s 326(2). It is immaterial whether the accused acted wholly or partly for a reason specified in ss 326(1) or (2): s 326(3).

An offence against s 326 is, by its very nature, serious; amounting to a direct attack upon the administration of justice: *Linney v R* [2013] NSWCCA 251 at [88]. In *Linney v R*, the applicant sent emails containing death threats aimed at a judge via the judge's associate and the police. The court found no error in the sentencing judge's assessment of the offence as above mid-range: *Linney v R* at [85]. Although the offence is concerned not only with threatening but also doing or causing injury or detriment, the death threats made by the applicant were repeated, not spontaneous and made in circumstances where the recipient was given real cause to fear they could be carried out: *Linney v R* at [82], [84]–[85].

In *R v Jaques* [2002] NSWCCA 444, where the applicant made a threat to kill a magistrate, Dowd J (with Wood CJ at CL and Bell J agreeing) explained the gravamen of the offence at [5]:

> The offence of course is complete with the uttering of the words, and in the circumstances of the uttering of those words, the finding of guilty by the jury is not a finding of his intention to carry out the threat.

Dowd J continued at [12]–[13]:

> His Honour is correct that there is a need for deterrence for this sort of offence. However, in the circumstances of an offence which was not made in the face of the court, which was done in an office where there were other people present, and although it appears it was uttered in anger, it was not such as to clearly indicate an intention to commit the offence that was threatened.
>
> I consider that his Honour has erred in giving too much weight, in the circumstances of the utterance of these remarks, to the severity of what was uttered and has taken into account the applicant's previous record, and in the circumstances, the penalty is manifestly excessive.

In *R v Gaudry; MacDonald* [2010] NSWCCA 70 at [61], the sentencing judge erred by finding the s 326 offences committed by each respondent fell "toward the bottom of the range". Each respondent threatened a person waiting in the foyer of a courthouse

to give evidence. The threat involved reprisals against the person by persons with a reputation for violence. The making of the threat actually interfered with the course of justice by intimidating the person threatened to the effect that he did not give evidence that day: *R v Gaudry; MacDonald* at [61].

In *Malicki v R* [2015] NSWCCA 162, however, the offence contrary to s 326(2) was held to be properly characterised as at the lower end on the basis that Malicki's criminality was dwarfed by that of the co-offender Widmer: *Malicki v R* at [70].

Section 68A Jury Act 1977 — Soliciting information from or harassing jurors or former jurors

It is an offence under s 68A *Jury Act 1977* to solicit information from, or harass, a juror or former juror for the purpose of obtaining information about the deliberations of a jury or how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in the trial (or coronial inquest).

In sentencing the radio presenter John Laws for an offence under s 68A, Wood CJ at CL noted that the increase in maximum penalty from a fine to imprisonment for seven years in 1997 "marks the seriousness with which the Legislature regards intrusion into the sanctity of the jury room": *R v Laws* (2000) 50 NSWLR 96 at [24]. Wood CJ at CL imposed a suspended sentence.

[20-170] Perjury, false statements etc: Pt 7 Div 4 Crimes Act 1900; ICAC Act 1988; Police Integrity Commission Act 1996; Crime Commission Act 2012

Part 7 Div 4 *Crimes Act* provides a range of offences for perjury and false statements. Section 87 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) also provides that a person who, at a compulsory examination or public inquiry conducted by the Commission, gives evidence that is false or misleading in a material particular knowing it to be false or misleading, or not believing it to be true, is guilty of an indictable offence. The maximum penalty for the offence is 200 penalty units or imprisonment for 5 years, or both. Similarly, s 107(1) *Police Integrity Commission Act 1996* and s 27(1) *Crime Commission Act 2012* provides that a person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence. The maximum penalty for an offence under s 107 is the same as the maximum penalty for an offence under s 87 ICAC Act. The text in s 107, "(cf ICAC Act s 87)", evinces a legislative intention that the sentencer should compare or confer with the false swearing offence created in s 87.

Seriousness of offences

Offences of perjury and false swearing undermine the very foundation of the justice system: *R v Aristodemou* (unrep, 30/6/94, NSWCCA).

The need for general deterrence is the prime consideration in sentencing for offences of this kind: *R v Aristodemou*; *R v Bulliman* (unrep, 25/2/93, NSWCCA).

Any person who commits perjury or false swearing in the course of judicial proceedings or in proceedings such as a Royal Commission or an Independent Commission Against Corruption (ICAC) inquiry should do so in the clear understanding that if their offence is detected, they will go to gaol except in

exceptional circumstances: *R v Aristodemou*; *R v Chad* (unrep, 13/5/97, NSWCCA); *R v Chapman* (unrep, 21/5/98, NSWCCA); *R v Fish* [2002] NSWCCA 196 at [143], [152]; *R v Mahoney* [2004] NSWCCA 138 at [12]–[14].

Motive as relevant factor

An offence of perjury or false swearing will be of lower objective seriousness where it was motivated by threats rather than the offender's own purposes: *R v Pile* [2005] NSWCCA 74 at [33]. In that case, the applicant falsely resiled from statements implicating a co-offender in a robbery, but only after he was transferred from protective custody into a cell next to the co-offender.

In *R v Fish*, the first appellant was a police officer who denied in court that fellow police, including her husband, had assaulted prisoners. The husband had a history of domestic violence towards the appellant. Bell J (with Ipp AJA and Dunford J agreeing) allowed an appeal against sentence. Bell J stated at [163]:

> I am persuaded that it was relevant to the question of sentence to take into account the circumstance that the appellant's offence took place in the context of an abusive marital relationship. This was not simply a matter of a police officer lying in court to protect fellow officers because of a misguided sense of loyalty. The appellant's case in this respect possessed exceptional features. The reality of her situation was that had she given truthful evidence … she would not only have exposed her husband to liability for his criminal offences but almost certainly she would have been subject to serious physical violence at his hands. These matters raise considerations quite distinct from the need for courts to impose deterrent sentences in cases where police officers lie in order to protect their colleagues.

In *R v Yilmaz* (unrep, 4/3/91, NSWCCA) Smart J (with Gleeson CJ and Lee CJ at CL agreeing) considered that the applicant's subjective case was sufficient to justify a non-custodial sentence. The applicant spoke poor English and did not fully understand the consequences of giving false evidence; the false evidence was to no avail; there was considerable delay in finalising the matter. Regarding delay as a mitigating circumstance, see also *R v Fifita* (unrep, 26/11/92, NSWCCA).

However, in *R v Bulliman* (unrep, 25/2/93, NSWCCA) Abadee J (with Gleeson CJ and Hunt CJ at CL agreeing) stated:

> False evidence strikes at the whole basis of the administration of justice and indeed, it undermines the whole basis of it. Justice inevitably suffers, whatever be the motive for the making of false statements on oath and whatever be the circumstances in which the offence or offences are committed.

In *R v Aristodemou* (unrep, 30/6/94, NSWCCA) Badgery-Parker J stated:

> I do not accept the proposition that the community would regard as in any way a mitigating circumstance that the motive for the applicant's false swearing was not to conceal corruption on his own part but was to conceal the corrupt conduct of others. No doubt there is an acceptance on the part of those who commit crime that it is dishonourable to inform on others and that there is some nobility in declining to do so. It by no means follows that the same view is taken by right-thinking members of the community and for my part, I refuse to proceed on the assumption that that is so. It is no doubt true that in some circumstances the seriousness of a crime may be seen to be mitigated if it was committed for an honourable, albeit mistaken motive. It is in my view an attempt to press that submission too far if the conduct is such to defeat the purpose of legislation enacted in the public interest.

Other factors

In *R v Mahoney* [2004] NSWCCA 138 at [17], the respondent argued that his perjury was less serious because it involved "a pathetic attempt" to mount a defence to an "overwhelming case". Shaw J concluded that such a characterisation did not fundamentally detract from the seriousness of the offence.

Similarly, in *R v Bulliman* (unrep, 25/2/93, NSWCCA), Abadee J (with Gleeson CJ and Hunt CJ at CL agreeing) stated that offenders convicted of perjury "ought to be severely punished and this is irrespective of whatever be the outcome of the proceedings in which the false evidence was given".

[20-180] Other corruption and bribery offences: Pt 4A Crimes Act 1900; s 200 Police Act 1990; common law bribery

Part 4A Crimes Act 1900

Part 4A provides offences for corruptly receiving commissions or rewards, and other corrupt conduct.

In *Retsos v R* [2006] NSWCCA 85 at [31], Sully J (with Simpson and Howie JJ agreeing) said that: "Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly".

In *R v Potter* [2005] NSWCCA 26, the applicant pleaded guilty to five counts of corruptly receiving a benefit under s 249B(1)(a) as the Chief Steward of the Greyhound Racing Control Board. The sentencing judge properly took into account the historical background that the applicant had engaged in corrupt conduct for at least seven years, although he had been convicted of only five offences. It was permissible to use the applicant's course of conduct to demonstrate the seriousness of those offences: at [31]. The offences were at the top of the range, based on his official position, the motive of financial gain, the duration of his corrupt conduct, and the number of innocent people affected: at [46].

Section 200 *Police Act 1990* — common law bribery offences

Further offences of bribery and corruption are provided in s 200 *Police Act 1990*. Under s 200(1), it is an offence for a member of the NSW Police Force to receive or solicit a bribe (pecuniary or otherwise). Under s 200(2), it is an offence for a person to give, offer or promise a bribe to, or make any collusive agreement with, a police officer.

An offence against s 200 is an indictable offence punishable by 200 penalty units, or 7 years imprisonment, or both: s 200(4).

There are also residual common law offences of bribery, conspiracy to bribe a public officer, and conspiracy to receive or solicit a bribe.

In *R v Pangallo* (1991) 56 A Crim R 441 at 443, Lee J stated that:

> In my view, the crime of bribery is always to be regarded as one which strikes at the very heart of the justice system and it must be severely punished whenever it is detected.

In *R v O'Mally* [2005] NSWCCA 166 at [15]–[16], Grove J (with Stein AJA and Howie J agreeing) endorsed the following comments in *R v Nomchong* (unrep, 10/4/1997, NSWCCA): "The police are in a position of authority and trust in the community and the public depends on them to uphold the rule of law. The crime of bribery by a police officer is one that strikes at the very heart of the justice system".

Grove J added, "Those remarks are pertinent to the present offence and not just to an offence higher in the scale of criminality such as was the circumstance in that particular instance."

In *R v Duong* [1999] NSWCCA 353, Wood CJ at CL (with Foster AJ agreeing) said at [27]:

> The offence of bribery or of offering a bribe to police in the course of the execution of their duties is a most serious offence … Save in the most exceptional circumstances it will call for a significant term of imprisonment to be imposed cumulatively or at least substantially cumulatively upon the sentence for the primary offence in respect of the detection or prosecution of which the bribe was offered.

In *R v MacLeod* [2013] NSWCCA 108 at [64], the CCA reiterated the serious nature of offences of the kind under s 200, threatening as they do the integrity of the administration of justice and potentially posing danger to police sources of information and jeopardising important investigations.

The failure of an attempted bribery may not be a mitigating factor: *R v Duong* at [16]. The fact that an attempted bribery was made is more significant than in other attempts to commit substantive offences: *R v Duong* at [17]; *R v Taouk* (1992) 65 A Crim R 387. The likely outcome of an attempted bribery, if it had been successful, may be an aggravating factor. In *R v Duong*, Wood CJ at CL explained at [20]:

> Here we have an offence which, had the attempt succeeded, two results would have followed: first, two police would have been corrupted; second, no less than $8,000,000 worth of heroin would have found its way on to the streets of Sydney with the horrific social consequences which would flow from that release.
>
> These matters, and particularly the second of them, in my view place this attempt to bribe police squarely within the category of the worst type of case.

[20-190] Common law offence of misconduct in public office

The common law offence of misconduct in public office provides that it is an offence for a public official, in the course of or connected to his or her public offence, to wilfully misconduct himself or herself by act or omission without reasonable excuse or justification, where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects: *R v Quach* (2010) 27 VR 310 at [46]; *Obeid v R* [2015] NSWCCA 309 at [133]; *Shum Kwok Sher v HKSAR* [2002] 5 HKCFAR 381 per Sir Anthony Mason NPJ.

The offence extends to politicians, such as a member of the NSW Legislative Council: *Obeid v R* (2015) 91 NSWLR 226 at [123]–[125]. Members of Parliament are entrusted with certain powers and discretions on behalf of the community, and they must be free to exercise those powers and discretions in the public interest, unfettered by considerations of personal gain or profit: *Horne v Barber* (1920) 27 CLR 494 per Rich J. The system of government expects, and depends on, individual Ministers to do the right thing: *R v Macdonald* [2017] NSWSC 638 at [239].

As a common law offence, the penalty for misconduct in public office is at large. In such instances it is the practice of the court to adopt an analogous or corresponding

statutory offence, where available, as a reference point for the imposition of penalty: *Blackstock v R* [2013] NSWCCA 172 at [8]; citing *R v Hokin* (1922) 22 SR (NSW) 280. However, the courts have emphasised that the statutory analogue is a point of reference only; it does not establish a kind of de facto maximum: *Blackstock v R* at [59]; *Jansen v R* [2013] NSWCCA 301 at [51].

The penalty for an offence of being an accessory before the fact to misconduct in public office is also at large, as an accessory before the fact is liable to the same punishment as the principal offender: s 346 *Crimes Act 1900*. The same approach of sentencing having regard to a statutory reference point, as set out in *R v Hokin*, may be applied: *Jaturawong v R* [2011] NSWCCA 168 at [5]. The misconduct in *Jaturawong v R* involved the offender corruptly receiving payments whilst acting as the manager of a registry of the RTA. Both the offender and the Crown accepted that the relevant reference point was Pt 4A *Crimes Act* which provides for offences of corruptly receiving commissions and other corrupt practices which carried a maximum penalty of 7 years imprisonment: *Jaturawong v R* at [6].

Assessing objective seriousness

Given the offence can cover a wide range of conduct, the circumstances of a given offence and offender are likely to vary enormously; it is not helpful to attempt to break the offence up into artificial sub-categories: *Jansen v R* [2013] NSWCCA 301 at [64].

The court said in *Blackstock v R* [2013] NSWCCA 172 at [14]:

> By way of explanation of the rationale for the offence, Doyle CJ said in *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 66:
>
> > It is clear, I consider, that the .... offence ... strikes at the public officer who deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which, to put it differently, involves an element of corruption. It may be that the mere deliberate misuse of information is sufficient to give rise to an offence, but the further allegation of an intent to receive a benefit clearly, in my opinion, brings the matter within the ambit of the common law offence.
>
> This statement of the purpose of the applicable rule of criminal responsibility assists in the task of assessing the objective seriousness of the offending in this case: see also *R v Quach* [2010] VSCA 106; (2010) 27 VR 310 at [44]–[47]; and *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] 1 QB 73 at [55]–[61].

Where relevant, the amount of money involved is a highly relevant consideration in assessing the objective seriousness of the offending: *Blackstock v R* at [63]. In that case, the offender had channelled government contracts to a company he had specifically established for that purpose, and the level of profitability indicated the degree of abuse of office involved: *Blackstock v R* at [63].

However, the offence need not involve monetary amounts to be objectively serious. In *Hughes v R* [2014] NSWCCA 15, a police officer improperly accessed the COPS database for illegitimate purposes, passed on the information so gained, and failed to report admissions to crimes to appropriate police officers. The offending was correctly characterised as of a high level of objective seriousness: *Hughes v R* at [50]. *Jansen v R* [2013] NSWCCA 301 is a further example of the offence involving access and dissemination of confidential police information.

In the case of misconduct on the part of a politician, the damage caused by the offence is not measured by any material loss to the State or gain to the offender; the real harm is the damage caused to the institutions of government and public confidence in them: *R v Obeid (No 12)* [2016] NSWSC 1815 at [84]; *R v Macdonald* [2017] NSWSC 638 at [231], [237]–[238]. The offender's conduct in *R v Macdonald* in exercising power conferred by a statute, as a Minister, for an improper purpose to confer a benefit on a third party was found to be a serious example of the offence: *R v Macdonald* at [249].

As a breach of trust is not part of the definition of the offence under common law, it does not constitute double counting for a sentencing judge to have regard to that factor; rather it "serves to emphasise the degree of departure from the proper standard that must be established": *Blackstock v R* at [61] citing *R v Quach* (2010) 27 VR 310 at [44].

A very significant matter in the assessment of any level of criminality is the nature of the duty owed and the extent of the breach. The more senior the public official, the greater the level of public trust in their position and the more onerous the duty that is imposed: *R v Obeid (No 12)* at [79], [88]. Mr Obeid's offence was regarded by the court as a very serious example because of the onerous nature of the duty owed as a parliamentarian compared to other officials, and the extent of his departure from it: *R v Obeid (No 12)* at [89]. General deterrence, denunciation and recognition of harm done to the community were the dominant considerations in determining the appropriate sentence. No penalty other than imprisonment was appropriate in that case given the nature of the offending: *R v Obeid (No 12)* at [138].

Extra-curial punishment

Publicity will only be considered where "it reaches such proportion as to have a physical or psychological effect on the offender": *R v Obeid (No 12)* at [102] applying *Duncan v R* [2012] NSWCCA 78 at [28].

See further **Extra-curial punishment** at [10-520].

[20-195] Resisting/hindering/impersonating police

A person who hinders, resists, or incites another person to hinder or resist, a police officer in the execution of their duty is liable to imprisonment for 12 months and/or a fine of 20 penalty units: s 60(1AA) *Crimes Act 1900*.

Offences of assault and other actions against police and other law enforcement officers are contained in Pt 3 Div 8A (see [50-120] **Assaults etc against law enforcement officers and frontline emergency and health workers**).

It is also a summary offence to impersonate a police officer: s 546D(1) *Crimes Act*. A maximum penalty of 2 years imprisonment and/or a fine of 100 penalty units applies. Section 546D(2) provides for an aggravated form of the offence where a person not only impersonates an officer but purports to exercise a power or function as a police officer, with intent to deceive. A maximum penalty of 7 years' imprisonment applies.

The offence of impersonating a police officer was formerly in s 204 *Police Act 1990*. The maximum penalty was 6 months imprisonment and/or a fine of 100 penalty units. On 1 July 2007, the offence was replaced by s 546D, which was inserted into the *Crimes Act* by the *Police Amendment (Miscellaneous) Act 2006*. These amendments may be

taken as an indication by Parliament that such offences were to be regarded as more serious and warranted a higher level of criminal sanction than was previously the case: *Opacic v R* [2013] NSWCCA 294 at [55].

The aggravated offence under s 546D(2) committed in *Opacic v R* was "significantly serious" given the target of the applicant's deception was a young woman whose vulnerability was exploited for the applicant's own sexual gratification: *Opacic v R* at [65].

[The next page is 9571]

Robbery

[20-200] The essence of robbery

Last reviewed: November 2023

The *Crimes Act 1900* does not contain a definition of robbery. The common law definition is used to inform the meaning of the term where it is used in offences created in Pt 4, Div 2 of the Act: *R v Delk* (1999) 46 NSWLR 340 at [14]–[26]. In *R v Foster* (1995) 78 A Crim R 517 at 522, robbery was defined in the following terms:

> The essence of a robbery is that violence is done or threatened to the person of the owner or custodian who stands between the offender and the property stolen, in order to overcome that person's resistance and so to oblige him to part with the property; in other words, the victim must be compelled by force or fear to submit to the theft: *Smith v Desmond* [1965] AC 960 at 985–987, 997–998; (1965) 49 Cr App R 246 at 260–263, 275–276. It is not sufficient that the threat of violence is made after the property has been taken; both elements of the offence must coincide: *Emery* (1975) 11 SASR 169 at 173.

It is not necessary that the offender applies force. It is enough that the offender by his or her conduct (which may involve an express or implied threat) puts the victim in fear of violence: *R v King* (2004) 59 NSWLR 515 at [52], [114] and [126].

[20-210] The statutory scheme

Last reviewed: November 2023

Part 4, Div 2 *Crimes Act 1900* ("the Act") sets out five sections under the heading "Robbery", containing various offences set out in the table below. The related offence of demanding property with intent to steal is contained in s 99, Pt 4, Div 3 of the Act.

Offence	Section	Penalty (Max)/SNPP
Robbery or assault with intent to rob	s 94(a)	14 yrs
Steal from the person	s 94(b)	14 yrs
Aggravated robbery or assault with intent to rob	s 95(1)	20 yrs
Aggravated robbery with wounding or grievous bodily harm	s 96	25 yrs
Robbery or assault with intent to rob, whilst armed, or in company	s 97(1)	20 yrs
Stop any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, whilst armed, or in company	s 97(1)	20 yrs
Aggravated s 97(1) offence	s 97(2)	25 yrs
Robbery or assault with intent to rob, whilst armed, or in company, and immediately before/after, or at the time, assaults, wounds, or inflicts grievous bodily harm upon the person	s 98	25 yrs/SNPP 7 yrs

The provisions in Pt 4, Div 2 of the Act "establish a series of offences, in ascending degrees of seriousness, and with ascending orders of maximum penalty, depending on

the circumstances of the case": *R v Brown* (1989) 17 NSWLR 472 at 473. For this reason, the principle enunciated in *The Queen v De Simoni* (1981) 147 CLR 383 by Gibbs J at 389 that "a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence" has particular relevance to robbery offences.

The application of the *De Simoni* principle is dealt with in the discussion of each of the offences under ss 94–99 below.

[20-215] The Henry guideline judgment for armed robbery

Last reviewed: November 2023

It was said over twenty years ago that a robbery, whether with or without arms, is to be regarded "in virtually all circumstances as an offence of the utmost gravity, which must carry a custodial sentence": *R v Murray* (unrep, 11/9/86, NSWCCA) per Lee J; *R v Valentini* (1989) 46 A Crim R 23 at 26. This approach was affirmed in the guideline judgment of *R v Henry* (1999) 46 NSWLR 346. It applies to armed robbery (s 97) sentences and has sentencing implications for other robbery offences elsewhere in the Act: see **[20-230]**; **[20-250]**; **[20-270]**; and **[20-280]**.

Robbery with arms etc and wounding under s 98 is included in the Table of Standard non-parole period offences in s 54D of the *Crimes (Sentencing Procedure) Act 1999* (NSW): see **Standard non-parole period** in **[20-270]** below.

See further, L Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph 30, Judicial Commission of NSW, 2007, pp 47 and 51.

[20-220] Robbery or assault with intent to rob or stealing from the person: s 94

Last reviewed: November 2023

Section 94 provides:

> Whosoever:
>
> (a) robs or assaults with intent to rob any person, or
>
> (b) steals any chattel, money, or valuable security from the person of another,
>
> shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

Stealing from the person is robbery without the element of violence or threat of violence: *R v Delk* (1999) 46 NSWLR 340 at [30]. A common form of this offence is bag snatching: see, for example, *R v White* (unrep, 29/5/98, NSWCCA).

Summary disposal of s 94 offences

Offences under s 94 may be dealt with summarily.

An offence of robbery or assault with intent to rob contrary to s 94(a) is a Table 1 offence and subject to a maximum penalty of 2 years imprisonment or a fine of 100 penalty units: s 267(2), (3) *Criminal Procedure Act 1986*. An offence of stealing from the person contrary to s 94(b), where the value of the property, matter or thing stolen exceeds $5,000, is a Table 1 offence and is subject to a maximum penalty of

2 years imprisonment or a fine of 100 penalty units: s 267(2), (3) *Criminal Procedure Act*. Where the value does not exceed $5,000 it is a Table 2 offence and subject to a maximum penalty of 2 years imprisonment or a fine of 50 penalty units, or both. Where the value does not exceed $2,000 the maximum penalty that the Local Court may impose is a penalty of 2 years' imprisonment or 20 penalty units, or both: s 268(2)(b) *Criminal Procedure Act*.

The jurisdictional maximum set by the *Criminal Procedure Act* does not supplant the maximum penalty for the offence. Nor is the jurisdictional maximum necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see also **[10-005] Cases that attract the maximum**): *R v Doan* (2000) 50 NSWLR 115 at [35]; *Park v The Queen* [2021] HCA 37 at [19], [23].

The fact that stealing from the person can be dealt with in the Local Court is not automatically a matter in mitigation if the offender is dealt with on indictment in the District Court. The offender's case must come within the exceptional circumstances outlined in *Zreika v R* [2012] NSWCCA 44 at [107]–[109].

See further **Possibility of summary disposal** at **[10-080]**.

In *Trindall* [2005] NSWCCA 446, the applicant pleaded guilty to two offences of steal from the person. The judge erred in not referring to the maximum penalties in the Local Court. However, given the circumstances of the case, including the fact that the offences were committed while the applicant was on parole, and aggravating circumstances surrounding the second steal from person offence, this error did not warrant appellate intervention: at [40].

Bag snatching

Bag snatching offences are often dealt with under s 94 because the offender steals the bag unbeknown to the victim. It has been consistently held that general deterrence should play a significant part in the sentencing process for such offences, because of the comparative ease with which they can be committed: *R v Ranse* (unrep, 8/8/94, NSWCCA).

In *R v Ranse*, Gleeson CJ said of bag snatching offences:

> One of the primary purposes of the system of criminal justice is to keep the peace. In this connection the idea of peace embraces the freedom of ordinary citizens to walk the streets and to go about their daily affairs without fear of physical violence. It also embraces respect for the property of others.
>
> Offences of the kind committed by the present respondent are not trivial instances of disrespect for private property. They are serious breaches of the peace. They are direct attacks upon the security of person and property which the law exists to protect.

R v Ranse was quoted with approval in *R v Maloukis* [2002] NSWCCA 155 at [15] and *R v Marinos* [2003] NSWCCA 136 at [17].

It was said more than 10 years ago that a bag snatching offence will attract a full-time custodial sentence when violence is involved, unless there are exceptional circumstances: *R v Taylor* [2000] NSWCCA 442 per Wood CJ at CL at [48]. This is necessary to reflect the element of general deterrence which has a particular significance for a bag snatching offence given its prevalence and the fact the victims are most often the aged and infirm: at [48].

The De Simoni principle and s 94

The courts have grappled with the *De Simoni* principle as it applies to offences contained with s 94. The applicant in *R v Young* [2003] NSWCCA 276 had originally been charged with robbery but the Crown accepted a plea to stealing from the person in full satisfaction of the charges. The judge referred to the charge as "robbery" and took into account the fact that the applicant had a knife and frightened his victims. This was an error for it "blurred the distinction between the two offences, and [gave] rise to a reasonable apprehension that the sentencing exercise was not focussed upon the elements of the alternative charge to which the applicant had pleaded guilty": at [10].

However, in *Edwards v R* [2009] NSWCCA 199 at [40], it was asserted that the judge breached the *De Simoni* principle by finding that it "was an offence where violence was offered during the stealing". The finding was based on the action of the applicant of squeezing the victim's hand. The applicant submitted it was available for a robbery offence but not for an offence of stealing from the person. Johnson J at [41] rejected the submission on the basis that both robbery and stealing from a person have the same maximum penalty and that the latter offence "usually involves a personal confrontation and the potential for personal conflict and force or fear, particularly if the victim endeavours to stop the theft: *R v Delk* (1999) 46 NSWLR 340 at 343 [15]. Stealing from the person is a variant of robbery rather than a variant of larceny: *R v Delk* at 345 [29]. Not every offence of stealing from the person is less serious than robbery, with such an assessment depending upon the particular facts of the case: *R v Hua* [2002] NSWCCA 384 at [19]".

The court held that nothing said in *R v Young* [2003] NSWCCA 276 or *R v Hooper* [2004] NSWCCA 10 required a contrary conclusion that the *De Simoni* principle had been breached: [41].

It is a breach of the *De Simoni* principle if a judge takes into account circumstances of aggravation that would have warranted a conviction for any of the offences found in s 97: see **Robbery etc or stopping mail, being armed or in company: s 97(1)** at **[20-250]**. For example, the fact that the offender was armed: *R v Grainger* (unrep, 3/8/94, NSWCCA); or for example, that the offence was committed in company: *Rend v R* [2006] NSWCCA 41 at [103]; *Iese v R* [2005] NSWCCA 418 at [18].

[20-230] Robbery in circumstances of aggravation: s 95

Last reviewed: November 2023

Section 95 provides:

> (1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.

Section 95(2) sets out three circumstances of aggravation: namely, the use of corporal violence; the infliction of actual bodily harm, whether intentional or reckless; and deprivation of liberty.

When the circumstance of aggravation relied upon is the use of corporal violence, the nature and extent of the violence will be relevant to the seriousness of the offence: *R v Atonio* [2005] NSWCCA 200 at [29]. Sentences must reflect the distinction

between using force and inflicting actual injuries "lest it be thought that there is no point in limiting the violence used to commit crimes": *Gray v R* [2007] NSWCCA 366 at [28] per Adams J.

The Henry guideline and s 95 offences

Many of the characteristics considered in the *R v Henry* armed robbery guideline judgment (quoted below at **[20-250]**) are common to offences contrary to s 95. The court in *Azzi v R* [2008] NSWCCA 169 at [37] accepted that the guideline is a "relevant reference point". However, because *R v Henry* considers the circumstance where a weapon is used, the use of the armed robbery guideline must be approached with caution when sentencing for an offence contrary to s 95: *R v Tortell* [2007] NSWCCA 313 at [14]. Even when all of the characteristics set out at [162] of the guideline judgment in *R v Henry* are satisfied (apart from the characteristic that the offender was armed), a sentencing judge is not permitted to adopt as a starting point, or as a prima facie sentence, a sentence of four to five years. Nor can the judge oscillate around the four to five year figure by enquiring whether any circumstances are present which would justify a heavier or a lighter sentence: *R v Yates* [2002] NSWCCA 520 at [366].

The De Simoni principle and s 95

It is permissible to take into account as an aggravating factor the fact that the offence was committed in company for a s 95 offence. This is because the offence of robbery in company contrary to s 97 carries the same maximum penalty as an offence pursuant to s 95: *Moore v R* [2005] NSWCCA 407 at [33].

Where the s 95 robbery offence is based on conduct consisting of the threat of violence, it is permissible to apply s 21A(2)(b) *Crimes (Sentencing Procedure) Act 1999* and take into account any actual violence without double counting: *Hamze v R* [2006] NSWCCA 36 at [26]. The statements in *R v Mauai* [2005] NSWCCA 207 at [13]–[16] concerning the application of s 21A(2)(b) *Crimes (Sentencing Procedure) Act* to offences under s 95 should be read in light of *Hamze v R*.

It was an error in *Kukovec v R* [2014] NSWCCA 308 where the Crown charged an offence of aid and abet aggravated (corporal violence) robbery, for the judge to take into consideration the aggravating factor "in company" under s 21A(2)(e) *Crimes (Sentencing Procedure) Act* as it breached the suffix to s 21A(2) *Crimes (Sentencing Procedure) Act* (the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence). It was an element of the offence when the offender was a principal in the second degree, that the offence was committed in company.

In *McDonald v R* [2015] NSWCCA 280, the court held that the sentencing judge was entitled to take into account actual use of violence as an aggravating factor under s 21A(2)(b) *Crimes (Sentencing Procedure) Act* where the offender had been convicted of aggravated robbery where the circumstance of aggravation was deprivation of liberty.

In *Melaisis v R* [2018] NSWCCA 184, the offending was held to be at a low level of seriousness due to the offence being spontaneous and unpremeditated, the threatening and physical conduct being short-lived, the actual bodily harm having no significant long-term consequences, and the victim not permanently losing his property: [16].

[20-240] Robbery in circumstances of aggravation with wounding: s 96

Last reviewed: November 2023

Section 96 provides:

> Whosoever commits any offence under s 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

All offences under s 96 involving the infliction of grievous bodily harm are serious, but those resulting in permanent disability are necessarily more so: *R v MS2* [2005] NSWCCA 397 at [13]. This must be reflected in the severity of the sentence.

A sentencing judge is entitled to take into account the *R v Henry* guideline judgment as a means to assess the seriousness of an offence under s 96: *R v Thomas* [2007] NSWCCA 269 at [22], [91].

[20-250] Robbery etc or stopping mail, being armed or in company: s 97(1)

Last reviewed: November 2023

Section 97(1) provides:

> (1) Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person,
>
> robs, or assaults with intent to rob, any person, or
>
> stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same,
>
> shall be liable to imprisonment for 20 years.

An "offensive weapon" is defined in s 4(1) of the Act as either a dangerous weapon, any thing made or adapted for offensive purposes, or any thing that, "in the circumstances, is used, or intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm".

The Henry guideline and armed robbery

In *R v Henry* (1999) 46 NSWLR 346 Spigelman CJ stated at [99]:

> Armed robbery is not simply a crime against property. It is a crime against persons. Furthermore, the fear engendered by the perpetrator of this crime, together with the continued adverse effects on its victims, establish armed robbery to be a serious crime which requires condign punishment.

Robbery in company and the guideline

The *R v Henry* guideline judgment is equally applicable to an offence of robbery in company, which has the same maximum penalty as an offence of armed robbery and which can be seen as broadly equivalent: *R v Murchie* [1999] NSWCCA 424 at [20]; *R v Lesi* [2005] NSWCCA 63 at [31]; *R v II* [2008] NSWSC 325 at [24].

The seven considerations enumerated in *R v Henry* at [162] apply "mutatis mutandis" to the s 97 offence of assault in company and with intent to rob: *R v Stanley* [2003] NSWCCA 233 at [14].

See also **Joint criminal enterprise** and **Parity** at **[20-290]** below.

Full time custody unless exceptional circumstances

An offender convicted of armed robbery should expect to receive a full-time custodial sentence, save in the "most exceptional circumstances": *R v Roberts* (1994) 73 A Crim R 306 at 308. In *R v Henry*, Spigelman CJ at [113] applied the *Roberts* principle with the phrase "most exceptional circumstances" in favour of the phrase "wholly exceptional and unusual circumstances" employed in *R v Crotty* (unrep, 29/2/94, NSWCCA) at 5. However, a number of subsequent cases refer to *R v Henry* as authority for the principle that merely "exceptional circumstances" (as opposed to "most exceptional circumstances") are required: see, for example, *Legge v R* [2007] NSWCCA 244 at [44]. The court in *R v Henry* described the test as being "most exceptional circumstances" at one point in its judgment ([113]) and later being "exceptional circumstances": see, for example, [210] and [270]. The differences between these expressions may not be material.

Youth by itself is not an exceptional circumstance: *R v Tran* [1999] NSWCCA 109 at [18]. Nor necessarily is the attempt or achievement of rehabilitation: *R v Tran*, above, at [18]. The provision of assistance to authorities may qualify as an exceptional circumstance but the case would need to be compelling and the assistance to authorities substantial; what constitutes exceptional circumstances will depend upon the particular case: *R v Tran* at [21]. Cases of note since the guideline where exceptional circumstances have been found include: *R v Govinden* (1999) 106 A Crim R 314 at [35]; *R v Metcalf* [2000] NSWCCA 277 at [36]; *R v Blackman* [2001] NSWCCA 121 at [45]; *R v Parsons* [2002] NSWCCA 296 at [70]; *R v Nair* [2003] NSWCCA 368 at [17]; and *R v Gadsden* [2005] NSWCCA 453 at [36].

"Henry" factors

The guideline judgment of *R v Henry* (1999) 46 NSWLR 346 is directed at the offence of armed robbery pursuant to s 97(1) of the Act. The rationale and impetus for the guideline judgment was "the inconsistency in sentencing practice and systematic excessive leniency in the level of sentences" for s 97(1) offences: per Spigelman CJ at [110]. In particular, the judgment expressed concern regarding the prevalence of first instance judges finding exceptional circumstances warranting the imposition of a non-custodial sentence.

Spigelman CJ promulgated the following guideline at [162]:

> **A Guideline for New South Wales**
>
> It appears from the cases that come to this Court, including the present proceedings, that there is a category of case which is sufficiently common for purposes of determining a guideline:
>
> (i) Young offender with no or little criminal history
>
> (ii) Weapon like a knife, capable of killing or inflicting serious injury
>
> (iii) Limited degree of planning
>
> (iv) Limited, if any, actual violence but a real threat thereof
>
> (v) Victim in a vulnerable position such as a shopkeeper or taxi driver
>
> (vi) Small amount taken
>
> (vii) Plea of guilty, the significance of which is limited by a strong Crown case.

> Whilst it is possible to determine a starting point in a case of this kind, i.e. a sentence of X years imprisonment, I do not believe that the Court should do so. Rather, I propose the Court should identify a narrow sentencing range within which this Court would expect sentences in such cases to fall.
>
> There are two principal reasons why a sentencing range is appropriate for this offence:
>
> (i) The seven characteristics identified above do not represent the full range of factors relevant to the sentencing exercise.
>
> (ii) Many of the seven identified characteristics contain within themselves an inherent variability, eg different kinds of knives or weapons in (ii); extent of "limited actual violence" in (iv); degree of vulnerability in (v); amount in (vi).
>
> In my opinion sentences for an offence of the character identified above should generally fall between four and five years for the full term. I have arrived at this figure after drawing on the collective knowledge of the other four members of the Court with respect to sentence ranges. I have also reviewed the sentences which this Court has imposed on occasions when it has intervened, including in Crown appeals where the principle of double jeopardy applies. The proposed range is broadly consistent with this body of prior decisions in this Court.
>
> …
>
> Aggravating and mitigating factors will justify a sentence below or above the range, as this Court's prior decisions indicate. The narrow range is a starting point.
>
> In addition to factors which may arise in any case eg youth, offender's criminal record, cooperation with authorities, guilty plea in the absence of a strong case, rehabilitation efforts, offence committed whilst on bail etc, a number of circumstances are particular to the offence of armed robbery. These include:
>
> (i) Nature of the weapon
>
> (ii) Vulnerability of the victim
>
> (iii) Position on a scale of impulsiveness/planning
>
> (iv) Intensity of threat, or actual use, of force
>
> (v) Number of offenders
>
> (vi) Amount taken
>
> (vii) Effect on victim(s).

Spigelman CJ has since clarified that the guilty plea component (number (vii)) at [162] refers to a late plea of guilty for the purposes of the application of the guideline promulgated in *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [161]. Therefore, where there is an early plea, all other things being equal, the sentence should be lower than the suggested range: *R v Thomson and Houlton* per Spigelman CJ at [161]. Note: s 25D *Crimes (Sentencing Procedure) Act 1999* provides the mandatory sentencing discounts for a guilty plea for offences dealt with on indictment. For dealing with a late guilty plea, see *R v Thomas* [2007] NSWCCA 269 at [26].

Spigelman CJ said in *Legge v R* [2007] NSWCCA 244 at [59]: "a guideline is not a tramline." It is not the case exceptional circumstances must be demonstrated before a sentence of less than the guideline promulgated in *R v Henry* may be imposed: at [44]. Such an approach impermissibly confines the exercise of sentencing discretion. It is also inconsistent with the nature of guideline as a check, a guide or an indicator or as a sounding board: *Legge v R* at [59]. The *R v Henry* guideline is not to be approached

as a 'mechanical checklist' as the particular facts of each case will inform the relative seriousness of the offence: *Harris v R* [2021] NSWCCA 322 at [77]. In *Foaiaulima v R* [2020] NSWCCA 270 at [23], Johnson J noted that 21 years had passed since the *R v Henry* guideline judgment, there had been significant changes to statutory and common law over that period, and the guideline is be applied within the context of evolving sentencing law.

The guideline judgment and s 21A

In "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43, Howie J expressed the opinion that s 21A(2), which sets out various aggravating matters, has limited operation where there is a guideline judgment for an offence:

> The guideline judgments are offence specific. The facts relevant to a determination of whether or not the guideline applies will generally merely be specific aspects of the aggravating and mitigating factors in s 21A. There will be few, if any, aggravating or mitigating features to take into account once the specific offence-related matters have been considered.

In the armed robbery case of *R v Street* [2005] NSWCCA 139, the sentencing judge first considered the guideline judgment in *R v Henry* which referred to factors, the absence or presence of which indicated that the guideline judgment was applicable, and then by way of separate analysis took into account the specific factors referred to in s 21A, albeit in a collective and non-specific way as has been described. This approach "exacerbated the risk of aggravating factors being double counted": Hoeben J at [35].

See also **Armed robbery and s 21A** at **[20-260]** below.

The De Simoni Principle and s 97(1)

It is not an error for the judge, when sentencing for an offence of armed robbery, to take into account the actual bodily harm suffered by the victim: *Liao v R* [2007] NSWCCA 132 at [8]–[12]. Section 95 (which provides for a specific offence of robbery in circumstances where an offender uses corporal violence) carries the same maximum penalty as s 97(1): at [12].

Where a single s 97(1) offence can be proved by the existence of one of two elements (eg being in company, or the use of an offensive weapon), it is not a breach of the *De Simoni* principle to take into account the presence of the other element in assessing the objective seriousness of the offending and to give it due weight: *R v Fangaloka* [2019] NSWCCA 173 at [24].

[20-260] Robbery armed with a dangerous weapon: s 97(2)

Last reviewed: November 2023

Section 97(2) provides:

> **Aggravated offence**
>
> A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) when armed with a dangerous weapon. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

A "dangerous weapon" is defined in s 4(1) of the Act as either a firearm within the meaning of the *Firearms Act 1996*, a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*, or a spear gun.

A sentencing judge is entitled to take into account the *R v Henry* guideline judgment as a means to assess the seriousness of an offence under s 97(2): *R v Hamied* [2007] NSWCCA 151 at [11]–[13]; *R v Franks* [2005] NSWCCA 196 at [32].

Armed robbery offences escalate in seriousness according to how weapons are used. Maxwell J said in *R v Readman* (1990) 47 A Crim R 181 at 185:

> [T]his Court indicated in *Regina v Dicker*, 3 July 1980 that robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target.

This principle was applied in *R v Campbell* [2000] NSWCCA 157 at [24].

However, a s 97(2) offence will not necessarily be more serious than a s 97(1) offence where an offender is armed with an offensive weapon; it will depend on the nature of the dangerous weapon itself. In *Barnes v R* [2022] NSWCCA 40, the offender was armed with a pistol that could not be established as genuine. As it was not a weapon capable of killing or inflicting serious injury, it was held that the seriousness of the offending was less than that of a 'typical' *R v Henry* guideline case: [71].

The De Simoni principle and s 97(2)

It is not a breach of the *De Simoni* principle, when sentencing for a s 97(2) offence, to take into account as a circumstance of aggravation the fact that the victim was wounded. In *R v Hooper* [2004] NSWCCA 10, James J said at [38] that robbery with wounding under s 98 is not a more serious offence than an offence under s 97(2). Both offences have the same statutory maximum penalty: at [35]. The elements of ss 97(2) and 98 are not the same, nor do the elements of a s 98 offence wholly encompass the elements of a s 97(2) offence. A wounding under s 98 may not necessarily involve a serious injury. It may be any injury involving the breaking of the skin: at [36].

Armed robbery and s 21A

Note: For a general discussion of s 21A factors see **Section 21A Factors "in addition to" any Act or Rule of Law** at **[11-000]** above. The cases below are confined to the application of the section to armed robbery.

Section 21A(2)(b) — the offence involved the actual or threatened use of violence

In *Hamze v R* [2006] NSWCCA 36 at [26] and *R v Dougan* [2006] NSWCCA 34 at [30], and *McDonald v R* [2015] NSWCCA 280 at [100]–[101], it was held that the threatened use of violence is a necessary element of armed robbery, but that actual use of violence as referred to in s 21A(2)(b) is not necessarily an element. The nature and extent of the threat (as opposed to the bare fact of the threat) can be taken into account via s 21A(2)(b) to assess the seriousness of the crime: *R v Way* (2004) 60 NSWLR 168 at [106]–[107]; *Antonio v R* [2008] NSWCCA 213 at [27] (although this decision involved robbery simpliciter under s 94. Thus, in *Dougan*, the court held at [29] that it would have been permissible for the judge to have assessed the precise circumstances in which violence was threatened as a factor which increased the seriousness of the offence. Similarly in *Hamze v R* at [29], it would have been permissible for the judge to have regard to "the nature of the threatened use of violence in considering the seriousness of the offence". However in both cases the sentencing judge erred by failing to make clear precisely how s 21A(2)(b) was applied to the facts of the case.

In *Dougan*, considering the "nature and extent" of the threatened use of violence, the judge would have been entitled to have regard to the fact that the offence involved the actual pointing of a pistol at the victim's neck. This was indicative of a heightened level of threat and a very specific use of the weapon, which increased the seriousness of the offence: at [29]. But it is not entirely clear whether the CCA will persist with the distinction drawn in *Dougan*. Bell J said in *Fairbairn v R* (2006) 165 A Crim R 434 at [31]:

> The Judge was satisfied that the applicant's offences were aggravated by factors (b), (c) and (m). The threatened use of violence and the threatened use of the knife were each elements of the offences and it was not open to the Judge to regard them as factors that aggravated the offence: *R v Ibrahimi* [2005] NSWCCA 153 at [17]–[18]; *R v Street* [2005] NSWCCA 139 at [32]; *R v House* [2005] NSWCCA 88 at [8]–[9]; *R v Suaalii* [2005] NSWCCA 206 at [12]–[15]; *R v McNamara* [2005] NSWCCA 195 at [31].

The appellant in that case had pleaded guilty to assault with intent to rob whilst armed with an offensive weapon (knife).

Section 21A(2)(c) — the offence involved the actual or threatened use of a weapon

In *R v Dougan* [2006] NSWCCA 34, the judge was entitled to take into account that the offence involved actual or threatened use of a pistol, as an aggravating factor in sentencing for the offence of assault with intent to rob while armed with a dangerous weapon. This is because "actual or threatened *use* of a weapon" is not an element of the offence under s 97(2) of the *Crimes Act*. The requirement that the offence was committed "while armed with a dangerous weapon" means possession of a weapon available for immediate use (*R v Farrar* (1983) 78 FLR 10), *not* its actual or threatened use: at [32]. Hoeben J said at [32]:

> robbery when armed with a dangerous weapon may be made out even if the offender does not threaten to use or use the weapon. The victim may submit to the theft by fear as a result of the knowledge that the offender is armed with a dangerous weapon.

The fact that the applicant pointed the pistol at the victim's neck was an additional aggravating factor.

In *Huynh v R* [2006] NSWCCA 224, the judge was entitled to take into account the firing of a gun as an aggravating factor pursuant to s 21A(2)(c) in sentencing for an offence under s 97(2). Hidden J said at [18]:

> True it is that the threatened use of violence, if not the infliction of it, is an element of robbery. The presentation of a weapon is an element of armed robbery, and the expression "use" of a weapon could embrace the presentation of it. Clearly, however, by the phrase she used her Honour was referring compendiously to the firing of the gun by Pham. That act could be described as the use of the weapon, and as an act of actual violence carrying with it the threat of further violence. The firing of the gun, of course, was not an element of the offence.

Mere possession of a weapon cannot be taken into account as a factor aggravating an armed robbery offence: *R v House* [2005] NSWCCA 88. The judge erred there by treating mere possession by the applicant of a tyre lever and socket wrench as a factor to which additional regard could be given per s 21A(2): at [8].

Section 21A(2)(e) — the offence was committed in company

It may be double counting for a judge sentencing for an offence under s 97(2) to take into account as an aggravating factor the fact that the offence was committed in company for the purposes of s 21A(2)(e). In *Hamze v R* [2006] NSWCCA 36 Giles JA said at [37]:

> Section 97(2) builds upon s 97(1), and incorporates the commission of an offence under s 97(1). The two limbs in s 97(1) can also be cumulative, and the applicant was charged with an offence with the two elements … It would be an error in this case to take into account that the robbery was [committed] in company. It would still be open to a sentencing judge, in assessing the seriousness of an offence, to conclude that the company of a number of men rather than a few increased the seriousness; this would depend on the facts (see *R v Way* [(2004) 60 NSWLR 168]). But I am unable to conclude that the judge took this approach … In my opinion, there was error in this respect.

Section 21A(2)(g) — the injury, emotional harm, loss or damage caused by the offence is substantial

It is double counting for a judge to take into account as an aggravating feature pursuant to s 21A(2)(g), the effects of a crime upon a victim of an armed robbery where the effects are those that would be expected to result from the commission of that type of offence. In *R v Solomon* [2005] NSWCCA 158, Howie J stated at [19] that: "… the court assumes, without evidence, that the victim of a robbery would be affected both physically and psychologically from the commission of the offence …". Therefore "something more is required" to aggravate the offence.

Similarly in *R v Youkhana* [2004] NSWCCA 412, Hidden J stated at [26] that before a judge could find substantial emotional harm within the meaning of s 21A(2)(g), the evidence "would need to disclose an emotional response significantly deleterious than that which any ordinary person would have when subjected to an armed robbery". In *Moore v R* [2005] NSWCCA 407, involving an offence of armed robbery and another of aggravated robbery, the court held (at [29]–[30]) there was insufficient evidence to support a finding that the emotional harm caused by the offences to the victims (a taxi driver and pizza deliverer) was substantial.

Section 21A(2)(l) — the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)

Vulnerable victims in robbery cases are discussed at **[20-290]**.

Section 21A(3)(a) — the injury, emotional harm, loss or damage caused by the offence was not substantial

This mitigating factor in s 21A(3)(a) is the converse of the aggravating factor set out under s 21A(2)(g), dealt with above.

In the armed robbery case of *Bichar v R* [2006] NSWCCA 1, when considering the mitigating factors under s 21A(3)(a), the sentencing judge concluded "so far as the long term is concerned" the injury and emotional harm caused by the offence was not substantial. The CCA held that there was simply no evidence on the subject and the judge erred in assuming that there was no lasting impact upon the victim. Howie J said

at [22] that, as was explained in *R v Solomon* [2005] NSWCCA 158, the court assumes that the effect upon a victim of an armed robbery is substantial and this is taken into account in the penalty to be imposed. Had there been evidence of a long-lasting effect on the victim, this might have been a matter of aggravation.

[20-270] Robbery with arms and wounding: s 98

Last reviewed: November 2023

Section 98 provides:

> Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

Robbery with wounding in company will usually constitute a serious offence, and will be more serious if it extends over a longer period, involves a more serious degree of bodily harm or results in a greater loss of property: *Krishna v DPP* [2007] NSWCCA 318 at [37]. The involvement of a high level of violence will also affect the objective seriousness of the offending and the offender's criminality: *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 at [40].

Standard non-parole period

Where a s 98 offence was committed on or after 1 February 2003, the offence carries a standard non-parole period of seven years. In *R v Henry* [2007] NSWCCA 90 at [26], Howie J stated:

> the offence under s 98 had a standard non-parole period of 7 years but a maximum penalty of 25 years. This Court has remarked about the problems that are posed for a sentencing court by a standard non-parole period that is out of proportion to the maximum penalty and the difficulty in determining the rationale of parliament in specifying a standard non-parole period that is well above or well below half the maximum penalty: see *Marshall* [*v R* [2007] NSWCCA 24] at [34].

A list of the appeal cases and summaries for offences which carry a standard non-parole period is accessible via "SNPP Appeals" on the JIRS website.

Effect of the standard non-parole period on the relevance of the Henry guideline judgment

Simpson J stated in *R v Tobar* [2004] NSWCCA 391 at [55] that, in relation to the offence of armed robbery with wounding, the introduction of the standard non-parole period "must be taken to have excluded, or at least significantly reduced, the application of the guideline judgment in *R v Henry*".

In *R v Henry* [2007] NSWCCA 90, Howie J stated that the *R v Henry* guideline judgment of 1999 has a reduced role to play in determining a sentence for a s 98 offence even without the standard non-parole provisions, because there is a higher maximum penalty for such offences by reason of the fact that there has been a wounding: at [34]. If a court imposes a sentence for a s 98 offence that is less than that proposed in the

armed robbery *R v Henry* guideline, that fact alone should cause the court to consider whether the sentence is justified, given that s 98 has a higher maximum penalty than s 97(1): at [34].

His Honour said at [35]:

> I do not see anything inconsistent between the *Henry* guideline and the standard non-parole period for the s 98 offence. The *Henry* guideline looks to the total sentence and it is dealing with the normal case for an offence under s 97. Therefore, it is considering an offence in the midrange of seriousness where the maximum penalty is imprisonment for 20 years. The sentence suggested in the guideline, however, is the end result of the application of the relevant s 21A matters to an offence objectively of midrange seriousness. So it takes into account the young age of the offender and the lack of serious record. It also takes into account a late plea. Bearing those matters in mind, it still represents a guide to the sentencing for related offences, such as an offence under s 98 even though that offence carries a standard non-parole period. It is another reference point but one indicating a range of sentences that would not normally be appropriate for a s 98 offence.

In short, the relevance of the *R v Henry* guideline is that it states a range that is below the range appropriate for a s 98 offence: *R v PB* [2008] NSWCCA 109 at [25].

Section 98 offences and s 21A

It is an error for a sentencing judge, when sentencing for an offence of assault with intent to rob in company with wounding, to take into account as an aggravating factor the actual or threatened use of violence. This factor is implicit in the assault element of the offence: *R v LLM* [2005] NSWCCA 302 at [38].

The applicant in *McArthur v R* [2006] NSWCCA 200 pleaded guilty to one count of robbery armed with an offensive weapon with which he inflicted grievous bodily harm upon the victim. The victim suffered a fractured skull which required surgery. Other effects included broken teeth, sinus difficulties, eye discomfort, nightmares, sleep deprivation and a loss of confidence about going out at night. The applicant submitted that the sentencing judge erred in taking into account as an aggravating factor the fact that the emotional harm was substantial (s 21A(2)(g)), arguing that this was an element of the offence. Grove J rejected the submission. He said at [13] that "[b]y definition, grievous bodily harm is really serious physical injury" and that emotional harm is not necessarily an element of grievous bodily harm.

[20-280] Demanding property with intent to steal: s 99

Last reviewed: November 2023

Section 99 provides:

> (1) Whosoever, with menaces, or by force, demands any property from any person, with intent to steal the same, shall be liable to imprisonment for ten years.
>
> (2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.
>
> (3) It is immaterial whether any such menace is of violence or injury by the offender or by any other person.

Demanding property with intent to steal is a Table 1 offence and is to be dealt with summarily unless an election is made for trial on indictment: s 260 of the *Criminal Procedure Act 1986*. The maximum penalty which can be imposed by the Local Court is two years' imprisonment: s 267(2).

The jurisdictional maximum set by the *Criminal Procedure Act 1986* does not supplant the maximum penalty for the offence. The jurisdictional maximum is not necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; *R v Doan* (2000) 50 NSWLR 115 at [35]. See also **Cases that attract the maximum** at **[10-005]**).

The significance of the loss of a chance to be dealt with in the Local Court will vary from case to case and if the offender's criminality was too serious for the matter to be dealt with in the Local Court it will have little effect: *R v El Masri* [2005] NSWCCA 167 at [29]. In *R v Cage* [2006] NSWCCA 304, the respondent pleaded guilty to two offences under s 99. The court held that the sentencing judge had placed undue emphasis on the fact that the offences could theoretically have been disposed of summarily. Although capable of summary disposition, the offences were the result of very generous concessions made by the prosecution for the purposes of securing the pleas of guilty: at [32].

The Henry guideline and s 99

The *R v Henry* guideline judgment is not applicable when sentencing an offender pursuant to s 99(1): *R v Smith* [2004] NSWCCA 95 at [15]. The court held that it was "unnecessary and unhelpful" for the sentencing judge to have referred to the guideline judgment in such a case, and that: "[t]he guidelines laid down in the Court of Criminal Appeal in *R v Henry* are not to be extended outside the range of cases in circumstances to which it was directed": at [13].

The De Simoni principle and s 99

It is a breach of the *De Simoni* principle for a sentencing judge to take into account a circumstance that elevates a s 99 offence to one of robbery. Thus in *R v Smith*, it was held that in sentencing for an offence of demanding money with menaces, the sentencing judge should not have mentioned in his remarks the fact that the applicant took $200 from the person of the victim: at [16].

[20-290] Objective factors relevant to all robbery offences

Last reviewed: November 2023

Joint criminal enterprise

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime: *R v Cotter* [2003] NSWCCA 273 at [87]. If the agreed crime is committed by one or other or all of the parties to the joint criminal enterprise, all parties are equally guilty of the crime regardless of the part played by each in its commission: at [88]. It is inappropriate to attempt to assess with any degree of precision the role which each played in the consummation of the criminal enterprise: *R v Hoschke* [2001] NSWCCA 317 at [18].

This does not automatically mean that every participant in a joint enterprise shares the same degree of objective criminality. There may be a proper basis for differentiation, for example, if one offender stands out as the obvious ring-leader, or is the person who elects to carry out the threat of violence by using the weapon to injure the victim. However where the robbery proceeds according to plan, without violence beyond that contemplated and threatened by the presence of the weapon, each participant shares equal responsibility: *R v Goundar* [2001] NSWCCA 198 at [30]–[34].

In *R v Alameddine* [2004] NSWCCA 286, the applicant had pleaded guilty to one count of robbery in company while armed with a dangerous weapon under s 97(2). The applicant submitted that he was less objectively culpable than the other offenders involved in the robbery, as he had not entered the premises or personally participated in the violence. Wood CJ at CL at [52] stated:

> While there is a difference between the circumstances which are sufficient to render a person criminally liable for conduct that comes within joint [criminal] enterprise principles, and that which establish the extent of such offender's culpability, inevitably this becomes a question of degree.

The court ultimately held at [59]–[61] that even if the applicant did not enter the premises, he was "centrally involved". He was the co-ordinator of what occurred at the scene and therefore his culpability was equally as great as the others who were there: *R v Hoschke* applied.

In *R v Fepuleai* [2007] NSWCCA 325, the applicant had pleaded guilty to one count of assault with intent to rob whilst armed with a dangerous weapon under s 97(2). The offence was committed in the company of four co-offenders. Latham J said at [21]:

> It is rare that precise quantifications can be made as to the extent to which each offender in a joint criminal enterprise contributes to the planning and execution of an offence … [I]t matters not whether the respondent was involved in the planning of the offence to a substantial extent or not. The fact that he was a party to such a criminal enterprise is the essence of his liability.

The *R v Henry* guideline judgment may be considered when sentencing a person who is not the principal offender, and whose criminal liability is founded upon the doctrine of joint criminal enterprise or common purpose, even though *R v Henry* did not expressly deal with such an offender: *R v Donovan* [2003] NSWCCA 324 at [26].

Aiders, abettors and principals in the second degree

It is not always the case that an aider and abettor will be less culpable than a principal offender. "A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case": *GAS v The Queen* (2004) 217 CLR 198 at [23]; *R v Swan* [2006] NSWCCA 47 at [72].

In *R v Anderson* [2002] NSWCCA 485, the appellant drove the car involved in a robbery and pleaded guilty to robbery in company as a principal in the second degree. Hidden J at [28] found that the offender's role was "very much less" than that of her co-offenders.

The *R v Henry* guideline judgment is relevant to sentencing for an offence of aiding and abetting an armed robbery: *R v Goundar*, above, at [37]–[38]. Sections 345 and 346 *Crimes Act* clarify that an abettor or accessory to the commission of an offence is liable to the same penalty as the person who commits the principal offence.

Parity

In the armed robbery case of *Lowe v The Queen* (1984) 154 CLR 606 Dawson J, with whom Wilson J agreed, said of the principle of parity at 623:

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. … [However] any difference between the sentences imposed on co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done.

Matters such as the age, background, criminal history and general character of the offender and the part which they played in the commission of the offence may result in different sentences for offenders involved in the same robbery: *Lowe v The Queen*, above, at 609.

Where co-offenders are broadly involved in a joint criminal enterprise, the parity principle may not be applied if there are significant differences between the respective offences for which each co-offender is to be sentenced, the objective roles of each co-offender, and their subjective circumstances: *Hiron v R* [2018] NSWCCA 10 at [54].

The parity principle may still apply even when co-offenders have been convicted of robbery offences with different maximum penalties: *R v Rend* [2006] NSWCCA 41.

See also **Parity** at **[10-800]** above.

Multiple counts/totality

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour: *Johnson v The Queen* (2004) 78 ALJR 616 at [18], citing *Mill v The Queen* (1988) 166 CLR 59 at 63.

Multiplicity of offences calls for a total sentence well in excess of the guideline promulgated in *R v Henry* in relation to one offence. As the offending continues, each succeeding offence calls for a greater punishment than the earlier offence, to reflect the need for specific deterrence: *R v Smith* [2007] NSWCCA 100 at [66].

In *Vaovasa v R* [2007] NSWCCA 253 at [19], the judge failed to properly apply the principle of totality by imposing wholly concurrent sentences for three robbery in company offences upon the basis that the offences, committed against three victims, were part of one course of criminality of short duration.

See also **Concurrent and Consecutive Sentences** at **[8-200]**.

Form 1 offences

Where a Form 1 includes serious offences, they must be taken into account at sentence. This involves taking into account the totality of the offender's criminality. However, the penalty imposed should be significantly less than that which would have been imposed had the Form 1 offence(s) been prosecuted separately: *R v Bavadra* [2000] NSWCCA

292 at [31]; *R v Harris* [2001] NSWCCA 322 at [27]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 (Form 1 guideline judgment) per Spigelman CJ at [66].

The judge erred in *TS v R* [2007] NSWCCA 194 by failing to impose a longer sentence for the principal offence by reason of the offences on the Form 1, than that imposed for the other offences. Imposing identical sentences for all of the offences breached the principles set out in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002*: at [24].

Conversely, in *Cummins v R* [2019] NSWCCA 163, the judge erred in increasing the objective seriousness of the principal offences by considering additional offences placed on Form 1. A permissible use of Form 1 offences however is in giving greater weight to personal deterrence and retribution: [44], [51]–[53]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* at [42]–[44].

See also **Taking Further Offences into Account (Form 1 Offences)** at **[13-200]**.

Use of weapons

The objective seriousness of a robbery will be affected by whether a weapon or weapons are used, and if so, the nature of the weapons and the manner in which they are used: *R v Jenkins* [1999] NSWCCA 110 at [5]; *R v Anaki* [2006] NSWCCA 414 at [38]; *R v Readman* (1990) 47 A Crim R 181 at 185.

Firearms

> Robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target: *R v Readman* (1990) 47 A Crim R 181 at 185.

A loaded shotgun is much more dangerous than a knife and much more capable of causing death or grievous bodily harm. Even if not loaded, a shotgun is prone to cause panic and fear in victims: *R v Campbell* [2000] NSWCCA 157 at [22].

The fact that the firearm may not have been loaded means that the offence was not as serious as it may have been but is still a very serious offence: *R v Mangan* [1999] NSWCCA 194 at [13]. It can be inferred from the fact that a firearm was found to be loaded when the accused was arrested a short time after the robbery that the firearm was loaded at the time of the robbery: *R v Taha* [2000] NSWCCA 520 at [32].

While a replica pistol used in the course of a robbery may not pose a physical risk to victims or members of the public and in this respect is a less serious factor than a weapon such as a loaded gun or a knife, a sentence for a robbery involving a replica pistol should recognise that the use of the weapon was designed to strike fear into victims: *R v Majstrovic* [2000] NSWCCA 420 at [9]–[10].

Syringes

The use of a syringe apparently filled with blood is a particularly serious factor because of the terror and revulsion it causes in victims: *R v Fernando* [2002] NSWCCA 28 at [17]. The use of a blood-filled syringe is more serious than the use of a knife or the category of weapon envisaged in the *R v Henry* guideline judgment: *R v Kyrogolu*

[1999] NSWCCA 106 at [88]; *Rumble v R* [2006] NSWCCA 211 at [40]. Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA).

Knives

Those who use knives when perpetrating criminal offences must expect to receive a significant measure of criminal punishment: *R v House* [2005] NSWCCA 88 at [18] quoting *R v Underhill* (unrep, 9/5/1986, NSWCCA).

The degree of seriousness involved in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27]. The fact that the type of knife used is a Swiss army knife does not make the offence less serious, since such a weapon can inflict a serious or mortal wound: *R v Randell* [2004] NSWCCA 337 at [32]

Victims

As noted above, armed robbery is not simply a crime against property. It is a crime against persons. "[T]he fear engendered by the perpetrator of this crime, together with the continued adverse effects on its victims, establish armed robbery to be a serious crime which requires condign punishment": *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [99]. The actual impact of an offence on victims will vary from case to case and cause variations in the sentences imposed: *R v Henry* at [95]. The devastating psychological damage that can result from the trauma of being the victim of an armed robbery offence is a matter that should be given due weight in the sentencing process: *R v Broxam* (unrep, 28/9/95, NSWCCA) at 3; *R v Sotheren* [2001] NSWCCA 425 at [44]–[46].

In respect of an offence of assault with intent to rob, the sentence should take into account the effect of the assault on the victim: *R v Hall* (unrep, 28/9/95, NSWCCA). When robbery is committed under the threat of a knife, an offender's assurance to a victim that they will not hurt the victim will not alleviate the seriousness of the offence: *R v Speeding* [2001] NSWCCA 105 per Giles JA at [24].

Vulnerable victims

One of the characteristics of the category of cases to which the *R v Henry* guideline judgment applies is that the victim was in a vulnerable position, such as a shopkeeper or taxi driver: *R v Henry* at [162]. In relation to taxi drivers, see also *R v Sotheren*, above, at [27] and *R v Matthews* [2007] NSWCCA 294 at [27]. The seriousness of robbery offences involving other types of vulnerable victims has also been recognised. For example, service station attendants (*R v Goundar* (2001) 127 A Crim R 331 at [36], citing *R v Thwaites* (unrep, 6/10/93)), motel receptionists (*R v Sharma* (2002) 54 NSWLR 300 at [75]), operators of small retail shops (*R v Fernando* [2002] NSWCCA 28 at [62]) and tobacconists (*R v El Sayah* [2018] NSWCCA 64 at [61]. Section 21A(2)(l) lists the fact that the victim was vulnerable as an aggravating factor. In addition to taxi drivers and service station attendants, s 21A(2)(l) gives as examples of vulnerable victims bus drivers and other public transport workers, and bank tellers.

The examples of vulnerable victims given in s 21A(2)(l) do not comprise an exclusive list and the CCA has declined to decide the precise scope of vulnerability for the purposes of the section. In *R v Ibrahimi* [2005] NSWCCA 153, a robbery in

company case, Latham J said at [19] that s 21A(2)(l) is not limited to a vulnerability that depends upon either the personal attributes of the victim or arising out of the victim's occupation. The judge had not erred in taking into account as a factor aggravating the offence that the robbery victims were young men relying upon public transport late in the evening. Even if such victims did not fall within the s 21A(2)(l) definition of "vulnerable", the factor could be taken into account in light of s 21A(1), which allows other matters required or permitted to be taken into account under any Act or rule of law to be considered: at [20]–[24].

In *R v Atonio* [2005] NSWCCA 200, a case involving an offence of aggravated assault with intent to rob, the victim was "on the railway station in circumstances where it [wa]s difficult … to escape, with the drop onto the railway tracks on each side." Hislop J declined to rule upon the issue of whether these circumstances meant that the victim was vulnerable pursuant to s 21A(2)(l), stating at [32]:

> The matters which caused his Honour to categorise the victim as vulnerable were objective factors which affected the relative seriousness of the offence, and which his Honour was entitled to take into account pursuant to s 21A(1)(c) if those matters were not appropriately categorised as within s 21A(2)(l). Accordingly, it is unnecessary and unproductive to seek to determine the precise meaning and extent of the word "vulnerable" in s 21A(2)(l).

Offending in a custodial setting

In *Tammer-Spence v R* [2021] NSWCCA 90, the offender was sentenced for an offence of demanding money with menaces (s 99(1) *Crimes Act*) from an inmate in custody, as well as further offences against the person. Section 56 applied so that the s 99(1) sentence is to be consecutive on the other sentences as the offence was committed while the offender was a convicted inmate in a correctional centre. The Court also emphasised the need for general deterrence in sentencing for violent offences committed while in custody as it was important to maintain discipline in the custodial environment: [45]–[46].

[20-300] Subjective factors commonly relevant to robbery

Last reviewed: November 2023

Drug addiction

See **Drug addiction** at **[10-485]**.

Mental health and intellectual functioning

The sentencing principles to be applied in respect of an offender who suffers from a mental disorder or severe intellectual disability are discussed at **[10-460]**.

Deprived background

Where a young offender's resort to violence during an aggravated robbery is a product of their deprived childhood, the principles in *Bugmy v The Queen* (2013) 249 CLR 571 apply and the weight to be given to general deterrence should be moderated in favour of other purposes of punishment, particularly rehabilitation: *IS v R* [2017] NSWCCA 116 at [62]–[65]. This especially will be the case where the offending occurs at a time when an offender has not yet gained maturity and the effect of the deprivation is at its

fullest: *IS v R* at [62]. Notwithstanding a strong subjective case involving a severely deprived background, a sentence for robbery must still be reasonably proportionate to the gravity of the offending: *Edwards v R* [2021] NSWCCA 57 at [65].

See further **Deprived background** at **[10-470]**.

Rehabilitation

Where an offender has made substantial effort, and achieved progress, towards rehabilitation, this warrants a significant 'downward departure' from the *R v Henry* guideline: *Gardiner v R* [2018] NSWCCA 27 at [60].

Youth

Youth is a recognised mitigating factor and, generally, the younger an offender, the greater the weight that should be given to the element of youth: *R v Hearne* [2001] NSWCCA 37 at [27]. The rehabilitation of youthful offenders will for the most part take precedence over deterrence and retribution in the sentencing exercise: *R v GDP* (1991) 53 A Crim R 112; *R v DM* [2005] NSWCCA 181 at [61].

However, when a juvenile offender conducts themself in a way that an adult does, and commits a crime that involves violence or is one of considerable gravity, it is the function of the court to protect the community, and to appropriately give effect to the retributive and deterrent elements of sentencing: *R v Pham* (1991) 55 A Crim R 128 at [13]; *R v Tran* [1999] NSWCCA 109 at [10].

In *R v Sharma* (2002) 54 NSWLR 300, Spigelman CJ observed at [74] in relation to armed robberies committed by youthful offenders:

> Armed robberies of the character involved in the present proceedings, committed by young persons, generally with an addiction problem, are so prevalent that the objective of general deterrence is entitled to significant weight in the process of sentencing for this offence, notwithstanding the youth of the typical offender.

It has been held that youth is not a cloak of convenience behind which those who deliberately engage in armed robbery can shelter from the just consequences of their conduct: *R v Mastronardi* [2000] NSWCCA 12 at [20]; *R v Drollett* [2002] NSWCCA 13 at [19]. Simply because offenders are in their late teens does not signify deterrence and retribution cease to be important, particularly where the crimes entail physical violence on a vulnerable victim: *R v El Sayah* [2018] NSWCCA 64 at [61]. In *TM v R* [2023] NSWCCA 185, the court held that the qualification to the relevance of youth where young people "conduct themselves in an 'adult-like manner'" should be applied with some caution. The gravity of an offence does not of itself demonstrate "adult-like" behaviour, an assessment is required of maturity and conduct and not only of the degree of violence: at [49]. The judge failed to take account of the youth of the 15-year-old offender in assessing his moral culpability: at [61], [66].

In the *R v Henry* guideline judgment, Spigelman CJ included the expression "young offenders" among the characteristics of the category of cases which was "sufficiently common for purposes of determining a guideline" at [162]. The youth of the offender is one of the factors that might mitigate a sentence below the indicative range: at [170]. In addition to chronological age, it is also important to be mindful of an offender's relative maturity or otherwise when applying the *R v Henry* guideline judgment: *Yildiz v R* [2020] NSWCCA 69 at [61].

Although the *R v Henry* guideline judgment was not specifically addressed to the sentencing of offenders under 18 years of age, there is no error in using the guideline as a starting point when sentencing a child: *R v SDM* (2001) 51 NSWLR 530 at [40]–[43]; *TS v R* [2007] NSWCCA 194 at [25]. The special considerations that apply under s 6 of the *Children (Criminal Proceedings) Act 1987* can be taken into account, along with all the other aspects of sentencing policy and principle relevant to offenders who were children at the time of offending, within the ambit of the guideline judgment: *R v SDM*, above, at [20].

Adult offenders' Children's Court criminal histories (where no convictions are recorded) are not admissible in sentencing proceedings and it is an error to take such matters into account: *Dungay v R* [2020] NSWCCA 209 at [95]; ss 14, 15 *Children (Criminal Proceedings) Act 1987*; see further **Child offenders** at **[10-405] Prior record** .

See further **Youth** at **[10-440]** and **Sentencing principles applicable to children dealt with at law** at **[15-090]**.

Juvenile and adult co-offenders — sentencing parity

It is not uncommon when robbery offences are committed by multiple offenders for one or more of the offenders to be a juvenile and the other or others an adult. Examples include *DGM v R* [2006] NSWCCA 296, *Ersman v R* [2007] NSWCCA 161 and *DFS v R* [2007] NSWCCA 77. The different sentencing objectives and considerations applicable to sentencing offenders in the Children's Court and adult courts restrict comparison of the sentences handed down to co-offenders under the two regimes: *R v Ho* (unrep, 28/2/97, NSWCCA).

In *R v Colgan* [1999] NSWCCA 292 Spigelman CJ said at [15]: "… an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of the regimes": following *R v Govinden* [1999] NSWCCA 118 at [36]–[38]. It was subsequently held in the two judge bench case of *R v Boney* [2001] NSWCCA 432 at [14] per Wood CJ; approved in *Ersman v R* at [74]:

> There is no longer an inflexible rule that there is no utility in comparing the sentences imposed upon co-offenders who are separately dealt with: one in the Children's Court and the other as an adult.

In *R v Tran* [2004] NSWCCA 6 the court held at [17] that, while the sentences were within the range indicated in the *R v Henry* guideline judgment, the appellant had a justifiable sense of grievance arising from the difference between his sentence and that of his co-accused. The latter received a control order in the Children's Court of 15 months. Despite the fact that there are different sentencing objectives in the Children's Court, which limit the worth of any comparison, the sentencing judge should have paid some regard to the control order imposed on the co-offender.

The relevance of comparing such sentences is the greater in cases where all offenders were sentenced in the District Court in accordance with law pursuant to the *Children (Criminal Proceedings) Act 1987*: *R v Cox* [2004] NSWCCA 413 at [28].

See further **Juvenile and adult co-offenders** at **[10-820]**.

[The next page is 9601]

Car-jacking and car rebirthing offences

[20-400] Car-jacking offences

The *Crimes Amendment (Gang and Vehicle Related Offences) Act 2001* inserted s 154C into the *Crimes Act 1900*, creating a basic offence of taking a motor vehicle (or vessel) with assault or with an occupant on board (car-jacking) and an aggravated form of the offence. In his Second Reading Speech for the Crimes (Amendment) (Gang and Vehicle Related Offences) Bill, the then Attorney General (NSW), the Hon RJ Debus, explained the rationale for the new offence:

> The new offence needs to be understood in light of the existing laws relating to car theft and kidnapping. It should be remembered that there are already comprehensive and adequate laws dealing with robbery, assaults and kidnapping.
>
> It is not the intention of this new offence to override existing and adequate laws. Rather, it is intended that this new offence will apply to circumstances not already covered by a specific offence. In short, it is an attempt to fill the gap between robbery and larceny.
>
> The new offence will provide police with a simple and straightforward offence. It will apply in circumstances which involve actions more serious than joy-riding but not as serious as robbery or kidnapping. In addition, it will apply irrespective of whether the defendant has an intention to permanently deprive the owner of his or her vehicle.

Taking motor vehicle or vessel with assault or with occupant on board: s 154C(1)

Section 154C(1) provides for the offence of taking a motor vehicle or vessel with assault or with an occupant on board. The section provides that:

> A person who:
>
> (a) assaults another person with intent to take a motor vehicle or vessel and, without having the consent of the owner or person in lawful possession of it, takes and drives it, or takes it for the purpose of driving it, or
>
> (b) without having the consent of the owner or person in lawful possession of a motor vehicle or vessel, takes and drives it, or takes it for the purpose of driving it, when a person is in or on it,
>
> is liable to imprisonment for 10 years.

Taking motor vehicle or vessel with assault or with occupant on board in circumstances of aggravation: s 154C(2)

Section 154C(2) provides that a person is guilty of an offence under that subsection if he or she commits an offence under s 154C(1) in circumstances of aggravation. Section 154C(3) specifies that "circumstances of aggravation" means circumstances involving any one or more of the following:

> (a) the alleged offender is in the company of another person or persons,
>
> (b) the alleged offender is armed with an offensive weapon or instrument,
>
> (c) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person.

Standard non-parole periods

Section 154C is included in the Table — Standard non-parole periods: s 54D *Crimes (Sentencing Procedure) Act 1999*. For offences committed on or after 1 February 2003:

- the basic offence under s 154C(1) has a standard non-parole period of 3 years: item 14
- the aggravated form of the offence under s 154C(2) has a standard non-parole period of 5 years: item 15.

Court of Criminal Appeal sentencing decisions which consider the aggravated form of the offence under s 154C(2) can be accessed on the SNPP Appeals component of the Judicial Information Research System (JIRS).

In order to apply the standard non-parole period legislation, a sentencing judge is obliged to consider where an aggravated car-jacking offence lies on the scale of objective seriousness. In *R v Barker* [2006] NSWCCA 20 at [63], Howie J, Basten JA and Hall J agreeing, set out the following non-exhaustive list of factors which may be relevant to an assessment of the objective seriousness of an offence under s 154C(2), where the aggravating circumstance is that the offender was in company:

> … whether the offence was planned; the number of persons involved in committing the offence and their conduct; the type of threats made; the degree of violence displayed; the number of persons in the vehicle at the time of the offence; the degree of fear instilled in the victim; the period over which the vehicle is used; damage to the vehicle (if not giving rise to a separate charge); the place and time the offence is committed (for example whether at night or in an isolated area); the special vulnerability of the victim; and the motive for the commission of the offence.

Howie J added at [64]:

> Of course the objective seriousness of the offence will be increased if either of the other two aggravating elements of the offence are also present: that is that the offenders, or any of them, are armed with an offensive weapon or actual bodily harm is inflicted upon the victim. If they are present then the nature of the weapon and its capacity to inflict serious injury, and the nature of the injury inflicted, will be relevant factors.

While Howie J doubted at [63] that the value of the vehicle is a consideration relevant to the assessment of the objective seriousness of an offence against s 154C(2) (as in such an offence there is no intention to permanently deprive the owner of the vehicle), in *Trad v R* [2009] NSWCCA 56 at [18], Price J, Grove and Buddin JJ agreeing, stated that:

> Whilst I otherwise enthusiastically endorse what Howie J said in the passage I have quoted, it seems to me that the value of the motor vehicle, the subject of the car-jacking, is a relevant consideration as that motor vehicle is the victim's property which is taken. The car-jacking of a brand new Lamborghini by way of illustration would normally be considered more serious than the car-jacking of a vehicle of a common make and model. Car-jackings are in many cases motivated by the make and model of the vehicle to be taken.

It was open to the sentencing judge in *R v Matthews* [2007] NSWCCA 294 to find that the car-jacking offence was "towards the bottom of the range of objective seriousness"

for the purposes of applying the standard non-parole period provisions: at [32]. The offence did not involve restraining the driver for a long period of time, threats of serious injury or the actual infliction of injury.

Taxi drivers and objective seriousness

The court in *R v Matthews* at [27] discussed the relevance of the commission of the offence against taxi drivers:

> The vulnerability of taxi drivers is a significant concern not only for taxi drivers and their families, but also for the general community. They provide what has become an essential service to the public and their protection from the consequences of criminal behaviour is a significant factor to be considered in the sentencing process particularly with a view to deterrence from and denunciation of such behaviour: s 3A *Crimes (Sentencing Procedure) Act 1999*. However the fact of vulnerability, simpliciter, does not mean that any offence involving a taxi driver is to be categorised in the middle of the range of objective seriousness. It will depend on all the circumstances of the case.

Role and objective seriousness assessments

The fact that it was a co-offender rather than the offender being sentenced who produced a weapon will be relevant in assessing the objective seriousness of the offence: *R v Baghdadi* [2008] NSWCCA 239. In *R v Baghdadi* the circumstance of aggravation was that the offence was committed in company. The fact that Baghdadi's co-offender carried and brandished a weapon justified a finding of greater criminality on the co-offender's part: at [55]. However, Baghdadi's reduced role did not necessarily justify a finding that his offence fell below the mid-range of objective seriousness: at [55].

[20-420] Car rebirthing offences

The *Crimes Amendment (Organised Car and Boat Theft) Act 2006* inserted s 154G into the *Crimes Act 1900* (effective 1 September 2006), creating an offence of knowingly facilitating an organised car (or boat) rebirthing activity.

In the Second Reading Speech for the Crimes Amendment (Organised Car and Boat Theft) Bill 2006, Ms Alison Megarrity, on behalf of the then Attorney General (NSW), the Hon RJ Debus, stated that the Bill's aim was to deter those who engage in "rebirthing", a term which "covers a range of illegal activities that have one thing in common: to allow a stolen vehicle, or a vehicle that has parts that have been stolen, to be passed off and registered as a legitimate vehicle". Re-birthing has adverse financial consequences for the owners of stolen cars; for the unwitting purchasers of "rebirthed" vehicles; and for the community through higher insurance premiums: *R v Elkhouri* [2001] NSWCCA 277 at [16] (in the context of offences involving the theft of cars for the purpose of rebirthing).

Section 154G(1) provides:

> (1) A person who facilitates a car or boat rebirthing activity that is carried out on an organised basis knowing that:
>
> (a) it is a car or boat rebirthing activity, and
>
> (b) it is carried out on an organised basis,
>
> is guilty of an offence.

The maximum penalty for an offence under s 154G(1) is 14 years imprisonment.

Standard non parole period

The offence under s 154G(1) has a standard non-parole period of 4 years: s 54D *Crimes (Sentencing Procedure) Act 1999*, Table — Standard non-parole periods, item 15A.

Where the offence is dealt with on indictment, it is necessary to identify where on the scale of objective seriousness the offence lies: *R v Hamieh* [2010] NSWCCA 189 at [28], [33], [51]. A court's fundamental obligation to give reasons as part of the sentencing process encompasses giving reasons for such a finding: *R v Hamieh* at [32]–[33]. A finding that a car rebirthing offence "did not fall within the mid-range of seriousness" was not "very illuminating" as offences under s 154G include a significant range of different types of offending of varying degrees of severity: *R v Hamieh* at [33]. Where the judge departs from the standard non-parole period, reasons should be provided: *R v Hamieh* at [39].

Relevant sentencing principles

In *R v Hamieh* [2010] NSWCCA 189, the court identified the following matters relevant to sentencing for a car rebirthing offence:

1. General deterrence is a factor which must be given weight: at [45], [63]. As was said in the Second Reading Speech for the Crimes Amendment (Organised Car and Boat Theft) Bill 2006, the intention of creating the offence was to deter involvement in car rebirthing and to "send a clear message to those thinking of being involved in rebirthing activity that the punishment will far outweigh any illegal benefits": at [48].
2. The creation of a new offence with a maximum penalty greater than the offences which previously caught this type of criminal activity (car stealing under s 154A *Crimes Act 1900*) requires that the sentences imposed for such criminal activity "reflect the legislature's purpose and concerns" resulting in higher sentences: at [49].
3. Section 154G encompasses a wide range of criminal activity. A court's task is to punish an offender for the actual offending conduct engaged in: at [50]; *Ibbs v The Queen* (1987) 163 CLR 447 at 452. An offender's knowledge of how to source repairable write-off vehicles, how to register those vehicles and then how to substantially rebuild those vehicles with parts from stolen vehicles are all relevant to the assessment of the objective seriousness of the offence: at [52]. Every step in the rebirthing industry is necessary and interrelated: at [52].
4. The court must give consideration to the standard non-parole period. It is difficult to reconcile a standard non-parole period of 4 years with the maximum penalty of 14 years imprisonment: at [54]. However, the court must nevertheless approach the determination of the appropriate sentence both by reference to the maximum penalty of 14 years and to the 4-year standard non-parole period, which is the statutory reference point for an offence in the mid-range of seriousness: at [56]. It is first necessary to determine where in the range of objective seriousness the offence lies: at [57]. This part of the sentencing exercise does not require a mathematical approach, but some sense of "scaling" is required: at [57].

In *R v Hamieh* at [87], an order for periodic detention (not available in NSW as a sentencing option since 1 October 2010) was held to be inappropriate because of the

objective seriousness of the offence; the need for general deterrence for such offences; and the respondent's prior record which showed he had "a history of disrespect for lawful authority" which indicated a need for personal deterrence. The offender had been sentenced to 24 months imprisonment, with a non-parole period of 12 months, to be served by way of periodic detention. The Court of Criminal Appeal allowed the Crown appeal and resentenced the respondent to 3 years full-time imprisonment comprising a non-parole period of 2 years and a balance of term of 12 months.

[The next page is 9631]

Sexual assault

[20-600] Statutory scheme in Crimes Act 1900

Part 3 Div 10 *Crimes Act 1900* is titled "Offences in the nature of rape, offences relating to other acts of sexual assault etc". Division 10A contains offences relating to sexual servitude. Unless otherwise specified, references to sections below are references to sections of the *Crimes Act*.

For commentary on the following offences relating to children see **Sexual offences against children** at **[17-400]**ff: ss 61M(2), 66A–66EB, 73, 77 and 80AA (child sexual assault), ss 91C–91H (child prostitution and pornography) and ss 91I–91M (grooming and voyeurism).

A brief legislative history describing the significant reforms to the laws relating to sexual assault in the past 30 years can be found at [1-025] in the *Sexual Assault Trials Handbook*.

[20-604] Change in community attitudes to sexual assault and harm

In *R v MJR* (2002) 54 NSWLR 368 at [11], Spigelman CJ said that sexual assault has generally "come to be regarded as requiring increased sentences … by reason of a change of community attitudes". Mason P at [57] explained the increased pattern of sentencing for child sexual abuse by reference to the greater understanding of the long-term psychological consequences for the victims and the considered judicial response to changing community attitudes to these crimes.

In *DBW v R* [2007] NSWCCA 236, the court held that the decision of *R v Muldoon* (unrep, 13/12/90, NSWCCA) — where it was held that to prove harm, the Crown must adduce evidence in the form of studies of the lasting effects of sexual abuse and, if necessary, a psychiatric assessment — is no longer of assistance today. Chief Justice Spigelman said at [39] that the effect of sexual abuse was not a matter for expert evidence and "the public and the courts have become much more aware of, and knowledgeable about, the effects of child sexual abuse".

The court again considered the issue of harm in *R v King* [2009] NSWCCA 117 at [41]:

> It should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child who is old enough, as was the complainant, to appreciate the significance of the act committed by the offender. It should be assumed that there is a real risk of some harm of more than a transitory nature occurring. That should be a factor taken into account when sentencing for a child sexual assault offence. It is an inherent part of what makes the offence so serious.

The High Court remarked in *The Queen v Kilic* (2016) 259 CLR 256 at [21]:

> current sentencing practices with respect to sexual offences may be seen to depart from past practices by reason, inter alia, of changes in understanding of the long-term harm done to the victim.

[20-610] Effect of increase in maximum penalties

This issue is dealt with comprehensively in **Objective factors at common law** at **[10-000]**ff. It is well settled that the legislature may be taken to indicate that sentences for an offence must increase following an increase in the maximum penalty: *Baumer v The Queen* (1988) 166 CLR 51 at 56; *R v Slattery* (1996) 90 A Crim R 519 at 524. In the context of sexual assault, the 1989 amendments substantially increased the maximum penalties for sexual assault offences. The maximum penalty for sexual intercourse without consent was increased from 8 years (under s 61D (rep)) to 14 years (under s 61I). Similarly, the maximum penalty for aggravated sexual assault increased from between 12–14 years (under s 61C (rep)) to 20 years (under s 61J).

In the 1990s, the Court of Criminal Appeal repeatedly declared that the *Crimes Amendment Act 1989* was designed to reflect community standards and the seriousness with which the community regards sexual assault offences: *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v Gilbert* (unrep, 24/2/94, NSWCCA); and *R v May* [1999] NSWCCA 40 at [7]. The amendments make it incumbent upon the courts to give effect to the concerns of Parliament in almost doubling the penalties, at least for s 61J: *R v Truong* (unrep, 8/12/97, NSWCCA).

The court in both *Upton v R* [2006] NSWCCA 256 at [47] and *R v MAK* [2005] NSWCCA 369 at [130] observed that the introduction of a maximum penalty of life imprisonment for offences under s 61JA manifests an intention on the part of Parliament to substantially increase penalties for aggravated sexual assault committed in company.

Importance of maximum penalty

In *Markarian v The Queen* (2005) 228 CLR 357 at [30]–[31], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks. It is well accepted that the maximum sentence available may in some cases be a matter of great relevance …
>
> It follows that careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

[20-620] Standard non-parole period sexual assault offences

The statutory regime for standard non-parole period offences is dealt with in detail in **Standard non-parole period offences** at **[7-890]**ff. Offences committed on or after 1 February 2003 are subject to the standard non-parole period provisions. Standard non-parole periods have been prescribed for the following sexual offences:

- sexual assault (s 61I) — 7 years
- aggravated sexual assault (s 61J) — 10 years
- aggravated sexual assault in company (s 61JA) — 15 years
- aggravated indecent assault (s 61M(1)) — 5 years, increased to 7 years for offences committed on or after 1 January 2009.

In the area of child sexual assault standard non-parole periods were introduced for offences under ss 61M(2) (8 years), 66A (15 years), 66B (10 years), 66C(1) (7 years), 66C(2) (9 years) and 66C(4) (5 years) (discussed separately in **Sexual offences against children** at **[17-400]**).

It is an error to decline to set a non-parole period for a sexual offence with a standard non-parole period: *Leddin v R* [2008] NSWCCA 242 at [13].

The Table of standard non-parole periods does not include attempt offences, except for the various manifestations of the offence of attempt murder: *R v DAC* [2006] NSWCCA 265 at [10]. In *R v DAC*, the judge erred in applying the Table to an aggravated attempt to have sexual intercourse without consent under ss 61J and 61P.

It was predicted that the effect of the standard non-parole period would generally be to increase the level of sentencing for offences to which it applies: *R v AJP* (2004) 150 A Crim R 575. See the statement of the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31] and an earlier study by the Judicial Commission of NSW that found the introduction of standard non-parole periods in fact resulted in significant increases in sentences: P Poletti and H Donnelly, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Research Monograph 33, Judicial Commission of NSW, Sydney, 2010. See **Move upwards in the length of non-parole periods?** at **[7-990]**.

[20-630] Assessing objective gravity of sexual assault

An important step in determining the appropriate sentence is to assess where the particular sexual assault offence lies on the spectrum or scale of seriousness: *Ibbs v The Queen* (1987) 163 CLR 447. In *R v Gebrail* (unrep, 18/11/94, NSWCCA), Mahoney JA emphasised the importance of making clear findings about the objective seriousness of the crime in sexual assault cases:

> it is important to understand why assessments of the seriousness of the instant offence [s 61J] are made and the significance of such assessments. As I have indicated, every offence of this kind is a serious offence. But those whose duty it is to deal with crimes of this kind and to sentence those who commit them know that though each case is inherently serious, some are more serious than others. In some cases, the degree of violence, the physical hurt inflicted, the form of forced intercourse and the circumstances, of humiliation and otherwise, are much greater than are involved in this case. It is to be understood that in sentencing it is appropriate — indeed, in most cases it is necessary — that the sentencing judge form and record his assessment of where, on the relevant scale of seriousness, the particular offence lies.

Part of the assessment of the objective seriousness of the sexual assault involves taking into account the nature of the sexual act. In *Ibbs v The Queen* at 452, Mason CJ and Wilson, Brennan, Toohey and Gaudron JJ stated:

> The inclusion of several categories of sexual penetration within the offence described as sexual assault carries no implication that each category of sexual penetration is as heinous as another if done without consent. When an offence is defined to include any of several categories of conduct, the heinousness of the conduct in a particular case depends not on the statute defining the offence but on the facts of the case. In a case of sexual assault, a sentencing judge has to consider where the facts of the particular case lie in a spectrum, at one end of which lies the worst type of sexual assault perpetrated by any act which constitutes sexual penetration as defined …

Ibbs v The Queen requires the sentencer to assess and take into account where the sexual act fits in the continuum of seriousness for a given offence. In *R v PGM* (2008) 187 A Crim R 152 at [26], Fullerton J summarised the position as follows:

> While there is no hierarchy of sexual acts that constitute sexual intercourse for the purposes of the criminal law, it is generally accepted that some forms of sexual activity may be regarded as more serious than others (see *Ibbs v The Queen* (1987) 163 CLR 447). This is of course necessarily modified by the context in which the offence occurred, and other circumstances of the particular offending to which Simpson J referred in *AJP* at [24]–[26].

Forms of sexual intercourse and objective seriousness

Section 61H(1) *Crimes Act 1900* provides, inter alia:

> "*sexual intercourse*" means:
>
> (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
>
> (i) any part of the body of another person, or
>
> (ii) any object manipulated by another person,
>
> except where the penetration is carried out for proper medical purposes, or
>
> (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
>
> (c) cunnilingus, …

The Court of Criminal Appeal has at various times drawn distinctions between the relative seriousness of the acts referred to in s 61H. The cases are discussed below. The discussion demonstrates that drawing distinctions between specific sexual acts for the purpose of assessing the objective seriousness of an offence cannot be pressed too far. It is only one part of the task. The objective seriousness of an offence depends on *all* the circumstances of the case and is not confined to the nature of the act committed by the offender. While the form of intercourse "is an important factor, it is not to be regarded as the sole consideration": *R v Hibberd* (2009) 194 A Crim R 1 at [56]. Other relevant matters in deciding where on the continuum of seriousness an offence lies include: "the degree of violence, the physical hurt inflicted, the form of the forced intercourse, the circumstances of humiliation … the duration of the offence": *R v Hibberd* at [56], cited with approval in *R v Daley* [2010] NSWCCA 223 at [48]. In *R v Daley* at [48], Price J (Hodgson JA and Fullerton J agreeing) clarified what was said in *R v Hibberd* about the duration of an assault:

> the short duration of a sexual assault would not ordinarily be considered as a factor which reduces the objective seriousness of the offence. Most sexual assaults will not be prolonged as the offender will seek to avoid apprehension. On the other hand, a sexual assault of an extended duration will necessarily add to the seriousness of the offending as the suffering and the humiliation of the victim will be increased.

The context in which the offending occurs is an important part of determining the objective seriousness of a particular offence. In *R v Hall* [2017] NSWCCA 313, two forcible acts of penetration occurred over a period of about 20 to 30 minutes while the victim was threatened with being killed with a knife and dragged around a motel room

while blindfolded. In those circumstances, the court described the victim's ordeal as "utterly terrifying" and concluded the fact the victim did not sustain any significant physical harm did not lessen the objective seriousness of two offences against s 61D(1) (an earlier form of s 61J(1)): *R v Hall* at [118]. The offences were not of "short duration": *R v Hall* at [53], [118]. Further, the sentencing judge's description of the violence as "limited" and involving "a degree of rough handling" was a significant understatement: *R v Hall* at [55].

Fellatio, cunnilingus and penile-penetration

In *R v O'Donnell* (unrep, 1/7/94, NSWCCA), Hunt CJ at CL said that "[f]ellatio, in my opinion, is clearly less criminal than, say, anal or vaginal penetration". Justice Grove said in *R v Andrews* [2001] NSWCCA 428 at [6] that Hunt CJ at CL's statement "clearly did not intend … to reveal some matter of law" and he could only have expressed it as a matter of opinion. Further:

> the penetration of a victim by a sexual organ derives its seriousness from a consideration of the particular circumstances of the case rather than from the nature of the sexual act itself.

Although *R v Andrews* was a two-judge bench decision it was cited with approval and applied in *R v Hajeid* [2005] NSWCCA 262 at [52]; *R v MS* [2005] NSWCCA 322 at [16]; and *R v Sanoussi* [2005] NSWCCA 323 at [32].

In *R v AJP* (2004) 150 A Crim R 575 at [23]–[25], Simpson J reviewed the authorities on the question of whether some acts, such as penile-vaginal penetration, are more serious than others, and what factors should be considered in assessing the objective seriousness in the context of the standard non-parole period provisions. Those provisions require the judge to determine whether an offence falls in the middle of the range of objective seriousness. Her Honour said:

> In *R v Davis* [1999] NSWCCA 15 Wood CJ at CL wrote:
>
> > "[66] In *Ibbs v The Queen* … the High Court rejected the proposition that each kind of sexual penetration as defined in the section, there under consideration, was to be regarded as neither more nor less heinous than another. The Court said that such a proposition cannot be accepted. It appears to me that any other view would beggar common sense, and that penile-vaginal penetration of a child is significantly more serious than many of the other forms of conduct encompassed within s 66A [sexual intercourse — child under 10 years] …"
>
> It might be true, as senior counsel suggested, that penile-vaginal intercourse would, in the circumstances, have amounted to a more serious offence. But does that avail the respondent? Let it be supposed that his Honour had not excluded as irrelevant the nature of the sexual activity in question. It is difficult to think that that of itself would have led him to the conclusion that the offence was of something less than mid-range gravity. It is not possible to create some kind of hierarchy of the seriousness of the various kinds of sexual intercourse contemplated by s 66A (and defined in s 61H). It is the facts and circumstances of each case, including the nature of the intercourse, that enables the proper evaluation of objective seriousness. While penile-vaginal penetration might be taken to be more serious than enforced fellatio, that does not mean that enforced fellatio necessarily falls somewhere below the mid-point of objective seriousness. There are many instances of conduct that come within the definition of sexual intercourse that would be significantly less serious than enforced fellatio. Had his Honour considered

> the nature of the sexual intercourse as relevant, he must, in my view, have come to the view that enforced fellatio falls somewhere in the middle, or towards the upper end, of that scale.
>
> Other appropriate areas of inquiry in the consideration of the objective seriousness of a s 66A offence are, for example, how the offences took place, over what period of time, with what degree of force or coercion, the use of threats or pressure before or after the offence to ensure the victim's compliance with the demands made, and subsequent silence, and any immediately apparent effect on the victim. Although the sentencing judge was fully conversant with the facts of the offences, he has not explicitly considered these matters in the specific context of the evaluation of objective seriousness.

In *R v PGM* (2008) 187 A Crim R 152, the court held that it was open for the trial judge to find that the acts of cunnilingus were in general terms less serious than the penile penetration: However, at [28] Fullerton J said:

> to reason to the conclusion that the act of penile penetration … was of the same order of seriousness as cunnilingus simply by reason of the fact that the respondent's penis penetrated the child's genitalia only to a small extent, is to fail to give account to the fact that penile penetration of a young child involves conduct of a quite different order and criminality of a more serious kind than other forms of sexual intercourse contemplated by the statutory definition in s 61H of the *Crimes Act*. In that connection I note the observation of the Chief Justice in *RJA v R* [2008] NSWCCA 137 at [33] that a limited degree of penetration is not necessarily indicative of a lower level of objective criminality.

The court held in *R v MS* [2005] NSWCCA 322 at [16], that in some cases little may differentiate the objective seriousness of an act of fellatio from an act of penile-vaginal intercourse:

> The circumstances of an act of fellatio may place it in a position on that spectrum consistent with an act of penile-vaginal intercourse. For example, where the complainant's head is forced and held onto the offender's penis to the point of ejaculation into the complainant's mouth, while threats and insults are uttered, in the company of a number of other offenders who are waiting their turn, little may objectively differentiate such an offence from an act of penile-vaginal intercourse, absent overt threats where the offender wears a condom.

R v Oloitoa [2007] NSWCCA 177 is clearly an example of a very serious assault involving fellatio. The act of enforced fellatio was the basis of an aggravated sexual assault charge under s 61J. It was committed during a home invasion in the early hours of the morning. The respondent was armed and in company with another offender. The act was accompanied by threats of violence and completed by the respondent ejaculating in the victim's mouth in front of her children. McClellan CJ at CL said at [42]: "the offence was marked by the personal degradation of the victim", and later at [43]:

> these features should have led the sentencing judge to conclude that the crime was above the mid range of objective seriousness. It called for a non-parole period greater than 10 years.

R v Oloitoa was cited in *Cole v R* [2010] NSWCCA 227 at [87] to justify a high sentence for an offence involving fellatio.

Any physical injury inflicted by penile penetration is also relevant. In *R v Shannon* [2006] NSWCCA 39 at [37], Howie J said:

> with young children it seems to me that penile penetration is the most serious form of sexual assault for the obvious reason that it is the most likely to result in physical injury to the child.

Digital and penile penetration

Non-consensual sexual intercourse by digital penetration is generally less serious than an offence of penile penetration, but each case depends on its own facts: *R v Hibberd* (2009) 194 A Crim R 1 at [56]; *R v Da Silva* (unrep, 30/11/95, NSWCCA), per Grove J at 3. However, there is no canon of law which mandates a finding that digital penetration must be considered less serious than other non-consensual acts of sexual intercourse: *R v Hibberd* at [56]. In *R v Hibberd* at [21], Tobias JA said that the law should change:

> the time has come for this Court to depart from any prima facie assumption, let alone general proposition, that digital sexual intercourse is to be regarded as generally less serious than penile sexual intercourse …
>
> [T]he objective seriousness of the offence is wholly dependent on the facts and circumstances of the particular case …

Justice James agreed with Price J — who had applied *R v Da Silva* — and his Honour reserved his position on whether the court should depart from previous statements that digital penetration is generally less serious than penile penetration at [27]. The court held nevertheless that the judge erred by focusing too heavily on the form of the forced intercourse (digital penetration) and had failed to give sufficient weight to the extent of the violence used in the offence: *R v Hibberd* at [66].

In *R v King* [2009] NSWCCA 117 at [36], the court said in response to a submission that it was open for the trial judge to find that digital penetration was less serious than penile penetration and that this was a very significant fact in the assessment of the degree of criminality:

> What is to be considered is the type of penetration in all the circumstances surrounding the offending. The type of penetration is simply one factor and by itself does not indicate how serious the particular offence is. The simple fact is that had the intercourse in this case been penile penetration it would have been an offence of very great seriousness if for no other reason than because of the age of the child. In such a case the seriousness of the offence may have been above mid range. But the fact that it was not penile penetration does not mean that the offence is reduced to low range.

Anal penetration

The s 61J offence in *R v Russell* (unrep, 21/6/96, NSWCCA) involved anal intercourse. Justice Dunford said:

> The nature of the offences is further aggravated, in my view, by the degrading nature of the anal intercourse, even though this offence in any circumstance is of its nature always degrading.

Age gap between offender and victim

In *R v Shortland* [2018] NSWCCA 34, the court found the lack of a significant age gap between the 25-year-old offender and 31-year-old victim was immaterial

when determining the objective seriousness of the offence. In cases of non-consensual intercourse between adults, age difference is rarely likely to be relevant: *R v Shortland* at [15], [87].

[20-640] Sexual intercourse without consent: s 61I

Sexual intercourse without consent carries a maximum sentence of 14 years imprisonment. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 7 years. The courts have always regarded sexual intercourse without consent as a serious offence: *R v Russell* (unrep, 21/6/96, NSWCCA). In *R v Hartikainen* (unrep, 8/6/93, NSWCCA), Gleeson CJ said that non-consensual intercourse is an extreme form of violence and one which the community expects the courts to take very seriously. This remains so even in cases where there is no additional violence perpetrated against the victim: *R v May* [1999] NSWCCA 40 at [7]. Even before the introduction of the standard non-parole period for the offence of sexual intercourse without consent the Court of Criminal Appeal held that it would be unusual if a conviction under s 61I did not ordinarily result in a sentence of full-time imprisonment: *R v Crisologo* (1997) 99 A Crim R 178 at 179; *R v May* at [10].

Counsel for the appellant in *Sabapathy v R* [2008] NSWCCA 82 at [71] submitted that the appellant's mental state of recklessness and his subjective circumstances warranted a sentence other than full-time custody. The court held:

> that [a] conviction for the offence of sexual intercourse without consent will ordinarily bring a custodial sentence. There may be unusual or exceptional circumstances in which a sentence other than a custodial sentence will be appropriate, but there is no litmus test for when that might be so. It is part of the exercise of the broadly based sentencing discretion in the light of all the facts in the particular case.

In *R v Shortland* [2018] NSWCCA 34, Basten JA (R A Hulme J agreeing at [37]) observed that, although it was unhelpful to talk of the principle in *Sabapathy v R* as a general rule or presumption, it was apparent it had been followed: *R v Shortland* at [6]. However, his Honour concluded it would be unusual or extraordinary to impose a non-custodial sentence in a case where there was no guilty plea or an accompanying finding that the offender was remorseful: *R v Shortland* at [7].

The 7-year standard non-parole period will most likely increase sentences for offences committed under s 61I since that is generally the effect of the standard non-parole period: *R v AJP* (2004) 150 A Crim R 575. This statement should be read in light of later statements by the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 at [31].

Summaries of the Crown and severity appeals for offences committed under s 61I since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Attempted intercourse: s 61P

A sexual assault offence is not to be regarded as at the lower end of the scale merely because intercourse did not actually occur. An attempted sexual intercourse without consent may be a serious offence, in particular where there are aggravating features: *R v Grech* [1999] NSWCCA 268. Section 61P provides that an attempt to commit

sexual intercourse without consent carries the same penalty as if the completed offence was committed: *R v Gulliford* (2004) 148 A Crim R 558. It applies to ss 61I–61O inclusive.

The standard non-parole period provisions in Pt 4 Div 1A *Crimes (Sentencing Procedure) Act* do not apply, except for the various manifestations of the offence of attempt murder, to attempt offences: *R v DAC* [2006] NSWCCA 265 at [10]. The judge erred in *R v DAC* by applying the standard non-parole period to the offence of aggravated attempt to have sexual intercourse without consent contrary to ss 61J and 61P.

[20-645] Consent must be addressed when in issue

Where consent is an issue on sentence, it is erroneous not to address the offender's arguments or explain the basis upon which the issue was resolved: *R v Alcazar* [2017] NSWCCA 51 at [44]. In *R v Alcazar* at [45], the court held that this error contributed to a manifestly inadequate sentence because the seriousness of the offending was not properly identified.

See **Suggested direction — sexual intercourse without consent (s 61I) where the offence was allegedly committed on and after 1 January 2008** at [5-1566] and **Notes** at [5-1568] of the *Criminal Trial Courts Bench Book*.

[20-650] De Simoni principle and s 61I

The court must disregard a matter of aggravation if to take it into account would be to punish the offender for an offence which was more serious than that for which the offender stands for sentence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act*, such as: the offence was committed in company; the offender used a weapon; or the offender was in a position of trust: *R v Wickham* [2004] NSWCCA 193 at [26]. None of the aggravating matters in s 61J (listed below) can be taken into account in aggravation for an offence under s 61I.

The sentencing judge erred in *R v Bakewell* (unrep, 27/6/96, NSWCCA) by taking into account the psychological impact of the crime on the victim and the applicant's forcefulness during sexual intercourse. This was held to be impermissible since these matters, described in a victim impact statement, effectively constituted an aggravated form of the offence found under s 61J.

In *R v Johnson* [2005] NSWCCA 186 at [26], the sentencing judge erred by taking into account as a matter of aggravation that the offences involved violence of a sexual character. According to Hunt AJA at [23], violence can be taken into account provided that it does not involve the infliction of actual bodily harm:

> When defining the offence of sexual intercourse without consent, s 61I of the *Crimes Act 1900* makes no reference to violence, and its title "Sexual Assault" does not go beyond the common assault which is inherent in the "sexual connection" to which the definition of "sexual intercourse" in s 61H refers. It does not include any suggestion of either violence or (as violence is usually defined) the exercise of physical force. Many sexual assaults do involve violence, and that violence is appropriately taken into account by way of aggravation in a sexual assault charge under s 61I — provided that it does not involve the infliction of actual bodily harm, when the offender becomes exposed

> to a greater maximum sentence, one of imprisonment for 20 years (s 61J "Aggravated Sexual Assault"), in lieu of imprisonment for 14 years (s 61I "Sexual Assault"). The principle laid down in *The Queen v De Simoni* (at 388–392), that a matter may be taken into account in aggravation of sentence only where it does not render the accused liable to a greater punishment, would otherwise be infringed.

[20-660] Aggravated sexual assault: s 61J

Sexual intercourse without consent committed in circumstances of aggravation carries a maximum sentence of 20 years. Where it is committed on or after 1 February 2003 it is also subject to a standard non-parole period of 10 years. "Circumstances of aggravation" are defined in s 61J(2):

(a) intentional or reckless infliction of actual bodily harm

(b) threat of actual bodily harm by means of an offensive weapon/instrument

(c) in company

(d) victim under the age of 16 years

(e) victim under the authority of the offender

(f) victim has a serious physical disability

(g) victim has a cognitive impairment

(h) break and entry into dwelling-house or other building with the intention of committing the offence or any other serious indictable offence

(i) deprivation of victim's liberty for a period before or after the commission of the offence.

For offences committed prior to 15 February 2008, the previous form of s 61J(2)(a) applies, that is "malicious" infliction of actual bodily harm.

Section 61J(2)(h) and (i) were inserted by the *Crimes Amendment (Sexual Offences) Act 2008*, which commenced on 1 January 2009.

The aggravating factors under s 61J(2) are not all of equal seriousness: *Thorne v R* [2007] NSWCCA 10 at [82]. For example, a threat to inflict actual bodily harm may be less serious than actually inflicting harm. There can also be other aggravating factors applicable to this offence not mentioned in s 61J(2), such as acts degrading the complainant: *Thorne v R* at [82].

Range for s 61J

In *R v AEM* [2002] NSWCCA 58 at [103]–[143], the court reviewed the pattern of sentencing for offences under s 61J at that time and concluded that the cases cited by counsel did not establish a relevant pattern of sentencing. The court also cautioned against the use of Judicial Commission of NSW statistics for sexual assault offences: at [110]–[117].

Whatever view may be taken on the question of whether there is an established range, the introduction of a standard non-parole period of 10 years will have the effect of generally increasing sentences for this offence. In *R v AD* [2005] NSWCCA 208 at [43], Howie J said in the course of dealing with a severity appeal for a s 61J offence:

> the judge in the present matter was obliged to have regard to the standard non-parole period of 10 years even though it was not applicable to the applicant's case. In [*R v AJP*

> (2004) 150 A Crim R 575] it was made clear that the effect of the standard non-parole period will generally be to increase the level of sentencing for offences to which it applies. If the provisions prescribe a standard non-parole period of 10 years, as against a maximum penalty of 20 years, as is the case with an offence under s 61J, it follows that the head sentence must exceed half the maximum penalty for the offence notwithstanding that the offence is one of only mid-range seriousness.

Summaries of the Crown and severity appeals for offences committed under s 61J since the introduction of the standard non-parole period can be accessed via the SNPP appeals component of JIRS.

Section 61J cases that attract the maximum

See generally the discussion with regard to worst cases at [10-005] **Cases that attract the maximum**; see also *The Queen v Kilic* (2016) 259 CLR 256.

R v Anderson [2002] NSWCCA 304 is an example of near worst case category of a s 61J offence. *Anderson* was said to be worse than *R v AEM* [2002] NSWCCA 58 because it involved infliction of actual bodily harm. The offender had a long history of criminal conduct and committed numerous violent offences after escaping from a prison.

In *R v Boatswain* (unrep, 15/12/93, NSWCCA) the offender committed seven counts of aggravated sexual intercourse without consent against two different victims on different occasions. The court imposed an effective sentence of 23 years with a non-parole period of 15 years. *R v Presta* [2000] NSWCCA 40 was also a serious case. The applicant received a minimum term of 14 years and 3 months and additional term of 4 years and 9 months.

[20-670] Aggravated sexual assault in company: s 61JA

Section 61JA(1) provides that:

> A person:
>
> (a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and
>
> (b) who is in the company of another person or persons, and
>
> (c) who:
>
> (i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or
>
> (ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or
>
> (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,
>
> is liable to imprisonment for life.

In *R v MRK* [2005] NSWCCA 271 at [3], Spigelman CJ stated :

> As indicated by the maximum penalty of life imprisonment, the offence under s 61JA is in the highest level of sexual assault offences under the *Crimes Act*, above the offences

> for which s 61J provides being sexual assault in circumstances of aggravation. This represents a recognition by the legislature of the particular heinousness which often accompanies gang rapes.

R v Hoang [2003] NSWCCA 380 involved the applicant having sexual intercourse with the victim without her consent, in company, having deprived her of her liberty for a period prior to the commission of the offence. According to Wood CJ at CL at [40]–[42], the sexual assault offence:

> fell within the upper range of seriousness for such an offence, the seriousness of which is, itself, underlined by the fact that the maximum available penalty for it is imprisonment for life … This community will not, and it cannot, tolerate the activities of marauding young gangs of the kind to which this appellant attached himself, and it is time that he and his ilk understood that to be the case, at the penalty otherwise of facing lengthy terms of imprisonment.

In *R v Upton* [2006] NSWCCA 256 at [50], the applicant played a lesser role than his co-offender and the Crown relied on the doctrine of extended joint criminal enterprise. The court agreed that the crime was one of the worst of its type and held that a sentence of imprisonment of 7 years with a non-parole period of 4 years "might be considered lenient": *R v Upton* at [50].

In *R v MAK* [2005] NSWCCA 369, the crime was characterised as falling into the worst category of offence (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256) under s 61JA. MRK's brothers were sentenced respectively to terms of imprisonment of 16 years, with a non-parole period of 12 years; 22 years, with a non-parole period of 16 years; and 22 years, with a non-parole period of 13 years. Justice Grove said that, having regard to the maximum penalty, the applicants were treated leniently: *R v MAK* at [97], [130].

Summaries of the Crown and severity appeals for offences committed under s 61JA since the introduction of the standard non-parole period legislation can be accessed via the SNPP Appeals component of JIRS.

[20-680] Assault with intent to have sexual intercourse: s 61K

Section 61K provides that any person who "intentionally or recklessly" (prior to 15 February 2008, "maliciously") inflicts actual bodily harm, or threatens to inflict actual bodily harm by means of an offensive weapon or instrument, with intent to have sexual intercourse with another person, is liable to imprisonment for 20 years. Appeals against sentences for s 61K offences include *R v Jones* (1993) 70 A Crim R 449; *R v Armand-Iskak* [1999] NSWCCA 414; *R v Smith* (1993) 69 A Crim R 47; *R v Leys* [2000] NSWCCA 358 and *R v Sanderson* [2000] NSWCCA 512.

[20-690] Indecent assault

Section 61L provides:

> Any person who assaults another person and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 5 years.

In *R v O'Sullivan* (unrep, 20/10/89, NSWCCA), Priestley JA said that the sentencing judge had taken an "over-strict approach" in saying that a custodial sentence had to be imposed in every case of indecent assault, as it was then defined.

Section 61M — "in circumstances of aggravation"

Section 61M is dealt with under **Sexual offences against children** at [17-510].

Under s 61M(1) any person who assaults another person in circumstances of aggravation is liable to imprisonment for 7 years. "Circumstances of aggravation" are defined in s 61M(3). Under s 61M(2):

> any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 16 years.

Parliament has set a standard non-parole period of 5 years for an offence under s 61M(1) and 8 years for an offence under s 61M(2): items 9A, 9B, Table of Standard non-parole periods, see [8-000].

[20-700] Sexual assault procured by intimidation, coercion and other non-violent threats

Section 65A was repealed by the *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*, which commenced 1 January 2008. It provided:

(1) In this section: "non-violent threat" means intimidatory or coercive conduct, or other threat, which does not involve a threat of physical force.

(2) Any person who has sexual intercourse with another person shall, if the other person submits to the sexual intercourse as a result of a non-violent threat and could not in the circumstances be reasonably expected to resist the threat, be liable to imprisonment for 6 years.

(3) A person does not commit an offence under this section unless the person knows that the person concerned submits to the sexual intercourse as a result of the non-violent threat.

In *R v Aiken* (2005) 63 NSWLR 719 the court held that s 65A was inserted in 1987 for the purpose of criminalising non-violent threats. The elements of intimidation, coercion and non-violent threats are now incorporated in s 61HA(6)(b) as grounds for establishing that a person does not consent to sexual intercourse.

[20-710] Victim with a cognitive impairment: s 66F

The *Crimes Amendment (Cognitive Impairment — Sexual Offences) Act 2008* clarified and extended the nature of sexual offences committed against persons who have a cognitive impairment. The amending Act replaced the term "intellectual disability" with "cognitive impairment", which includes not only intellectual disability, but extends to developmental or neurological disorders, dementia, severe mental illness or brain injury, which results in the person requiring supervision or social habilitation in connection with daily life activities.

Section 66F(2) provides that a person who has sexual intercourse with a person who has a cognitive impairment, and who is responsible for the care of that person (whether generally or at the time of the sexual intercourse only), is liable to a maximum

penalty of 10 years imprisonment. A person is responsible for the care of a person with a cognitive impairment if the person provides care to that person at a facility or at the home of that person in a program under which care is provided to persons with a cognitive impairment.

Section 66F(3) provides that any person who has sexual intercourse with a person who has a cognitive impairment, with the intention of taking advantage of that cognitive impairment, is liable to a maximum penalty of 8 years imprisonment.

In *R v Grech* [1999] NSWCCA 268 at [37], Carruthers J said deterrence looms large for offences under s 66F(2). His Honour explained the gravamen of the offence at [33]–[34]:

> strong emotional relationships are quite capable of developing between carer and intellectually disabled person, whether they are of the same gender or not. It is essential, therefore, that persons in authority exercise the utmost care to avoid such situations developing, and immediately there are indications of such a situation arising, the obligation is on the person in authority to remove himself or herself from the relationship or, at the very least, immediately to seek expert counselling.
>
> Neither of these courses was adopted in the subject case and, intolerably, the relationship developed into one of a continuing and prolonged violation of the provisions of s 66F(2) … The fact that the relationship may have developed, as the applicant contends, into a mutual loving relationship could fairly be described as an aggravating feature of the case rather than a mitigating factor.

[20-720] Sexual assault by forced self-manipulation: s 80A

Section 80A(2) provides that any person who compels another person to engage in self-manipulation, by means of a threat that the other person could not reasonably be expected to resist, is liable to imprisonment for 14 years. If there are circumstances of aggravation (outlined in s 80A(1)), the person is liable to imprisonment for 20 years under s 80A(2A). Section 80A(3) provides that a person does not commit an offence under this section unless the person knows that the other person engages in the self-manipulation as a result of the threat.

[20-730] Incest

Section 78A(1) states that "any person who has sexual intercourse with a close family member who is of or above the age of 16 years is liable to imprisonment for 8 years". Under s 78B any person who attempts to commit an offence under s 78A is liable to imprisonment for 2 years. In *R v GS* [2002] NSWCCA 4, the applicant had engaged in a sexual relationship with his natural daughter over a 14-year period. On the three counts of incest, the court sentenced him to 4 years and 6 months, with a non-parole period of 3 years.

[20-740] Bestiality

Last reviewed: August 2023

Section 79 provides that "any person who commits an act of bestiality with any animal" shall be liable to imprisonment for 14 years. Any person who attempts to commit an act of bestiality with any animal shall be liable to imprisonment for 5 years: s 80.

Bestiality is not defined in the *Crimes Act 1900*, but at common law it has been held to consist of any form of sexual intercourse with an animal: *R v Brown* (1889) 24 QBD 357. No particular mode of penetration is required: *R v Bourne* (1952) 36 Cr App R 125; applied by the High Court in *Bounds v The Queen* [2006] HCA 39. A woman may commit bestiality: *R v Packer* [1932] VLR 225. In *Chesworth v R* [2023] NSWCCA 115 at [19], the court noted the objective seriousness of bestiality offences should be assessed having regard to the animal's inability to consent to any form of activity with a human.

[20-750] Intensive correction order not available for a "prescribed sexual offence"

Section 67(1)(b) *Crimes (Sentencing Procedure) Act 1999* states that an intensive correction order (ICO) must not be made in respect of a sentence of imprisonment for a "prescribed sexual offence". A "prescribed sexual offence" is defined in s 67(2) as:

(a) an offence under Pt 3, Divs 10 or 10A *Crimes Act 1900*, being:

  (i) an offence where the victim is under 16 years of age, or

  (ii) an offence where the victim is any age and the elements of which includes sexual intercourse (as defined by s 61H)

(b) an offence against ss 91D, 91E, 91F, 91G or 91H *Crimes Act*

(c) an offence against ss 91J, 91K or 91L *Crimes Act*, where the victim is under 16 years, or

(d) an offence that, at the time it was committed, was a prescribed sexual offence within the meaning of this definition.

Section 67(2)(d)–(f) also lists a number of Commonwealth offences which are purported to fall within the definition of a "prescribed sexual offence" in respect of which an ICO must not be made.

[20-760] Other aggravating circumstances

Breach of trust

In *R v Qin* [2008] NSWCCA 189, offences under ss 61I and 61L that were committed in the context of a relationship between a masseuse and his customer were aggravated by a breach of the trust inherent in that relationship: at [36], [49].

See "Breach of trust" in **Sexual offences against children** at **[17-560]**.

Risk of pregnancy

The risk of pregnancy is an aggravating factor that can be taken into account in sentence: *KAB v R* [2015] NSWCCA 55. The court (Wilson J and Ward JA agreeing, Simpson J in dissent) in *KAB v R* held that there was no denial of procedural fairness for the judge to take into account that there was a "high risk of pregnancy" when the agreed facts included that the offender had penile/vaginal intercourse with his step-daughter and ejaculated into her vagina where neither party had raised the issue at the sentencing hearing. On appeal, the offender argued that had he known the judge was going to take this factor into account he would have submitted evidence that he had undergone a vasectomy.

Use of weapon

The use of a knife in sexual offences, where it can be taken into account as a matter of aggravation, is regarded by the court as abhorrent to the community, and will lead to a significant increase in the sentence: *R v Rothapfel* (unrep, 4/8/92, NSWCCA) per Studdert J at [12]. Offenders who use knives in sexual attacks must expect stern punishment: *R v H* (unrep, 23/8/96, NSWCCA) per Studdert J.

Home invasion

It is an aggravating circumstance where a victim is assaulted in his or her own home both at common law and under s 21A(2)(eb) *Crimes (Sentencing Procedure) Act*. Break and entry into a dwelling-house is also a specified circumstance of aggravation under ss 61J(2)(h) and 66C. In *R v Preston* (unrep, 9/4/97, NSWCCA) at 25, Dunford J said:

> sexual assault is a serious offence at any time, but its criminality is aggravated when it is committed against a defenceless woman in the sanctity of her own home.

Examples where sexual assault offences were committed in the context of break and enter offences include: *R v Johnston* [2002] NSWCCA 201; *R v Anderson* [2002] NSWCCA 304; *R v Hoang* [2003] NSWCCA 380; *R v Allan* [2004] NSWCCA 107; *R v DAC* [2006] NSWCCA 265 and *R v Oloitoa* [2007] NSWCCA 177.

Offences committed by medical practitioner

The gravity of sexual offences is magnified by the circumstance that it involved a breach of trust which the patient reposed in a medical practitioner: *R v Arvind* (unrep, 8/3/96, NSWCCA) per Grove J at [16]. Criminal interference with the bodies of persons seeking health care by medical practitioners will be met with stern retribution. Patients are extremely vulnerable and taking advantage of that situation for self-gratification means that general and personal deterrence will be part of an appropriate sentence: *R v Arvind*.

Drink spiking

Sexual offences which are preceded by spiking the victim's drink are ordinarily dealt with under ss 38 and 38A. See discussion in **Assault, wounding and related offences** at [50-110].

Intoxication

Intoxication as a factor in sentencing is discussed in **Subjective matters at common law** at **[10-480]**.

[20-770] Mitigating circumstances

Youth of offender

The general principle is that in cases involving young offenders, general deterrence is given less weight and more emphasis is placed on rehabilitation. However, where a youth behaves like an adult and commits a sexual assault of considerable gravity, the function of the courts and the primary objective of sentencing is the protection of the community: *R v Nichols* (1991) 57 A Crim R 391; *R v Gordon* (1994) 71 A Crim R 459 at 469; *R v BUS* (unrep, 3/11/95, NSWCCA); *R v DAR* (unrep, 2/10/97, NSWCCA); *R v AEM* [2002] NSWCCA 58; *R v Alcazar* [2017] NSWCCA 51 at [122]–[124]. It is not the youth of an offender per se that justifies the amelioration of a sentence, but

the circumstances of a particular juvenile offender and a particular offence that may indicate that general deterrence and retribution should play a lesser role: *IE v R* (2008) 183 A Crim R 150 at [16]. Special considerations must be applied under Pt 2 Div 4 *Children (Criminal Proceedings) Act 1987* where the offender is under 18 years of age at the time of the offence and under 21 years when charged.

See the further discussion of this factor in **Subjective matters at common law** at **[10-430]**.

Mental condition

See discussion of this factor in **Subjective matters at common law** at **[10-460]**.

Delay

The suspense or uncertainty suffered by an offender who remains silent in the hope that his or her offences will not be discovered must not be taken into account on sentence: *R v Spiers* [2008] NSWCCA 107 at [37]–[38] and cases cited therein. The delay enabled the sentencing judge to conclude that this offender was unlikely to re-offend, but the court noted at [39] that this was "perhaps not properly regarded as rehabilitation".

In *R v Hall* [2017] NSWCCA 313, the court observed that there are cases where the descriptor "delay" is inapt and suggests "something that might have occurred earlier was deferred, postponed or put off until later": *R v Hall* at [98]. In that case, the 23-year delay between the offences (in respect of which the victim had immediately complained) and his arrest was solely attributable to the respondent evading detection. The court found that the concepts of delay and "stale crime" do not automatically lead to certain consequences in sentencing, such as leniency. The underlying circumstances and their impact on the assessment of sentence must be considered: *R v Hall* at [98]–[99].

Rehabilitation and established good character in the time since offending is a relevant consideration: *R v Hall* at [100]. However, general deterrence still has a role to play. It is important it is known that the criminal justice system will punish, denounce and make an offender accountable for serious criminal offending, no matter how long it takes for them to be brought to account (where the time required to do so is not the fault of anyone else): *R v Hall* at [122].

See also discussion of delay in **Sexual offences against children** at **[17-570]** and **Subjective matters at common law** at **[10-530]**.

Extra-curial punishment

The court is entitled to take into account punishment meted out by others, such as abuse and harassment and threats of injury to person and property: *R v Allpass* (1993) 72 A Crim R 561 at 566. In *R v Holyoak* (1995) 82 A Crim R 502 at 506, the court took account of the fact that the applicant had suffered substantially from personal harassment by media representatives and received a large volume of "hate" communications from members of the public. The punishment commenced, in a real sense, before his sentence.

In *Sharwood v R* [2006] NSWCCA 157, the judge erred by excluding evidence that the applicant was beaten in his home in the presence of his wife and daughter by two men in relation to his offences under s 61M(1). The attack resulted in physical

injury and damage to the applicant's house. The court held at [67] that the incident was a matter which should have been taken into account as a subjective circumstance justifying some degree of leniency.

See further discussion of this factor in **Subjective matters at common law** at **[10-520]**.

Possibility of summary disposal

The *Criminal Procedure Act 1986* makes provisions in Ch 5 of the Act for some indictable offences to be dealt with summarily in certain circumstances. Section 260 provides:

> (1) An indictable offence listed in Table 1 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor or the person charged with the offence elects in accordance with this Chapter to have the offence dealt with on indictment.
>
> (2) An indictable offence listed in Table 2 to Schedule 1 is to be dealt with summarily by the Local Court unless the prosecutor elects in accordance with this Chapter to have the offence dealt with on indictment.

Section 260 applies to the following sexual assault offences:

- indecent assault — s 61L [Table 2 offence]
- aggravated indecent assault — s 61M [Table 1 offence]
- act of indecency — s 61N [Table 2 offence]
- aggravated act of indecency — s 61O(1), (1A) [Table 2 offence] and s 61O(2), (2A) [Table 1 offence]
- sexual intercourse — child between 14 and 16 — s 66C(3) [Table 1 offence]
- attempting, or assaulting with intent, to have sexual intercourse with child between 10 and 16 — s 66D [Table 1 offence, where victim 14 years of age or over]
- procuring or grooming child under 16 for unlawful sexual activity — s 66EB [Table 1 offence]
- attempt to commit bestiality — s 80 [Table 1 offence]
- procuring person for prostitution — s 91A [Table 1 offence]
- procuring person for prostitution by drugs, etc — s 91B [Table 1 offence]
- production, dissemination or possession of child abuse (previously child pornography) material — s 91H [Table 1 offence]
- aggravated voyeurism — s 91J(3) [Table 1 offence]
- aggravated offence of filming a person engaged in private act — s 91K(3) [Table 1 offence]
- aggravated offence of filming a person's private parts — s 91L(3) [Table 1 offence].

Where an offence that could have been dealt with summarily is prosecuted on indictment, the court may have regard to that fact but only in the exceptional circumstances outlined in *Zreika v R* (2012) 223 A Crim R 460 at [107]–[109].

See further discussion of this factor in **Objective factors at common law** at **[10-080]**.

Hardship of custody

Sentencers should no longer assume that persons convicted of sexual assault, who serve their sentences in protection, will spend their time in more onerous custodial conditions than the general prison population: *R v Mostyn* (2004) 145 A Crim R 304 at [179]; *R v Way* (2004) 60 NSWLR 168 at [177] and *R v Gu* [2006] NSWCCA 104 at [33]. The court must base such a conclusion on evidence: *R v Durocher-Yvon* (2003) 58 NSWLR 581 at [22].

This factor is discussed further in **Subjective matters at common law** at **[10-500]**.

[20-775] Factors which are *not* mitigating at sentence

Last reviewed: March 2024

The relevance of a prior relationship

The mere fact that there was a pre-existing relationship between an offender and a victim does not mitigate the criminality of the sexual assault: *R v Cortese* [2013] NSWCCA 148 at [55] and cases discussed therein. The fact that an offence occurred in a domestic context does not lessen its gravity: *R v Hamid* (2006) 164 A Crim R 179; *Heine v R* [2008] NSWCCA 61 at [40]; *R v Harvey* (unrep, 23/8/96, NSWCCA); *R v Grech* [1999] NSWCCA 268 at [34]–[35]. The assessment of the seriousness of the crime will ultimately depend on the facts of the case. One common circumstance in which a pre-existing relationship has been found to diminish the seriousness of a sexual offence is where it suggests some prevarication or at least initial consent on the part of the victim: *Bellchambers v R* [2011] NSWCCA 131 at [47]; *NM v R* [2012] NSWCCA 215 at [59]; *R v Cortese* at [55].

This circumstance has been contrasted to an assault committed by a stranger where there is no such potential prevarication: *R v Cortese* at [50]. See also *Boney v R* (2008) 187 A Crim R 167 at [106] and *NM v R* at [59]. Where the offender is a stranger, a further element of fear and terror would be expected: *ZZ v R* [2013] NSWCCA 83 at [103]. The fact that victim knew the offender and trusted him or her will "provide little comfort": *ZZ v R* at [103]. An offence which is committed where two people are engaged in intimate contact by consent and one of them fleetingly goes too far, is to be distinguished from one where the victim made her lack of consent clear and struggled: *Stewart v R* [2012] NSWCCA 183 at [69]. Offences committed in a domestic context as distinct from an attack from a stranger does not lessen their seriousness: *ZZ v R* at [104]. Sully J said in *R v O'Grady* (unrep, 13/5/97, NSWCCA) that where a relationship breaks down:

> the woman who is involved in the relationship is entitled to feel that, whatever other consequences ensue, her personal safety will not be threatened at all, let alone threatened by the commission of criminal offences of the gravity of those with which we are now called upon to deal.

Grove J said, in *Raczkowski v R* [2008] NSWCCA 152 at [46]:

> a violent and pre planned attack … in … a domestic setting is not a matter of mitigation. This Court has repeatedly stressed that it is a circumstance of significant seriousness: *R v Edigarov* [2001] 125 A Crim R 551; *R v Dunn* [2004] 144 A Crim R 180; *R v Burton* [2008] NSWCCA 128.

Manner of dress and sexual history of victim

It is entirely inappropriate to focus on the prior sexual conduct of the victim or to characterise the victim's manner of dress or behaviour as provocative and as somehow contributing to the commission of the offence: *R v Radenkovic* (unrep, 6/3/90, NSWCCA); *R v King* (unrep, 18/7/91, NSWCCA). The mere fact that the victim permitted the offender to sleep in her bed with her is not a mitigating factor: *R v O'Grady* (unrep, 13/5/97, NSWCCA).

Sex workers are as entitled to the protection of the law against sexual assault as other citizens. In such cases it is wrong to sentence on the basis that the psychological effect on the victim or the gravity of the offence will be less than that experienced by others: *R v Leary* (unrep, 8/10/93, NSWCCA) per Kirby ACJ at 6, disapproving *R v Hakopian* (unrep, 11/12/91, VicCCA).

"Cultural" conditioning

In *R v MAK* [2005] NSWCCA 369 counsel for MSK submitted that the court should favourably consider his appeal because, having come from Pakistan, he was culturally conditioned by its "very traditional views about women". This submission was emphatically rejected by McClellan CJ at CL at [4]:

> Whatever be its intended meaning the submission must be rejected. It is a fundamental right of every person in a civilised society to live without fear of being assaulted, whether it be physical assault or assaults of a sexual nature. For this reason the legislature has made all forms of assault upon the person a crime imposing heavy penalties on those who do not respect that right. When, as happened in the matters under appeal, the conduct of an offender demonstrates a complete disregard for that right our community expects the courts to impose penalties which punish the offender and mark out the seriousness of the offence so that others will be deterred from acting in a similar manner.

Counsel for MSK raised the issue of the relevance of cultural conditioning again at first instance in *R v MSK* [2006] NSWSC 237. Justice Hidden at [45] rejected the submission because it had no factual basis:

> he must have had sufficient exposure to the Australian way of life to be aware that the place occupied by women in the traditional culture of his area of origin is far removed from our social norms. He can have been in no doubt that to treat those two young women in the manner he did was utterly unacceptable.

Intoxication

Intoxication as a factor in sentencing is discussed in **Subjective matters at common law** at **[10-480]**.

[20-780] Sentencing for offences committed many years earlier

The court in *R v Hall* [2017] NSWCCA 313, confirmed that, in sentencing for sexual assault offences committed many years prior, judges should adopt the approach outlined by Howie J in *R v Moon* (2000) 117 A Crim R 497 at [70]–[71]. That is, where there is an absence of reliable statistical data for sentencing patterns at the time of the offence, the nature of the criminal conduct involved and the maximum penalty will be important factors in determining the appropriate sentence: *R v Hall* at [74]–[75].

This topic is further dealt with in **Sexual offences against children** at **[17-410]**.

[20-790] Utility of sentencing statistics

In *R v Shannon* [2006] NSWCCA 39 the applicant was charged with three counts of sexual intercourse with a 12-year-old victim under s 66C *Crimes Act 1900*. His counsel relied on available statistics and an examination of comparable cases dealt by the Court of Criminal Appeal to argue that the sentences imposed were at the "upper higher level" of punishment imposed for offences against this section. Justice Howie stated at [36]:

> The decisions referred to, the schedule relied upon by the applicant and the statistics maintained by the Judicial Commission indicate that there is a wide variation in the sentences that are imposed for offences of this type. That no doubt reflects the range of activity included within the concept of sexual intercourse and in the varying circumstances surrounding the offending. They are of little assistance in my view except as indicating the sentence imposed by the judge is at the upper end of the range.

In *R v Shortland* [2018] NSWCCA 34, the respondent to the Crown appeal was sentenced, after a trial, to a suspended sentence of 2 years imprisonment on each of three counts of sexual intercourse without consent contrary to s 61I. The sentencing judge was provided with Judicial Commission statistics which showed that 237 cases, where a s 61I offence was the principal offence, were dealt with between 2010 and 2016. In 47 of those cases, there was a conviction after trial and a custodial sentence was imposed in all but one. In 26 cases, offenders received suspended sentences but pleas of not guilty were entered in only three of those cases. Basten JA (RA Hulme J agreeing at [37]) concluded that the judge erroneously used sentencing precedent partly by focusing on the 26 cases where suspended sentences were imposed, observing that three out of 237 cases did not constitute a relevant sentencing pattern: *R v Shortland* at [6].

[20-800] Victim impact statements

See **Victims and victim impact statements** at **[12-820]**.

[20-810] Section 21A Crimes (Sentencing Procedure) Act 1999

The application of s 21A generally is discussed in detail at **[11-000]**.

Substantial injury, emotional harm, loss or damage: ss 21A(2)(g), (3)(a)

There must be evidence before the court to warrant a finding that the injury and emotional harm caused by the offence was substantial within the terms of s 21A(2)(g). Additional evidence of harm ordinarily found in a victim impact statement is required. In *R v Cunningham* [2006] NSWCCA 176, a child sexual assault case, the judge erred by taking into account as an aggravating factor that the impact of the offence on the victims was substantial. No evidence was led regarding the emotional or psychological harm suffered by any of the complainants.

R v Cunningham should be read with *DBW v R* [2007] NSWCCA 236, where the court held that it was not necessary for expert evidence to be led on matters that have become common knowledge and which could be inferred by common sense. In this case, it was open for the judge to infer, from reports tendered at sentence, a link between the applicant's sexual abuse of his son and his son's inappropriate sexual conduct at school: at [29]. The judge "would have been entitled to act on the basis that there was a substantial harm": at [38]. It was said in *R v King* [2009] NSWCCA 117 at [41] that

it should not be assumed, without evidence to the contrary, that there is no significant damage by way of long-term psychological and emotional injury resulting from a sexual assault of a child: see extract from the judgment at [20-604].

Victim was vulnerable: s 21A(2)(l)

The age of the victim is relevant to determining the objective seriousness of an offence. The younger the victim the more serious the crime: *RJA v R* (2008) 185 A Crim R 178 at [13]. Offences arising out of the home invasion of a 78-year-old woman were aggravated by her age: *R v DAC* [2006] NSWCCA 265 at [19]. On the other hand, an 18-year-old victim was not vulnerable for the purposes of s 21A(2)(l) on account of her age since 18 is the age of adulthood and cannot be regarded as "very young" under s 21A(2)(l): *Perrin v R* [2006] NSWCCA 64 at [35]. However, the victim was vulnerable on the basis that she was affected by alcohol which markedly lowered what she could appreciate and do at the time.

[20-820] Totality and sexual assault offences

Given that it is common for offenders to commit multiple offences, the totality principle has a central role in the sentencing exercise for sexual assault.

The totality principle is a well-established principle of sentencing to be applied by the court when sentencing an offender for more than one offence. It requires a judge or magistrate to determine an appropriate sentence for each offence, consider questions of cumulation or concurrence and then, when reviewing the aggregate sentence consider whether it is "just and appropriate": *Pearce v The Queen* (1998) 194 CLR 610.

The principle of totality requires that the effective sentence imposed on an offender represent a proper period of incarceration for the total criminality involved: *R v AEM* [2002] NSWCCA 58 at [69] per Beazley JA, Wood CJ at CL and Sully J.

The issue is discussed in detail with particular reference to sexual assault offences at **Concurrent and consecutive sentences** at **[8-230]**.

[20-830] Circumstances of certain sexual offences to be considered in passing sentence: s 61U

Section 61U states that where a person is convicted of:

(a) both an offence under s 61I and an offence under s 61K, or

(b) both an offence under s 61J and an offence under s 61K, or

(c) both an offence under s 61JA and an offence under s 61K,

whether at the same time or at different times, the judge passing sentence on the person in respect of the two convictions or the later of the two convictions is required, if it appears that the two offences arose substantially out of the one set of circumstances, to take that fact into account in passing sentence. *R v Ridgeway* (unrep, 16/7/98, NSWCCA) contains a short discussion of s 61U.

[20-840] Use of evidence of uncharged criminal acts at sentence

Last reviewed: March 2024

The court may take into account uncharged acts of a similar nature for the limited purpose of placing the offences charged into context and to rebut an assertion that the

offence is an isolated act or was out of character. The offender is denied leniency to which they might have been entitled if the offence(s) was an isolated incident: *R v H* (1980) 3 A Crim R 53; *R v Burchell* (1987) 34 A Crim R 148; *R v Kozakiewicz* (unrep, 11/6/91, NSWCCA); *R v Hartikainen* (unrep, 8/6/93, NSWCCA); *R v JCW* (2000) 112 A Crim R 466, *MJL v R* [2007] NSWCCA 261 at [15].

In *R v EMC* (unrep, 21/11/96, NSWCCA), the applicant was sentenced on the basis that several of the charges were representative of a wider series of offences. Chief Justice Gleeson said:

> This did not, of course, mean that his Honour was punishing the applicant for those other offences or treating them as part of the criminality in respect of which he was imposing the sentence … it meant that the applicant was not being dealt with on the basis that these were isolated instances.

This use of uncharged acts for this limited purpose does not infringe the principle that a person should not be punished for crimes for which they have not been convicted. There is a distinction between not increasing a penalty based on the presence of an aggravating fact and refusing to extend leniency on account of the fact that the events as charged were not isolated incidents: *R v JCW* (2000) 112 A Crim R 466 per Spigelman CJ at [68]; *MJL v R* [2007] NSWCCA 261 at [15]. However, see also *LN v R* [2020] NSWCCA 131 at [41].

[The next page is 15001]

Murder

[30-000] Introduction

Murder is defined in s 18(1)(a) *Crimes Act 1900* (NSW) in the following terms:

> Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

There are therefore four identifiable bases of liability of murder, involving:

- an intent to kill
- an intent to inflict grievous bodily harm
- reckless indifference to human life, or
- the commission of a crime punishable by life imprisonment or imprisonment for 25 years.

Murder has been described as the most serious offence in the criminal calendar: *R v Penisini* [2003] NSWSC 892 at [82]; *R v Dalley* [2002] NSWCCA 284 at [95]. It carries a maximum penalty of life imprisonment: s 19A *Crimes Act 1900*.

[30-010] Relative seriousness of the categories of murder

Intent to kill — seriousness compared to inflict grievous bodily harm

The state of mind in which murder is committed is directly relevant to determining the objective seriousness of the crime: *Charbaji v R* [2019] NSWCCA 28 at [180]. However, while intent to kill generally tends to greater objective seriousness than an intention to inflict grievous bodily harm, the question of intent is not the only relevant consideration: *Charbaji v R* at [180]; *Apps v R* [2006] NSWCCA 290 at [49]; *Versluys v R* [2008] NSWCCA 76 at [32]. There may be circumstances where an intention to inflict grievous bodily harm reflects similar criminality to cases involving an intention to kill: *R v Nelson* (unrep, 25/6/96, NSWCCA); *R v Wilson* [2005] NSWCCA 112 at [22]; *R v Hillsley* [2006] NSWCCA 312 at [16]–[17].

However, the existence of particular features is not determinative of where a particular offence of murder might sit within the range of objective seriousness. While in *Nguyen v R* [2007] NSWCCA 363 Smart AJ had said at [143] "An intention to kill and premeditation are usual elements in a murder of midrange objective seriousness", subsequently in *Park v R* [2019] NSWCCA 105, RA Hulme J observed that that statement had been misconstrued and that when taken in context indicated that those two features were not unusual elements of such an offence: at [52]–[53]; see also Harrison J at [23].

In *Park v R* the court reviewed a number of murder cases at [24]–[33] and concluded there was no reliable relationship between an assessment of any particular degree of objective seriousness and the sentence imposed but that factors present in cases described as significantly above the mid-range might include gratuitous cruelty,

contract killings, causing death in a way likely to cause excruciating pain or agony or particularly doing so in order that the process of dying occurs over an extended period or where the victim might have had undue time to contemplate the terror of what was coming: at [36].

Intent to inflict grievous bodily harm — seriousness compared to constructive murder

In *R v Wilson* [2005] NSWCCA 112, where the sentencing judge found that the basis for murder was an intention to inflict grievous bodily harm, as opposed to constructive murder, it was said at [22] that "[a]n offence of murder on some other basis than intent to kill is not necessarily of less culpability for that reason, and attention must be directed to the actual circumstances."

Reckless indifference to human life — seriousness compared to specific intention

In *R v Holton* [2004] NSWCCA 214, a case in which the appellant's vehicle collided with a police officer while the officer was in the process of deploying road spikes, the prosecution relied on reckless indifference to human life as the basis for liability for murder. The Crown appealed against the sentence of 16 years imprisonment with a non-parole period of 12 years. Grove J observed at [59] (cf Hulme J who would have increased the sentence at [120]):

> There is no prima facie presumption that murder resulting from reckless indifference to human life is less culpable than murder resulting from specific intention: *R v Ainsworth* 1994 76 A Crim R 127, but so to say inheres recognition that murder by reckless indifference is not necessarily as culpable as other forms. Each case must be considered on its own facts.

The need to consider each case on its own facts was recognised by the Victorian Court of Criminal appeal in *R v Aiton* (unrep, 5/10/93, VSC) referred to with approval by Gleeson CJ in *R v Ainsworth* (unrep, 6/12/94, NSWCCA).

Constructive murder — degrees of seriousness

The common law offence of felony murder has been replaced by the fourth category of murder as set out in s 18(1)(a) *Crimes Act 1900*. The term "constructive murder" should generally be used in preference to "felony murder" to avoid confusion with the common law: *R v Spathis; R v Patsalis* [2001] NSWCCA 476 at [209].

In *R v Jacobs* [2004] NSWCCA 462 at [332] Wood CJ at CL said:

> Constructive murder is not to be regarded as less serious, and thereby attracting a lighter total sentence or non-parole period than that which is appropriate for other categories of murder: *R v Mills* NSWCCA 3 April 1995. Just as is the case for the other categories, there are degrees of seriousness of constructive murder, and the determination of the appropriate sentence for any individual offence depends upon the nature of the offender's conduct and the part which he or she played in the events giving rise to death: *R v JB* [1999] NSWCCA 93.

Aslett v R [2006] NSWCCA 360 was a case of constructive murder, the foundational crime being one of robbery armed with a dangerous weapon. The court observed at [21] that "[a] murder committed in these circumstances may be as serious as a murder committed with intent to kill", but on appeal reduced a life sentence to a non-parole period of 28 years with an additional term of six years.

In *R v Mills* (unrep, 3/4/95, NSWCCA), Cole JA said:

> As the trial judge made clear, taking a loaded firearm and using it as a threat whilst in the course of committing a serious felony is a most serious matter. It is to be greatly discouraged by sentences of this Court. The fact that the murder was a felony murder is no ground for reducing either the minimum term or the total sentence.

Gleeson CJ agreed:

> The major premise underlying the argument of counsel for the appellant was that cases of felony murder involved a lower level of culpability than cases of murder involving intention to kill and therefore should receive a lower level of sentence than applies to intentional killing.
>
> I would reject that premise. Indeed, it would be difficult to select a better case than the present for the purpose of demonstrating its falsity. This was a case where a young man with an appalling history of criminal offending used a loaded gun in an armed robbery. He came to close quarters with the surprised victim. As is highly likely to occur in such circumstances, the weapon discharged. For the sake of the appellant's determination to get his hands on a few hundred dollars, an innocent person lost his life. This is a case of murder involving a very high degree of seriousness.

Mercy killings

While courts have generally found the moral culpability of an offender who commits a "mercy killing" to be less than other forms of intentional murder, a sentencing judge must still bear in mind that the offence involves deliberately taking a human life, the maximum penalty for which is life imprisonment with a standard non-parole period of 20 years. Unlawful homicide, in whatever form, has always been recognised as a most serious crime and protecting human life and personal safety is a primary objective of the criminal justice system: *Cooper v R* [2021] NSWCCA 65 at [83], [86]; *R v Edwards* (1996) 90 A Crim R 150 at 51. The court in *Cooper v R*, at [84], applied the observations of Hamill J at [7]–[8] in *R v Dowdle* [2018] NSWSC 240. His Honour said at [8] in respect of a manslaughter mercy killing:

> Sympathy which is legitimately aroused, and leniency and compassion that should be properly afforded, must never mask the objective gravity of any offence of homicide… Sentencing in such cases… must be seen to send a message to the community that nobody, however desperate things may get, is justified in taking it upon themselves to expunge human life.

[30-020] Standard non-parole periods

There are three standard non-parole periods prescribed for murder:

- 20 years for murder (general) committed on or after 1 February 2003
- 25 years for the murder of a person falling within a category of occupation committed on or after 1 February 2003
- 25 years for the murder of a child, whenever committed.

A table of standard non-parole period appeal cases is available for JIRS subscribers at https://jirs.judcom.nsw.gov.au/benchbks/sentencing/snpp_appeals.html.

Standard non-parole period — murder (general)

For offences of murder (other than those set out below) committed after 1 February 2003, there is a standard non-parole period of 20 years. The standard non-parole period

does not apply to matters for which a life sentence is imposed: s 54D(1)(a) *Crimes (Sentencing Procedure) Act 1999*. A list of appeal cases and summaries involving murder, which were decided following *Muldrock v The Queen* (2011) 244 CLR 120 is accessible via "SNPP Appeals" on the JIRS website. For a general discussion on standard non-parole periods see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

The standard non-parole period — victim occupation category

A standard non-parole period of 25 years is prescribed for murders committed after 1 February 2003 "where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation": item 1A, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act 1999*.

Even before the introduction and application of the above standard non-parole period, it was recognised that an offender's culpability may be aggravated by the fact that the victim was a police officer: *R v Adam* [1999] NSWSC 144 at [44]–[46]; *R v Penisini* [2004] NSWCCA 339 at [20]; *R v Holton* [2004] NSWCCA 214 at [100], [125]. In *R v Rees* (unrep, 22/9/95, NSWCCA), Gleeson CJ said that the deliberate killing of a police officer warrants "severe retribution."

Standard non-parole period — child victims

A standard non-parole period of 25 years is prescribed for murder cases where the victim is a child under the age of 18 years: item 1B, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act 1999*. Unlike other categories of murder with a standard non-parole period, this item applies "to the determination of a sentence whenever committed" (subject to the conviction being recorded or a plea being entered before 1 January 2008): Sch 2, Pt 17, cl 57, *Crimes (Sentencing Procedure) Act 1999*.

The murder of a child has always been considered a crime of extreme gravity, whether committed by a stranger or family member. The courts have recognised the enhanced culpability of an offender who is motivated to kill their child in order to punish the other parent. In *R v Fraser* [2005] NSWCCA 77, which involved the murder of the offender's three children during an access visit, Grove J said at [41]–[42]:

> there is one factor which is present in the circumstances for which the applicant must be sentenced, which was absent from all the cases cited, and that is that the applicant's motive in killing the children was, at least in part, to punish his wife. To that end he took steps to plan the homicides and to fulfil a threat which he had made on multiple occasions prior to carrying it out.
>
> I would uphold the Crown submission that, given that anger directed towards his wife played a significant role in determining to kill the children, and that the anger was focussed upon his beliefs as to her relationship and the institution of legal proceedings, there was a heightened need for denunciation and general deterrence. Some remarks of Lander J in *R v Hull* [1997] SASC 6087 are pertinent:
>
> > "This is a case where aspects of general deterrence are important. Many persons are involved in marital disputes and many of those disputes often become heated and some unfortunately become violent. Too often, sadly, children become pawns

> in those marital disputes. That is bad enough but those who do become involved in marital disputes must clearly understand that they cannot visit violence upon their children for any reason whatsoever, but in particular for the purpose of upsetting or punishing their spouse. Such action, it should be understood, will attract very severe punishment. The community ought to be able to expect that the courts will be quick to protect the defenceless, particularly children."

Whether the rationale for this standard non-parole period is reduced when the victim is just under 18 years old and the offender/s are just over was considered and rejected in *R v Hopkinson; R v Robertson* [2022] NSWCCA 80: see Leeming JA at [3]–[6]; Rothman J at [131]–[133]; Hamill J at [169]; see also *Milat v R; Klein v R* [2014] NSWCCA 29 at [164].

[30-025] Provisional sentencing of children under 16

Part 4, Div 2A *Crimes (Sentencing Procedure) Act 1999* provides for provisional sentencing of children convicted of murder.

Section 60B(1) enables a court to impose a provisional sentence where:

(a) the offender was less than 16 years of age at the time of the murder; and

(b) the offender is less than 18 years when the provisional sentence is imposed; and

(c) the sentence proposed is a term of imprisonment; and

(d) the court cannot satisfactorily assess the offender's prospects of rehabilitation or likelihood of re-offending because the information available does not permit a satisfactory assessment of whether the offender has or is likely to develop a serious personality or psychiatric disorder or a serious cognitive impairment.

A court that imposes a provisional sentence on an offender is to review the case at least once every two years after the provisional sentence is imposed: s 60E. Following a progress review, the court may impose or decline to impose a final sentence: s 60G(1). However, a final sentence must be imposed before the expiry of the "initial custodial period" as defined by s 60H(2). The term of imprisonment imposed under the final sentence, as well as the non-parole period if any is set, must not exceed the term of imprisonment and the non-parole period imposed under the provisional sentence: s 60G(3)(a), (b). The final sentence is taken to have commenced on the day on which the provisional sentence commenced: s 60G(3)(c).

Provisional and final sentences are subject to appeal under s 2(3) *Criminal Appeal Act 1912*. The Court of Criminal Appeal may substitute a new provisional sentence or a final sentence: s 60I(1).

Provisional sentencing applies to any sentence imposed after 25 March 2013, including a sentence for an offence committed before that date: Sch 2, Pt 23, cl 64, *Crimes (Sentencing Procedure) Act*.

[30-030] Life sentences

If an offender is sentenced to life imprisonment under s 19A, a non-parole period cannot be imposed and the offender must serve the sentence for their natural life, subject to the exercise of the prerogative of mercy: *R v Harris* (2000) 50 NSWLR 409 at [122], [125].

Life sentences at common law

See generally the discussion with regard to worst cases at [10-005] **Cases that attract the maximum**.

Under the common law, the maximum penalty of life imprisonment is intended for cases that are so grave as to warrant the maximum prescribed penalty: *The Queen v Kilic* (2016) 259 CLR 256 at [18].

Life sentences under s 61, Crimes (Sentencing Procedure) Act 1999

Section 61(1) *Crimes (Sentencing Procedure) Act 1999* provides:

> A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

In *R v Harris* (2000) 50 NSWLR 409 (*R v Harris (CCA)*) at [87]–[88], [90] the court held that s 61(1) effectively restates the common law concerning the imposition of life sentences for murder.

A convenient summary of the legislative history of s 61(1) and the relevant caselaw can be found in *Rogerson v R* [2021] NSWCCA 160 at [616]–[637]. See also the summary of the relevant principles in *Knight v R* [2006] NSWCCA 292 at [23]. The proper approach to s 61(1) is that stated in *R v Harris* [2000] NSWCCA 285 at [76]–[86] (*R v Harris (Bell J)*) and *R v Harris (CCA): Rogerson v R* at [636].

The burden is on the Crown to establish beyond reasonable doubt that a case falls within s 61(1): *R v Merritt* (2004) 59 NSWLR 557 at [35]. However, not all of the factors which would lead to a conclusion that s 61(1) is applicable must be established beyond reasonable doubt: *Adanguidi v R* [2006] NSWCCA 404 at [55]. It is the combined effect of the findings concerning the indicia in s 61(1) (that is, the interest in (i) retribution (ii) punishment (iii) community protection, and (iv) deterrence) that must be considered: *R v Merritt* at [52], [54].

Section 61 is subject to s 21(1) of the same Act (see s 61(3)), which provides that, even though liable to a sentence of life imprisonment, an offender may receive a determinate sentence. This necessarily involves a two-stage process when determining whether a life sentence is appropriate (see *R v Valera* [2002] NSWCCA 50 at [8] and *R v Merritt* (2004) 59 NSWLR 557 at [37]), but one that is different to the staged approach to sentencing disavowed in *Markarian v The Queen* (2005) 228 CLR 357 and *Muldrock v The Queen* (2011) 244 CLR 120: *Rogerson v R* at [636]; *Dean v R* [2015] NSWCCA 307 at [96].

In applying s 61(1), the court assesses first, whether the offence warrants a life sentence because of the circumstances surrounding or causally connected to the offence, and second, whether a lesser sentence is warranted because of other matters such as remorse, confessions, pleas of guilty and prospects of rehabilitation: *Rogerson v R* at [626]–[629], [635]–[636]; *R v Harris (Bell J)* at [84]–[85]; *R v Harris (CCA)* (2000) 50 NSWLR 409 at [60]; *CC v R* [2021] NSWCCA 71 at [81]–[83].

The first stage involves considering the requirements of s 61(1), which focuses on the offender's "level of culpability". This directs attention to objective factors, such as the objective seriousness of the offence, and subjective factors with a causative influence on the offender's culpability: see *R v Harris* (Bell J) at [84]–[87]; *Rogerson*

v R at [636]. The latter may include the offender's background and any mental health impairment, disorder or incapacity with a causative influence on their level of culpability but *not* consideration of remorse, admissions, whether or not there was a guilty plea or the offender's prospects of rehabilitation: *R v Harris* (Bell J) at [84]–[85]; *Rogerson v R* at [623]–[625].

In *CC v R*, Adamson J at [81]–[83] described the distinction drawn in *R v Harris* (Bell J) as one between factors relevant to the offender's level of culpability and factors relevant to the sentence to be imposed, observing that there was a degree of overlap between the two, but that "the instinctive synthesis required as part of the exercise of the sentencing discretion" involved considering *all* relevant matters, not just those affecting the offender's culpability in the commission of the offence. This approach was subsequently approved in *Rogerson v R* at [635], but as to the use of the descriptors "objective" and "subjective" in relation to the two-stage process the court said at [636]:

> [C]are must be taken in describing s 61 as differentiating between an assessment of the "objective gravity" of the offending and the offender's subjective circumstances. … what differentiates the two stages is whether the relevant factor is a "circumstances surrounding or causally connected to the offence" and that can include matters such as the offender's mental state, motive or personal background. Some matters may be relevant to both stages.

The second, discretionary, stage under s 21(1) is deciding whether a lesser sentence is warranted. This invites consideration of subjective matters such as remorse, confessions, pleas of guilty and their timing, and the offender's prospects of rehabilitation: *Rogerson v R* at [626]–[629], [635]–[636]; *R v Harris* (CCA) at [60]; *R v Harris* (Bell J) at [84]–[85].

R v Warwick (No 94) [2020] NSWSC 1168 and *Rogerson v R* are examples of cases where s 61(1) was found to be satisfied: see *R v Warwick (No 94)* at [18], [94]–[95]; *Rogerson v R* at [638]–[642]; *R v Rogerson; R v McNamara (No 57)* [2016] NSWSC 1207 at [230]–[242].

Life sentences may be imposed despite presence of subjective mitigating factors

The absence of criminal antecedents does not render an offender immune to the maximum penalty, either under s 61(1) (for example, *Adanguidi v R* [2006] NSWCCA 404 at [34]: *Knight v R* [2006] NSWCCA 292), or the common law (for example, *R v Ngo* [2001] NSWSC 1021).

A life sentence may also be imposed either at common law or under s 61(1) even if the offender pleads guilty: *R v Baker* (unrep, 20/9/95, NSWCCA); *R v Garforth* (unrep, 23/5/94, NSWCCA) (both sentenced prior to the introduction of the predecessor to s 61(1)); *R v Coulter* [2005] NSWSC 101 at [56]–[57]; *Knight v R* at [37]; *R v Miles* [2002] NSWCCA 276 at [213].

Section 61(1) does not apply to offenders under the age of 18 years (s 61(6)), although arguably the common law still applies to such offenders. Life sentences have been imposed on young adults in *Gonzales v R* [2007] NSWCCA 321 (20 years at the time of offence); and *R v Valera* [2002] NSWCCA 50 (19 years). These were cases to which s 61(1) applied. In *R v Leonard* (unrep, 7/12/98, NSWCCA), a case in which the common law applied, McInerney J said:

> to sentence the applicant to imprisonment for the term of his natural life is a terrible punishment to impose on a young man aged twenty-four. However, as the Crown has

> pointed out, the legislature has seen fit to pass such legislation and it expects this Court to carry out the intention of the legislature should the situation call for such a sentence. We should not shirk from our responsibility in so doing, no matter how distasteful it may be.

Both at common law and in the application of s 61(1), life sentences have been imposed regardless of whether there is some prospect of rehabilitation. In *R v Baker* (unrep, 20/9/95, NSWCCA), Barr AJ rejected the proposition that a life sentence should never be imposed where there is some prospect of rehabilitation. Similarly, in *R v Garforth* (unrep, 23/5/94, NSWCCA), the court said:

> We reject the applicant's submission that it is only where there is no chance of rehabilitation that the maximum penalty of life imprisonment can be imposed. There are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty.

These cases concerned sentences imposed prior to the introduction of the predecessor to s 61. Similar observations were made in *Knight v R* at [23], a case to which s 61 applied.

Murder of police officers

The *Crimes Amendment (Murder of Police Officers) Act 2011* amended the *Crimes Act 1900* by inserting s 19B. Section 19B requires a court to impose a sentence of life imprisonment where a police officer is murdered in the course of executing their duty; or as a consequence of, or in retaliation for, actions undertaken by any police officer in the execution of their duty where the person knew or ought to have known that the person killed was a police officer. The person must have intended to kill the police officer, or have been involved in criminal activity that risked serious harm to police officers. Section 19B applies to offences committed after 23 June 2011: s 19B(7).

Section 19B was applied in *R v Jacobs (No 9)* [2013] NSWSC 1470.

Multiple murders

One of the factors that might justify the imposition of a life sentence is where the offender commits multiple murders: *R v Baker* (unrep, 20/9/95, NSWCCA) per Gleeson CJ.

It is permissible to take the fact that there are multiple murders into account in determining whether an offence should attract the maximum: see *R v Harris* (2000) 50 NSWLR 409 at [94]–[95]; *Decision Restricted* [2005] NSWCCA 4 at [93]; *Adanguidi v R* [2006] NSWCCA 404 at [32]. However, as McClellan CJ at CL said in *Aslett v R* [2006] NSWCCA 360 at [25]:

> To my mind there is some difficulty reconciling the result in *Harris* with the principle defined in *Veen (No 2)*. If a prior offence, including a prior killing, is not capable of informing the objective criminality of the instant offence, even if it be another killing, the imposition of a life sentence for the latest killing, as was done on appeal in *Harris* requires that the latest offence qualifies as an offence of extreme culpability justifying a life sentence (s 61(1)).

The difficulty identified in *Aslett v R* does not arise in the context of multiple murders committed as part of a single episode of criminality. In such a case, the objective

criminality of one offence is capable of informing the objective criminality of another, and the court may have regard to the whole of the conduct in determining the level of culpability involved in the commission of each offence: *Adanguidi v R* at [32].

[30-040] Aggravating factors and cases that attract the maximum

The categories of murder warranting a life sentence are not closed and the conclusion that a life sentence should be imposed is a severe one: *Rogerson v R* [2021] NSWCCA 160 at [645]. Life sentences can impose "intolerable burdens upon most prisoners because of their incarceration for an indeterminate period" and cause difficulties in prison management: *R v Garforth* (unrep, 23/5/94, NSWCCA) at 11. Below are factors which may, in certain circumstances, warrant imposition of the maximum penalty.

See generally the discussion with regard to worst cases at **[10-005] Cases that attract the maximum**; see also *The Queen v Kilic* (2016) 259 CLR 256.

Contract killings

In *R v Baartman* (unrep, 7/12/94, NSWSC), Abadee J said that the "[p]lanned and deliberate shooting of another human being for no better reason than economic gain is surely to be regarded by a civilised society as being a very serious crime."

Similar comments were made by the Court of Criminal Appeal in *R v Kalajzich* (unrep, 13/4/89, NSWCCA); and *R v Lo* [2003] NSWCCA 313 at [16], where it was also held that the gravity of the offence was enhanced by the fact the murder was motivated by a desire to prevent the victim from giving evidence in criminal proceedings.

In *R v Crofts* (unrep, 6/12/96, NSWSC) Grove J said, "A deliberate killing for payment would prima facie find its place in the worst category of case with a potential for imposition of the maximum penalty of penal servitude for life." In *R v Kalajzich* (unrep, 16/5/97, NSWSC), Hunt CJ at CL endorsed this statement, but added:

> The word "potential" is important, for not every case of a contract killing would attract the maximum penalty. There will sometimes be a distinction to be drawn between the person who pays and the person who kills. Facts mitigating the objective seriousness of the crime may well eliminate that potential, at least so far as the person who pays. [Citations omitted.]

For a contract killing to which the standard non-parole period provisions applied, see *R v Willard* [2005] NSWSC 402 at [28].

Circumstances surrounding the offence

The mutilation of the deceased's body can be taken into account as an aggravating factor in assessing the seriousness of the offence: *R v Knight* [2006] NSWCCA 292 at [28]–[29]; *R v Yeo* [2003] NSWSC 315 at [36]; *DPP v England* [1999] VSCA 95 at [35], [37], [41].

In *R v Garforth* (unrep, 23/5/94, NSWCCA), the court held that the sentencing judge was entitled to take the abduction and sexual assault of the victim into account in determining whether the offence fell within the worst case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). In *R v Hillsley*

[2006] NSWCCA 312 at [20]–[22], the court held that the sexual assault of the deceased's child, which was part of the motive for the killing of the deceased, was rightly considered in assessing the objective gravity of the murder.

In *TL v R* [2020] NSWCCA 265 at [333]–[335], the court found it was not an error to take into account as part of the circumstances of the offending, evidence of previous assaults as a factor increasing the objective seriousness of the offence.

In *Charbaji v R* [2019] NSWCCA 28, the court found it was not an error to assess a murder, committed with an intent to kill, as being well above the mid-range and approaching the worst case, in circumstances where the offence was brutal, cruel and callous and involved torturing the deceased over a prolonged period of time: at [182]–[184].

Substantial harm

The harm caused by an offence can be taken into account in different ways. Part 3, Div 2 *Crimes (Sentencing Procedure) Act 1999* empowers a court to receive a victim impact statement from the victim of an offence (defined in s 26 as either a "primary" or "family" victim). See further **Victim impact statements of family victims** at **[12-838]**.

Another situation identified in *R v Lewis* [2001] NSWCCA 448 at [67], is where the offender knowingly deprives a child or children of their parent. In that case, Hodgson JA said the degree of harm an offender knows will be caused by the offence is highly relevant to their moral culpability and that:

> In this case, quite plainly the applicant knew that the death of Ms Pang would deprive five children of their mother, and prima facie that is serious harm, in addition to the death of Ms Pang, which the applicant knew would be caused by his offence. That is not to say that the crime is more serious because Ms Pang was in some way more worthy than other possible victims, merely to recognise the harm caused to children by the loss of their mother; and to recognise that where the offender knows that this harm will be caused, that can be relevant to the offender's culpability.

However, there is no requirement to find an intention to kill; this principle may also apply where the offender intends to inflict grievous bodily harm: *Sheiles v R* [2018] NSWCCA 285 at [40]. In *Sheiles v R,* the offender stabbed the deceased intending to inflict grievous bodily harm but this did not exclude her also being aware of the real possibility or risk of causing death by that action. She was well aware of the likely effect of the deceased's death on his daughter and terminally ill wife, and that was relevant to her moral culpability: at [39]–[42].

An aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999* is where the "injury, emotional harm, loss or damage caused by the offence was substantial". In *Aslett v R* [2006] NSWCCA 360 at [37] it was said that s 21A(2)(g) is not limited to the harm suffered by the primary victim.

Future dangerousness

Dangerousness alone is not sufficient to justify imposing the maximum penalty for murder: see *R v Hillsley* [2006] NSWCCA 312 at [24]. It is impermissible to increase an otherwise appropriate sentence merely to achieve preventative detention: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473, 474. An offender's future dangerousness is, however, a highly relevant factor. In *R v Harrison* (unrep, 20/2/91, NSWCCA) it was held that "a sentencing judge is not required to be satisfied beyond reasonable

doubt that a prisoner will in fact re-offend in the future. It is sufficient if a risk of re-offending be established by the Crown." This was confirmed in *R v Robinson* [2002] NSWCCA 359 at [48]–[50]; and *R v SLD* (2003) 58 NSWLR 589 at [40]. In addition to any other evidence before the court, the sentencing judge is entitled to take the circumstances of the offence into account in determining the question of future dangerousness: *R v Garforth* (unrep, 23/5/95, NSWCCA). In that case it was also said:

> It is now well settled that the protection of society — and hence the potential dangerousness of the offender — is a relevant matter on sentence (*Veen v The Queen (No 2)* (1988) 164 CLR 465). This factor cannot be given such weight as to lead to a penalty which is disproportionate to the gravity of the offence. But it can be used to offset a potentially mitigating feature of the case, such as the offender's mental condition, which might otherwise have led to a reduction of penalty … in the case of homicides involving a high degree of culpability, the fact that the offender will be likely to remain a danger to the community for the rest of his or her life might justify the imposition of life imprisonment.

The High Court discussed the issue of predicting dangerousness in *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [12], [124]–[125].

Other factors

Some other factors which have been identified in murder cases as aggravating the offence or indicating that it attracts the maximum include:

- murders motivated by financial greed: *Adanguidi v R* [2006] NSWCCA 404 at [34]; *R v Smith* [2000] NSWCCA 202 at [164] and [166]
- where the motive for murder is to conceal another offence: *Decision Restricted* [2005] NSWCCA 4 at [87]; *R v Lett* (unrep, 27/3/95, NSWCCA); *R v Baker* [2019] NSWCCA 58 (a solicit to murder case)
- the killing of a political figure for political ends: *R v Ngo* [2001] NSWSC 1021 at [23], [25]
- where the murder arises from a planned extortion: *R v Liew* (unrep, 24/12/93, NSWCCA)
- where the murder takes place within the sight of the deceased's children: *R v Miles* [2002] NSWCCA 276 at [180] (now given legislative recognition in s 21A(2)(ea) of the *Crimes (Sentencing Procedure) Act 1999*)
- where the offence involves prolonged suffering and torture of the deceased: *Charbaji v R* [2019] NSWCCA 28 at [182]–[184].
- where the offence involved a premeditated and cold-blooded execution: *Rogerson v R* [2021] NSWCCA 160 at [645].

In *R v Hore; R v Fyffe* [2005] NSWCCA 3 the applicants sought leave to appeal against life sentences imposed for the murder of a fellow prison inmate. In his sentencing remarks with respect to each offender, Barr J said (*R v Hore* [2002] NSWSC 749 at [41]; *R v Fyffe* [2002] NSWSC 751 at [33]):

> A serious feature of the murder is that it was carried out in prison. It was a minimum security prison and the offender abused the freedom that his classification in that environment afforded him. It is particularly important that courts impose sentences calculated to deter the commission of offences in prison.

On appeal it was held that the sentencing judge did not err in treating the fact that the murder occurred in a minimum security prison as a factor warranting condign punishment: *R v Hore; R v Fyffe*, above, at [351].

[30-045] Relevance of motive

The absence of a motive for a murder may require consideration as part of the factual circumstances of the offence. In *Louizos v R* [2009] NSWCCA 71, a solicit to murder case, a finding that the absence of motive warranted a lesser non-parole period was held to be erroneous: *Louizos v R* at [102]. Absent proof of a motive, there will be no causal explanation of the crime that might be taken into account to calculate whether repetition of the circumstances leading to it is likely or whether the applicant's prospects for rehabilitation are greater or less: *Cramp v R* [2016] NSWCCA 305 at [28]–[31].

In *DL v R* [2018] NSWCCA 302, a 16-year-old boy murdered a 15-year-old girl with no apparent motive. Critical features on re-sentence in that case were the combination of the frenzied nature of the attack and the absence of any satisfactory explanation, motive or the trigger for such an attack: *DL v R* at [61].

[30-047] Murders committed in a domestic violence context

Significant weight should be given to general deterrence, denunciation and community protection when sentencing an offender who takes their partner's or former partner's life. A just sentence must accord due recognition to the dignity of the domestic violence victim: *Quinn v R* [2018] NSWCCA 297 at [243]; *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55]. The High Court in *The Queen v Kilic* (2016) 259 CLR 256 at [21] recognised a societal shift in attitudes to domestic violence which may require current sentencing practices to depart from past practices: *Quinn v R* at [245]. Domestic violence offences not infrequently conform to a pattern where a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship: *Quinn v R* at [244]; *Patsan v R* [2018] NSWCCA 129 at [39]. This is an aspect of the protection which should be accorded by the law to persons in domestic relationships: *Quinn v R* at [244]. Rigorous and demanding consequences for the perpetrators of domestic violence are necessary to protect partners, family members and the wider community: *Cherry v R* [2017] NSWCCA 150 at [78].

In *Goodbun v R* [2020] NSWCCA 77, the court (by majority) dismissed an appeal against an aggregate sentence of 41 years, 6 months imprisonment with a non-parole period of 31 years, 1 month for offences including the murder of the applicant's wife in their adult daughter's presence, notwithstanding its practical effect was to impose a life sentence. The offending was correctly found to be at the "very top of the notional range of objective seriousness" — it was carefully planned, callous and motivated by hatred of the deceased: [128], [132]; [215], [267]–[270].

See also **Domestic violence offences** at **[63-500]**ff.

[30-050] Rejection of defences to murder

The rejection of either a partial defence (for example, provocation or substantial impairment) or complete defence (such as mental illness) to murder does not mean

that the basis for such defence is not relevant to the determination of the appropriate sentence: *R v Bell* (1985) 2 NSWLR 466 at 485; *R v Fraser* [2005] NSWCCA 77 at [25]. In *R v Verney* (unrep, 23/3/93, NSWCCA), Hunt CJ at CL said:

> a jury's rejection of a defence of diminished responsibility does not mean that the judge is not entitled to find for himself from the evidence some impairment of the prisoner's responsibility or culpability for his actions short of that which the defence pursuant to s 23A of the *Crimes Act 1900* requires.

In *R v Cheatham* [2002] NSWCCA 360 at [134] it was held that, although the appellant failed to satisfy the jury that his abnormality of mind substantially impaired his mental responsibility, allowance should be made for that abnormality.

In *R v Heffernan* [2005] NSWSC 739 at [50], Hoeben J took into account "circumstances which did amount to provocation, albeit that they did not reach the level required to reduce murder to manslaughter". His Honour also took into account at [51]–[52] the offender's level of intoxication and "some element of self-defence", although these factors similarly were not established to the degree necessary to reduce the offence to manslaughter. The combination of these three factors operated "to push the objective criminality of this murder towards the bottom of the range for that offence": *R v Heffernan* at [54].

Every case must be judged according to its own circumstances and the question for the court will be whether on the evidence the factor being put forward as a mitigating factor has a relevant connection to the offence: *R v Bell*, above, at 485.

A diminution of culpability may also be taken into account on sentencing for murder in cases where the offender has, for forensic reasons, declined to present evidence of substantial impairment at trial: *R v Turner* (unrep, 4/3/94, NSWCCA).

[30-070] Joint criminal enterprise

An offender's liability for murder may arise from a joint criminal enterprise or an extended joint criminal enterprise. Generally, the perpetrator responsible for the actual killing will be treated as having demonstrated greater objective criminality than an offender who is not physically responsible for the death, see for example *R v Taufahema* [2004] NSWSC 833 at [49].

Participants in a joint criminal enterprise are equally responsible for all the acts in the course of carrying out the enterprise, regardless of who commits them, but a particular participant's level of moral culpability is assessed by reference to that participant's particular conduct: *KR v R* [2012] NSWCCA 32 at [19]; *R v Wright* [2009] NSWCCA 3 at [28]–[29]; *R v JW* (2010) 77 NSWLR 7 at [161]. Such an approach is consonant with the distinction between an offender's responsibility for criminal conduct and his/her culpability. See further A Dyer and H Donnelly "Sentencing in complicity cases — Part 1: Joint criminal enterprise", *Sentencing Trends & Issues*, No 38, 2009.

Life sentences in cases of murder based on extended joint criminal enterprise would, however, appear to be rare, see for example *Brown v R* [2006] NSWCCA 395, where a head sentence of 20 years with a non-parole period of 15 years was imposed.

[30-080] Accessories

Accessories before the fact to murder

An accessory before the fact to murder is liable to the same maximum penalty as for murder: s 346 *Crimes Act 1900*. It has been held that the standard non-parole period provisions for murder do not apply to accessories before the fact: *Aoun v R* [2007] NSWCCA 292 at [27]. As of 15 November 2007, s 346 was amended to provide that an accessory before the fact to murder is liable to the "same punishment to which the person would have been liable had the person been the principal offender" (previously expressed as the "same punishment as the principal offender"): *Criminal Legislation Amendment Act 2007*, Sch 3[5].

An accessory is not necessarily less culpable than a principal, and in some cases may be more so, especially where the accessory instigates and plans the murder: *R v Norman; R v Oliveri* [2007] NSWSC 142 at [30].

Accessories after the fact to murder

An accessory after the fact to murder is liable to a maximum penalty of 25 years' imprisonment: s 349(1) *Crimes Act 1900*. There is a wide variation in the possible degrees of culpability involved in the offence: *R v Farroukh and Farroukh* (unrep, 29/3/96, NSWCCA). General deterrence and retribution are important considerations in sentencing: *R v Ward* [2004] NSWSC 420 at [51].

In *R v Quach* [2002] NSWSC 1205 at [11], Simpson J held that "assistance in the disposal of a body after a murder [as opposed to, for example, assisting the principal to clean him/herself up] takes a crime of this kind into the upper echelons of the offence against s 349".

Accessories after the fact are viewed more seriously where the offender has a personal interest in the criminal enterprise, or became involved through their association with criminal elements: *R v Farroukh and Farroukh*. Such cases are to be contrasted with situations thrust upon accessories without any prior warning and not of their own making. Where an accessory provides assistance after being thrust into a situation without warning, but the assistance continues for a period of time, it should no longer be regarded as a "spur-of-the-moment" reaction: *R v Farroukh and Farroukh*; *R v Walsh; R v Sharp* [2004] NSWSC 111 at [48]; see also *R v Ward* [2004] NSWSC 420 at [48]; and *R v Quach* at [11].

On the other hand, accessories who have no personal relationship with the principal may be viewed more seriously than accessories who provided assistance out of a sense of emotional attachment or misguided loyalty: *R v Dileski* [2002] NSWCCA 345 at [17], although that is not to say that an offence which is committed out of a misguided sense of loyalty will necessarily attract a lenient penalty, as "[s]uch offending commonly represents a choice to place the interests of the principal offender ahead of the victim and/or the public generally": *R v Ward* [2004] NSWSC 420 at [49].

Only assistance which helps the principal offender to evade justice is embraced by the offence of accessory after the fact: *R v Dileski* at [8]. In *R v Dileski*, the applicant remained at the scene of the crime to ensure the murder went undetected. He also lied about the victim's whereabouts when a friend came looking for him. However, it was an error to sentence the applicant for additional conduct which helped the principal obtain money from the victim's bank account. See also, *Ah Keni v R* [2021] NSWCCA 263

where the applicant, over a 5 month period, attempted to conceal her husband and his associate's involvement in the victim's murder and also attempted to assist her husband to leave the jurisdiction. Subsequent conduct by an accessory beyond assistance to the principal, for example lying about his or her own involvement to police, may nevertheless be relevant to findings of remorse and contrition: *R v Farroukh and Farroukh*.

[30-090] Conspiracy/solicit to murder: s 26 Crimes Act 1900

The offence of conspiracy or solicit to murder carries a maximum penalty of 25 years' imprisonment: s 26 *Crimes Act 1900*. In *R v Potier* [2004] NSWCCA 136 at [55], the maximum penalty was said to provide "a clear indication that the offence is one of the most serious in the criminal calendar". The court went on to say at [55]–[56]:

> On any view, the soliciting of a person to kill a third party is a fundamentally abhorrent and heinous crime. It is a crime for which the sentence must reflect a significant element of personal and general deterrence.
>
> Deterrence has a particular relevance by reason of the cold blooded motivation that lies behind the act of an offender in engaging or attempting to engage a hit man to kill another for regard. It also has a particular relevance in that part of the motivation, in contracting the job out to a professional, is to reduce the chances of detection, not only because that person is assumed to have special skills, but also because the offender is able to place himself or herself one step removed from the killing.

In that case, the fact that the offender was motivated by a desire to frustrate Family Court proceedings was held to place his criminality "in the upper level of objective seriousness": *R v Potier* at [81]. In *R v Lo* [2003] NSWCCA 313 at [42], the conspiracy to murder a witness in pending criminal proceedings was held to fall within the worst case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). Offences arising from a desire to interfere with criminal proceedings involve a high degree of culpability: *R v Lewis* (unrep, 24/4/98, NSWCCA).

In *R v Baker* [2019] NSWCCA 58, the respondent recruited his estranged wife to act as his agent by engaging an undercover operative (acting as a "hit man") to murder his son and his son's friend (both aged 14), who were witnesses at his pending trial for aggravated sexual assault (of his son's friend) and firearm offences. The court found the offending should have been assessed as well above the middle of the range and approaching the high range not, as was found at first instance, just above the mid-range: *R v Baker* at [62]–[63]. Factors influencing that decision included the fact the respondent instigated the plan, gave the directions to his co-offender who passed them on and did not avail himself of any of the many opportunities to resile from his intention to have the witnesses (both children) killed.

In *R v Qutami* [2001] NSWCCA 353 the respondent had sought to have his niece killed after she left her husband to live with a man of different religion. Smart AJ said at [37] that it was irrelevant that the victim had assured the court she no longer feared the respondent. His Honour went on to say at [57]:

> I wish to emphasise that this Court will ensure that those who solicit to murder are severely punished. It will not tolerate people taking the law into their own hands because others do not meet their standards or their code of morality or comply with their religious beliefs and practices.

An offender's culpability may be reduced if there is a real possibility that the offence would not have been committed but for the assistance, encouragement or incitement offered by undercover police officers: *R v Taouk* (unrep, 4/11/92, NSWCCA). However, there is no mitigation where the effect of police involvement is to detect the offence and obtain evidence against an offender, rather than encourage a person who would otherwise not have committed the offence: *R v Stockdale* [2004] NSWCCA 1 at [28].

Because there are relatively few cases on offences under s 26, they cannot be relied upon as establishing a relevant range of sentences: *R v Potier* at [75].

Standard non-parole period

For offences under s 26 committed after 1 February 2003 there is a standard non-parole period of 10 years: item 2, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act 1999*. Cases such as *Bou-Antoun v R* [2008] NSWCCA 1 and *Benitez v R* [2006] NSWCCA 21 have to be read in light of *Muldrock v The Queen* (2011) 244 CLR 120. See **Standard non-parole period offences — Pt 4 Div 1A** at **[7-890]**ff.

[30-095] Cause loss of foetus (death of pregnant woman)

Section 54B(1) *Crimes Act 1900* provides that a person commits the offence of causing the loss of a foetus (death of pregnant woman) if:

(a) the person's act or omission constitutes an offence under a homicide provision (the "relevant homicide provision"), and

(b) the victim of the offence is a pregnant woman, and

(c) the act or omission includes causing the loss of the pregnant woman's foetus.

The maximum penalty for the offence is 3 years' imprisonment: s 54B(3).

To be charged with an offence against s 54B(1) the person must also be charged with an offence under a relevant homicide provision relating to the same act or omission: s 54B(2). "Homicide provision" is defined to include murder: s 54B(6). These provisions apply to offences committed on or after 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act 2021*: Sch 1[2].

[30-100] Attempted murder

Introduction

Offences of attempted murder by various means are provided in ss 27, 28, 29 and 30 *Crimes Act 1900*.

Each form of attempted murder is liable to a maximum penalty of 25 years. The high maximum penalty reflects the obvious seriousness of the offence: *R v Thew* (unrep, 25/8/98, NSWCCA).

Where an offence under ss 27–30 is committed on or after 1 February 2003, a standard non-parole period of 10 years is prescribed: item 3, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act 1999*.

The offender in *R v Amati* [2019] NSWCCA 193 pleaded guilty to three offences including two against s 27. In upholding a Crown appeal, the court observed that

while caution is required in considering sentences imposed in s 27 cases, they remain useful given the relatively small number of such cases: at [87]–[89]. Examining other cases assisted the court to conclude the sentence was manifestly inadequate: see the discussion of those cases at [90]–[111].

Objective factors

Relevant objective factors include the skill and determination of the attempt, the motive, whether it was premeditated, the likelihood of death, and the injuries inflicted: *R v Nguyen* (unrep, 13/6/91, NSWCCA); *R v McCaffrey; R v Rowsell* [1999] NSWCCA 363 at [20]; *R v Hynds* (unrep, 4/6/91, NSWCCA); *R v Rae* [2001] NSWCCA 545 at [13].

The objective seriousness of an attempted murder may fall little short of the culpability for the completed crime: *R v Macadam-Kellie* [2001] NSWCCA 170 at [42] (two-judge bench).

In *R v Rae* the offender broke into the home of his former girlfriend, doused her in petrol, then set her alight. The sentencing judge described her injuries as "appalling" and her chances of a normal life "ruined forever". On appeal, Sully J suggested the objective circumstances were within the worst category of crime (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). The court also affirmed the continual need to condemn violence stemming from the breakdown of domestic relationships. Sully J said at [21]:

> The Courts, including this Court variously constituted, have tried to make it clear beyond any doubting that the breakdown of personal relationships, marital and extramarital alike, cannot be allowed to justify vengeful violence of any kind, let alone extreme violence of the kind here relevant. The facts of this present case require, sadly from the points of view of all concerned, that the principles be reaffirmed with all proper resolve.

To similar effect are observations in *Vaughan v R* [2020] NSWCCA 3, where the offender attacked his wife by knife and motor vehicle and also attacked a work colleague who came to her assistance. The court described the s 27 offence as a serious domestic violence offence stating the offender "sought to exercise control and domination over his wife as if he [was] … [entitled] to do so": at [108].

It is important, where there are multiple s 27 offences, for the aggregate (or effective) sentence to properly recognise the principle of totality and the harm done to each victim. In *R v Amati*, the offender randomly attacked two people with an axe, inflicting significant injuries and then attacked another person, terrifying him but not inflicting any physical injury. The first two offences were found to be above the mid-range of objective seriousness. The offender had mental health issues associated with gender dysphoria and, after consuming alcohol and drugs, and in a fit of anger, went out intending to inflict violence on strangers. The court allowed a Crown appeal, concluding the aggregate sentence did not recognise the harm done to the first two victims: at [115]. The fact the offences occurred over a relatively short period of time did not assist the offender because there were three deliberate and separate attacks on different individuals who believed they were going to die, which was what the offender intended: at [112]. See also *Vaughan v R* at [110].

An offender acting as an accessory or principal in the second degree may not be as culpable as a principal, although much will depend on the circumstances of the

offender's involvement. In *R v Doan* [2003] NSWSC 345 at [10], the applicant's conduct was described as "both minimal and reluctant". In contrast, in *R v AM* [2001] NSWCCA 80 at [20], the applicant's role in a contract killing was seen as crucial to carrying out the enterprise.

Mitigating factors

In the most serious attempted murder cases, the gravity of the crime may reduce the weight otherwise accorded to an offender's subjective circumstances. For example in *R v Rae* [2001] NSWCCA 545, the injuries inflicted on the victim were so severe that the offender's youth and absence of prior record carried less significance. Similarly, in *R v Quach* [2002] NSWCCA 173 (a two-judge bench) prior good character carried little weight in light of the seriousness of the attempted murder. However, it was an error for the sentencing judge to ignore good character entirely: at [19].

Mental disorder suffered by an offender at the time of an attempted murder, including depression, may be a mitigating factor: *R v Thew* (unrep, 25/8/98, NSWCCA); *R v Macadam-Kellie* [2001] NSWCCA 170 at [62]; see also *R v Cheatham* [2002] NSWCCA 360 at [134]. Although in *R v Amati*, at [87] the court recognised it was not uncommon for s 27 offences to be committed by persons who were, at the time of the offending, experiencing significant mental health issues.

In circumstances where an offender would otherwise have been prosecuted for a less serious offence, but voluntarily discloses an intention to kill the victim, some measure of leniency is warranted: *R v Bell* [2005] NSWCCA 81 at [11]–[12].

In *Davis v R* [2015] NSWCCA 90, it was held that a pre-existing heart condition, which may have contributed to the death of the victim, was not a mitigating factor.

Comparison with homicide sentences

Given the serious and long-lasting injuries inflicted in many attempted murder cases, comparisons with more severe sentences imposed in cases involving death are generally unhelpful: *R v Rae* [2001] NSWCCA 545 at [19].

When sentencing an offender convicted of separate offences for both attempted murder and murder, the attempt may be relevant to assessing the culpability for murder, particularly in considering whether a life sentence is warranted under s 61(1) of the *Crimes (Sentencing Procedure) Act 1999*: *Decision Restricted* [2005] NSWCCA 4 at [93].

[30-105] Conceal corpse

The common law offence of "conceal corpse" is satisfied if a person (1) knowingly buries or otherwise conceals, destroys or mutilates, a corpse, (2) knowing circumstances suggesting death resulted from some abnormal cause, and (3) the way in which the person deals with the corpse in fact operates, or is likely, to prevent or prejudice inquiry by the proper authorities: *R v Davis* (1942) 42 SR (NSW) 263 at 265; *Bentley v R* [2021] NSWCCA 18 at [120]. Conceal corpse offences prevent the family formally marking the passing of the deceased which would magnify their pain and grief. The concealment also does a more public harm – it has a substantially adverse impact on the progress of the police investigation into the death: *R v Aljubouri* [2019] NSWSC 180 at [48]–[49].

The penalty for the offence of conceal corpse is at large. Whilst some general guidance as to sentence can be taken from statutory offences where there is real similarity between them, there is no crime with a sufficient degree of similarity to provide any real assistance of that nature. In *R v Aljubouri*, Wilson J said at [50]–[51]:

> Perhaps the closest parallel is found in the public justice offences in Part 7 of the *Crimes Act*, such as an offence contrary to s 317 of tampering with evidence. However, even this offence, which carries 10 years imprisonment upon conviction, does not import the full criminality of concealing the body of a human being... Even on the basis of the very limited information provided to the Court about this offence, I regard it as gravely serious.

The fact the location of the corpse is unknown and never likely to be recovered, as distinct from an offender's failure to disclose its whereabouts, can increase the objective seriousness of the offence, as may the secretive fashion of disposing of the body: *Bentley v R* at [118]–[121]; *R v Davis* at 265–267. The concealment is also associated with an attempt to avoid detection and responsibility for the death. It causes public mischief by its tendency to obstruct the course of justice: *R v Davis* at 265–267; *Bentley v R* at [218]. However, it is not necessary for the Crown to demonstrate an intention to obstruct the course of justice to satisfy the offence: *R v Heffernan* (1951) 69 WN (NSW) 125 at 126.

In *Bentley v R* [2021] NSWCCA 18, the fact the deceased's body had not been recovered, and was never likely to be recovered, elevated the objective seriousness of the offence to well above the middle of the range: see [68], [120].

[The next page is 20001]

Manslaughter and infanticide

[40-000] Introduction

The *Crimes Act 1900* (NSW) does not define manslaughter, except to provide that it comprises all unlawful homicides other than murder: s 18(1)(b). There are only two categories of manslaughter at common law: manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence: *The Queen v Lavender* (2005) 222 CLR 67 at [38]. They are referred to as forms of "involuntary manslaughter" because the ingredients of each do not include intent to kill or inflict grievous bodily harm. Under the *Crimes Act* there are three statutory categories of manslaughter, based on the reduction of murder to manslaughter by reason of provocation (s 23), substantial impairment (s 23A), or excessive self-defence (s 421). The first two are referred to as forms of "voluntary manslaughter". The third category may or may not be described that way depending upon whether the fact finder accepts the presence of an intent to kill or cause grievous bodily harm: *Ward v R* [2006] NSWCCA 321 at [40].

A protean crime

The maximum penalty for manslaughter is 25 years imprisonment: s 24. Since the offence covers a wide variety of circumstances, calling for a wide variety of penal consequences, determining an appropriate sentence for manslaughter is "notoriously difficult": *R v Green* [1999] NSWCCA 97 at [24]. Although some assistance may be received from a consideration of facts of other cases and the sentences imposed therein, those cases do not determine an inflexible range: *R v Green* at [24].

Spigelman CJ said in *R v Forbes* [2005] NSWCCA 377 at [133]–[134]:

> manslaughter is almost unique in its protean character as an offence. (See in particular the observations of Gleeson CJ in *R v Blacklidge*). In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder.
>
> It is also relevant to recognise that, although manslaughters can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation *within* any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter. [Citations omitted; emphasis in original.]

In *R v Blacklidge* (unrep, 12/12/95, NSWCCA), Gleeson CJ said:

> It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.
>
> At the same time, the courts have repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case. [Citations omitted.]

Similar observations were made in *R v MacDonald* (unrep, 12/12/95, NSWCCA).

In *R v Dawes* [2004] NSWCCA 363, a case involving the killing of a severely disabled 10-year-old boy by his mother, Dunford J said at [31]:

> Manslaughter, whatever form it takes, constitutes unlawful homicide. It is always a most serious offence as it involved the taking of another human life and it is the responsibility

> of the courts to protect and preserve human life and to punish those who unlawfully take it. All human life is to be protected including that of the disabled, the handicapped, the criminal, the derelict and the friendless.

An assessment of the objective criminality of an offence of manslaughter will depend on the factual findings made by the sentencing judge: *R v MD* [2005] NSWCCA 342 at [62]. In that case it was also said at [65]:

> In many cases where an offender is convicted of manslaughter there will be exculpatory matters and personal circumstances that can lead the court to significantly ameliorate the sentence which might otherwise be imposed. However, as this Court pointed out in *R v Troja* (unreported, CCA 16 July 1991) it is important for the court to ensure that the subjective circumstances of an individual offender do not divert the court from imposing a sentence which adequately reflects the part which the law must play in upholding the protection of human life and in punishing those who take it.

Where the offence of manslaughter involves either an intention to kill or an intention to cause grievous bodily harm, the degree of harm the offender knows will be caused by the offence may be highly relevant to their moral culpability: *Sheiles v R* [2018] NSWCCA 285 at [29]–[39]. See also **Murder — Aggravating factors and cases that attract the maximum** at **[30-040]**.

There is a degree of overlap in sentencing for murder and manslaughter, and a higher sentence may be warranted in a manslaughter case than in a murder case, although ordinarily a conviction for murder would attract a greater penalty: *R v Hoerler* [2004] NSWCCA 184 at [26]–[28], [30].

It is very difficult to identify any pattern of sentencing: *R v Hill* (unrep, 18/6/81, NSWCCA). Limited assistance is to be derived from sentences in other cases: *Taber v R* [2007] NSWCCA 116 at [102].

Use of statistical data

Statistical data on sentencing for manslaughter is similarly of limited assistance; reliance on such data has been described as "unhelpful and even dangerous": *R v Vongsouvanh* [2004] NSWCCA 158 at [38]. Sentencing statistics for manslaughter are of such limited assistance that they should be avoided: *R v Wood* [2014] NSWCCA 184 at [59].

[40-010] Categories of manslaughter

In some cases the basis for manslaughter — particularly after a jury trial — is unclear. In the case of a jury trial, members of the jury may have been satisfied of guilt on different bases: *R v Dally* [2000] NSWCCA 162 at [56], [64], [68]. In the five-judge case of *R v Isaacs* (1997) 41 NSWLR 374, the court held that although the trial judge has the power to question the jury with a view to eliciting the basis upon which they brought in their verdict, the exercise of such a power "is, save in exceptional circumstances, to be discouraged rather than encouraged" (at 377); see also at 379–380; and *Cheung v The Queen* (2001) 209 CLR 1 at [18]. It is for the judge to determine the facts relevant to sentencing, bound by the need to ensure such facts are consistent with the jury's verdict: *Isaacs* at 378, 380; see further **Fact finding following a guilty verdict** at [1-440].

Although there are different categories of manslaughter — some involving the requisite intent for murder, others not — there is no hierarchy of seriousness between

voluntary and involuntary manslaughter: *R v Isaacs* at 381. As Smart AJ put it in *R v Dally* at [64], "It is not the variety of manslaughter but the facts which determine the objective gravity of the offence. Neither variety [in that case, provocation or unlawful and dangerous act] is inherently more serious than the other".

Similarly, Spigelman CJ said in *R v Hoerler* [2004] NSWCCA 184 at [29]:

> Even a case where there is present an intention to kill or maim, which would constitute murder but which is reduced, by reason of provocation or diminished responsibility, to a charge of manslaughter, will not necessarily attract a higher sentence than other forms of manslaughter, including the one relevant here, i.e. killing by an unlawful and dangerous act. As a five judge bench of this Court, including Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ, said in *R v Isaacs* (1997) 41 NSWLR 374 at 381:
>
> > "The argument for the appellant advanced on this appeal appeared to assume that a case of provocation manslaughter is necessarily, or at least ordinarily, worse than a case of manslaughter by unlawful and dangerous act. We do not accept that. Each case depends upon its own circumstances. The range of sentencing available in the case of manslaughter is notoriously wide. There have been cases where provocation manslaughter has resulted in non-custodial sentences."

In *R v Ali* [2005] NSWSC 334 at [56], it was said that "it is often not of any great consequence whether a killing is characterised as coming within any particular head of manslaughter. Rather, the critical question is what sentence is required to reflect the objective and subjective facts, and, if necessary, deterrence".

Unlawful and dangerous act

Manslaughter by unlawful and dangerous act does not involve an intention to kill or inflict grievous bodily harm. However, the unlawful and dangerous act involved must be an intentional and voluntary one and it must be established that a reasonable person in the position of the accused would have realised that he or she was exposing the victim to an appreciable risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313 at 333.

Although there is no murderous intent involved in manslaughter by unlawful and dangerous act, there will be cases where a heavy sentence will be appropriate: *R v Maguire* (unrep, 30/8/95, NSWCCA). In that case James J said:

> So far as comparing different instances of manslaughter by unlawful and dangerous act is concerned, although all such acts after the decision of the High Court in *Wilson v The Queen* must be such that a reasonable person in the position of the offender would have realised he was exposing another person to an appreciable risk of serious injury, the possible range of such acts and the possible range of culpability of the agents who performed those acts is very great.

Where the unlawful and dangerous act is of high objective gravity, the offence may be assessed as so grave as to warrant the maximum penalty. For example, in *Clare v R* [2008] NSWCCA 30, the unlawful and dangerous act was anal intercourse with a three-year-old child, causing the child to vomit and asphyxiate. McClellan CJ at CL said that the "abuse of a 3 years old child for sexual gratification by anal penetration resulting in death is a crime of utmost gravity": *Clare v R* at [48].

It is not a matter in mitigation that an offender neither desired nor contemplated the deceased's death; if the offender had so contemplated, there would be liability for murder: *R v Chapple* (unrep, 14/9/93, NSWCCA).

Criminal negligence

Manslaughter by criminal negligence arises when the accused does an act "consciously and voluntarily without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment": *Nydam v The Queen* [1977] VR 430 at 445, approved in *The Queen v Lavender* (2005) 222 CLR 67 at [136].

In *R v George* [2004] NSWCCA 247, the offender failed to provide proper care (nutrition, hydration, medication and medical care) for his 86-year-old mother, for whom he was the primary carer. On appeal against sentence, the court said at [19]:

> The views which [were] expressed by Wood CJ at CL in *Regina v Wilkinson* NSWSC 9 April 1998, concerning the heavy responsibility which rests upon carers of young children, to provide for their well being and to secure medical care when needed, in our view, apply equally to those who care for the elderly and infirm. An appeal from that sentence was dismissed (*R v Wilkinson* [1999] NSWCCA 248), and it supports the proposition that offences of this kind must generally be regarded as objectively serious. However, the extent of that criminality will very much depend upon the individual case.

The sentence was reduced to 3½ years imprisonment with a non-parole period of 2 years. The court, however, thought it necessary to state that "at the most, other cases can do no more than become part of a range of sentencing, which in the case of manslaughter is wider than for any other offence": *R v George* at [48].

Many cases of manslaughter by criminal negligence involve the failure of parents to obtain medical assistance for their children following the infliction of injuries: *R v Wilkinson* [1999] NSWCCA 248 (non-parole period of 3½ years, additional term of 3 years); *R v Eriksson* [2001] NSWSC 781 (non-parole period of 18 months, balance of 18 months); *Hill v R* [2003] NSWCCA 16 (non-parole period of 4½ years, balance of 1½ years). In *R v O'Brien* [2003] NSWCCA 121, the offender failed to have her 14-month-old child hospitalised when advised by medical practitioner that urgent hospitalisation was required. A non-parole period of 3 years, with a balance of 2 years was imposed. In dismissing the appeal against sentence, Dunford J said at [74]:

> This was a very serious offence. The appellant allowed her 14 months old, helpless and defenceless child to die. She was the child's mother, the person from whom above all others, the child was entitled to expect nurture, care, sustenance and protection, and she failed the child in her most important duty, with fatal results. I cannot see how a sentence of less than that imposed by his Honour could be properly regarded as reasonably proportionate to the nature and circumstances of the offence.

In *BW v R* [2011] NSWCCA 176, the court accepted the offending involved was in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256): *BW v R* at [63], [73]. In that case, the applicant's 7-year-old daughter died after a period of "protracted and cruel neglect where the applicant showed not a shred of care to [her] suffering … over a long period of time": *BW v R* at [63]. The court concluded that the non-parole period of 12 years with a balance of term of 4 years while heavy was well within range: *BW v R* at [73].

Significant sentences may be imposed in other cases of criminal negligence involving members of the public. In *R v Simpson* [2000] NSWCCA 284, the deceased died by coming into contact with an electric wire system erected by the offender to

protect an area of land used to grow marijuana. A non-parole period of 6 years and balance of 3 years was imposed; see also *R v Cameron* (unrep, 27/9/94, NSWCCA), where a non-parole period of 8 months and balance of 1 year and 4 months was imposed. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving as it did one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

Provocation

Under s 23 *Crimes Act 1900*, murder is reduced to manslaughter where the act or omission causing death was done or omitted under provocation. The partial defence is available where the act or omission is the result of a loss of self control induced by the deceased's conduct where that conduct could have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill or inflict grievous bodily harm.

Reference to other provocation cases may not be helpful. Barr J said *R v Green* [1999] NSWCCA 97 at [32]:

> comparison of the sentences in each of the cases to which I have referred and the similarities and dissimilarities in the facts which gave rise to those sentences illustrate the difficulties faced not only by a trial judge in determining a proper sentence but by an appellant who seeks by reference to such cases to demonstrate that the sentence imposed was outside the available range of sentencing discretion.

It has been said many times that provocation is a concession to human frailty: *R v Chhay* (unrep, 4/3/94,NSWCCA) Gleeson CJ at 11. In *R v Morabito* (unrep, 10/6/92, NSWCCA), Wood J said that "manslaughter, even though committed under provocation, is recognised as a major crime and is one which calls for a correspondingly grave measure of criminal justice being meted out to the guilty party"; see also *R v Bolt* [2001] NSWCCA 487 at [58].

Factors relevant to the determination of the level of culpability in provocation cases were set out by Hunt CJ at CL in *R v Alexander* (unrep, 26/10/94, NSWSC):

(1) the degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence;

(2) the time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence; and

(3) the degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence.

In *R v Cardoso* [2003] NSWCCA 15 at [10], the court acknowledged the sentencing judge's application of *R v Alexander*, above, at 144 as a "familiar discussion of the approach to sentence for provocation manslaughter".

In *R v Bolt*, above, at [35] it was observed that "as a matter of logic, the degree of provocation must reduce the objective gravity of the offence, and also the degree

of violence employed must increase the objective gravity of the offence". It was also noted that extreme provocation may be accompanied by excessive violence, pointing in opposite directions on the question of objective gravity: *R v Bolt* at [36], [46]. A strong adherence to particular values may be relevant to the gravity of the provocative act: *R v Khan* (unrep, 27/5/96, NSWCCA).

In exceptional cases involving a history of domestic violence perpetrated by the deceased a non-custodial sentence may be appropriate: *R v Bogunovich* (unrep, 30/5/85, NSWSC); *R v Alexander*, above, at 145.

The authors of the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* identified 65 cases where offenders were sentenced upon the basis of provocation defences between 1990 and 2004: see p 8 and the list at p 84 of the publication.

Substantial impairment

Section 23A *Crimes Act 1900* provides that murder is reduced to manslaughter where a person's capacity to understand events, or to judge whether the person's actions were right to wrong, or to control himself or herself, was substantially impaired because of a mental health impairment or cognitive impairment, provided the impairment was "so substantial as to warrant liability for murder being reduced to manslaughter." Section 23A(8)(a) provides that the person is entitled to be acquitted on the ground that the person was not criminally responsible because of mental health impairment or cognitive impairment. Section 23A(8) defines cognitive impairment for the purposes of s 23A.

As in the case of manslaughter by provocation, what is ordinarily involved in manslaughter by substantial impairment is a conclusion that the taking of human life was the consequence of a deliberate and voluntary act, performed with intent to kill or cause grievous bodily harm, or with reckless indifference to human life: *R v Blacklidge* (unrep, 12/12/95, NSWCCA).

The relevant impairment diminishes — but does not negate — the offender's responsibility: *Blacklidge*, above; *R v Dawes* [2004] NSWCCA 363 at [34]; see also *R v Low* (unrep, 13/8/91, NSWCCA). As stated in *R v Low*, "it is quite wrong to take the view that merely because there is an element of diminished responsibility, which substantially impairs a person's judgment, that that is the end of the matter and a light sentence must inevitably follow": at 18. In *R v Cooper* (unrep, 24/2/98, NSWCCA), Gleeson CJ said, "in some circumstances, a case of manslaughter based on diminished responsibility could attract the maximum penalty for manslaughter". In one case involving five counts of manslaughter by diminished responsibility, the offender was sentenced to concurrent head terms of 25 years imprisonment with non-parole periods of 18 years: *R v Evers* (unrep, 16/6/93, NSWCCA). At the other end of the spectrum, the offenders in *R v Sutton* [2007] NSWSC 295 received five-year good behaviour bonds for the manslaughter by substantial impairment of their severely disabled son.

It is necessary for a sentencing judge to consider the degree to which an offender's mental condition was impaired beyond that required to make out the partial defence: *R v Keceski* (unrep, 10/8/93, NSWCCA). While an impairment of greater degree may tend towards a further diminution in culpability, it may also raise the issue of future

dangerousness. As stated in *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477, where the offender's sentence of life imprisonment for manslaughter (the maximum penalty at the time) was upheld by the High Court at 476–477:

> There is an anomaly, however, in the way in which the mental abnormality which would make an offender a danger if he were at large is regarded when it reduces the crime of murder to manslaughter pursuant to s 23A. Prima facie, a mental abnormality which exonerates an offender from liability to conviction for a more serious offence is regarded as a mitigating circumstance affecting the appropriate level of punishment … However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment … And so a mental abnormality which makes an offender a danger to society when he is at large but which diminished his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.

In *Catley v R* [2014] NSWCCA 249, it was held that the sentencing judge did not err in finding that the offender's mental condition (psychosis) did not play a great part in the commission of the offence and to the extent that it did, the concomitant reduction in his culpability had already been taken into account because he had been found guilty of manslaughter rather than murder.

For a historical summary of the law and cases in this area, see the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* where the authors identified 56 diminished responsibility and 18 substantial impairment cases between 1990 and 2004: see pp 8 and 80–82 of the publication.

Excessive self-defence

Excessive self-defence has an ephemeral history as a partial defence. After a number of lower court rulings, the High Court confirmed it as a partial defence in *Viro v The Queen* (1978) 141 CLR 88, but later abolished it in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 664. It was resurrected by Parliament in NSW in the *Crimes Amendment (Self-Defence) Act 2002*. The partial defence to murder of excessive self-defence appears in s 421 *Crimes Act 1900*, which commenced operation on 22 February 2002. It applies to offences whenever committed, except where proceedings were instituted before the commencement of the provision: s 423.

Section 421(1) provides the defence of excessive self-defence reduces murder to manslaughter if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,

but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

The defence is available where a person uses lethal force and the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person

believes the conduct is necessary to defend himself or herself or another person or to prevent the unlawful deprivation of liberty. If the act causing death is deliberate and is committed with the intent to kill the deceased or inflict grievous bodily harm, an accused is guilty of manslaughter where it is found that there was a reasonable possibility that the accused believed his or her conduct was necessary in his or her own self-defence, but where the fact finder is satisfied beyond reasonable doubt that his or her response was not reasonable in the circumstances as he or she perceived them to be: *Ward v R* [2006] NSWCCA 321 at [41].

Range of conduct

Where a plea of manslaughter on the basis of excessive self-defence is accepted by the Crown, all the elements of murder are present and it is for the court to determine whether the offender intended to kill or commit grievous bodily harm, or acted with reckless indifference to human life: *Grant v R* [2014] NSWCCA 67 at [64], [66]; *Lane v R* [2013] NSWCCA 317 at [50]. It is an acceptance by the offender that his or her mental state was one which, but for the availability of excessive self-defence in s 421 *Crimes Act*, was sufficient to amount to murder: *Grant v R* at [66]. The state of mind must be proved beyond reasonable doubt: *Grant v R* at [77]. The circumstances can vary widely. For example, in *R v Nguyen* [2013] NSWCCA 195, the respondent discharged his pistol and the bullet struck a police officer in the upper arm. Another police officer then discharged his weapon at the offender, however, the bullet struck the victim's neck and he later died in hospital. The Crown accepted the plea on the basis of excessive self-defence, that is, he did not know the victim was a police officer and there was a reasonable possibility that he genuinely believed it was necessary to shoot at the victim whom he believed intended to rob him.

The emphasis in s 421 on the response of an offender "in the circumstances as he or she perceives them" requires a sentencing judge to make a finding as to what the offender perceived the circumstances to be, and to evaluate the degree to which the conduct departed from what would have been a reasonable response to those circumstances as perceived: *Smith v R* [2015] NSWCCA 193 at [45], [56], [59]. Both questions are central to the sentencing exercise where excessive self-defence is made out: *Smith v R* at [45], [59].

In *Smith v R*, the sentencing judge erred by failing to make a direct or express finding of what the applicant perceived the circumstances to be. The content of the applicant's belief was never clearly articulated. The lack of any finding or reference to the circumstances "as perceived" by the applicant had repercussions in the evaluation of the degree to which the applicant's response was unreasonable: *Smith v R* at [36], [61].

Certain of these principles and others were summarised in *Newburn v R* [2022] NSWCCA 139 at [39] as follows:

(1) A conviction of manslaughter based on a finding of excessive self-defence carries with it the implication that the offender perceived they were in a position where it was necessary they act in order to defend themself: *Smith v R* at [44]; *Patel v R* [2019] NSWCCA 170 at [14];

(2) Central to the sentencing exercise is the identification of:
   (a) the circumstances as the offender (rightly or wrongly) perceived them to be; and

(b) the precise conduct the offender believed was necessary in order to defend themself: *Smith* at [44]–[45]; *Patel* at [14];

(3) The offender's perception of the circumstances is relevant to the determination of what they believed it was necessary to do in order to defend themself: s 421(1)(c); *Smith* at [45];

(4) An offender's perception is also integral to the issue of the reasonableness of their conduct in responding to those circumstances: s 421(1)(b); *Smith* at [45], [56], [58];

(5) Both questions are to be assessed by reference to the offender's subjective perception regardless of whether that was objectively reasonable, taking into account any intoxication: *Smith* at [45]; and

(6) The anterior conduct of the offender, including the reasons for their attendance at the scene of the crime and for deciding to confront the deceased, forms no part of the actual offence and is not directly relevant to assessing its objective seriousness: *Patel* at [14].

Events leading to a confrontation are relevant only insofar as they provide context to the actual offence: *Newburn v R* at [41].

Manslaughter by excessive self-defence is a crime "committed under conditions of fear of varying degrees of extremity": *R v Trevenna* [2004] NSWCCA 43 at [46], applied in *Ward v R* [2006] NSWCCA 321 at [59], [70]–[72].

As in other categories of manslaughter, the relevant circumstances vary over a wide range: *R v Forbes* [2005] NSWCCA 377 at [135]. In *Vuni v R* [2006] NSWCCA 171 the court said that the statistical sample for cases involving excessive self-defence (approximately 10 cases by the time the appeal was heard) was too small to be of any real practical value: at [31]. James J said in *R v Williamson* [2008] NSWSC 686 at [40] that, although there have been many cases of excessive self-defence manslaughter, these cases do not establish a tariff. The cases "exhibit a wide degree of variation in their facts, which is typical of cases within any category of manslaughter" but nevertheless, provide some limited guidance.

Multiple partial defences

In cases where more than one partial defence is established, a more lenient sentence is likely to be warranted than would be the case if only one partial defence applied: *R v Low* (unrep, 13/8/91, NSWCCA). In *R v Ko* [2000] NSWSC 1130, Kirby J found that both the provocation by the deceased and the offender's substantial impairment constituted "significant extenuating circumstances": *R v Ko* at [41]. See, for a historical summary, the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* which identifies 10 cases where offenders were sentenced upon the basis of two partial defences between 1990 and 2004, including *R v Anthony* (unrep, 23/09/94, NSWSC); *R v Chaouk* (unrep, 17/8/93, NSWSC); *R v Diamond* (unrep, 15/4/94, NSWSC); *R v Gardner* (unrep, 27/3/92, NSWSC); *R v Kali* (unrep, 27/5/91, NSWSC); *R v K* [1999] NSWSC 933; and *R v Spencer* (unrep, 18/12/92, NSWSC).

[40-020] Killing of children by parents or carers

The protection of children is of fundamental importance to society: *R v Howard* [2001] NSWCCA 309 at [19]. However, "[t]here is no rule that the intentional killing of a child must always attract a custodial sentence. Each case must be judged on its peculiar facts": *R v Dawes* [2004] NSWCCA 363 at [70].

In *R v Hoerler* [2004] NSWCCA 184, the Crown appealed against the sentence imposed on the respondent, who had pleaded guilty to the manslaughter by unlawful and dangerous act of his girlfriend's seven-month-old son. Spigelman CJ rejected the proposition that there is an identifiable range of sentences for child killing on a charge of manslaughter by unlawful and dangerous act: *R v Hoerler* at [36]. Nor is there a distinct subcategory of manslaughter committed by parents or carers: *R v Hoerler* at [45], [47]. His Honour said at [41]:

> It may be possible to identify a distinct category of manslaughter for which variations on a basically similar factual situation can be identified … However, this can only be done if there is a significant number of cases which share the common characteristic and which represent a very broad range of differing circumstances. Child killing by a parent or carer does not occur so frequently to make it possible to deduce a sentencing pattern from past cases.

The killing of children cannot be excused by the existence of stress factors which often confront parents raising young children: *R v Vaughan* (unrep, 7/5/91, NSWCCA). In that case Lee CJ at CL said that "Courts have always regarded assault by parents upon little children resulting in death, as grave and serious cases of manslaughter": at 359.

See the earlier discussion of **Criminal negligence** at [40-010].

[40-030] Motor vehicle manslaughter

Motor vehicle manslaughter would generally fall under the category of criminal negligence or unlawful and dangerous act. In cases of manslaughter involving motor vehicles, it is "unproductive" to consider what might have been the appropriate sentence for an offence of aggravated dangerous driving occasioning death: *R v Cameron* [2005] NSWCCA 359. It was recognised in *R v Cramp* [1999] NSWCCA 324 at [108] that manslaughter is "a much more serious offence than aggravated dangerous driving occasioning death", which carries a maximum penalty of 14 years imprisonment as opposed to 25 years for manslaughter: *R v Cramp* at [108].

In *R v McKenna* (1992) 7 WAR 455, Ipp J (then of the Western Australian Court of Criminal Appeal) stated that "criminality is not reduced simply because the crime can be categorised as 'motor vehicle manslaughter'": at 469. This approach has since been adopted in New South Wales. In *R v Lawler* [2007] NSWCCA 85, the applicant appealed against his sentence of 10 years and 8 months, with a non-parole period of 8 years for manslaughter caused when his prime mover collided with the victim's vehicle. The applicant was aware that the braking system of his prime mover and trailer was defective, but continued to drive for commercial gain. In dismissing the appeal, the Court of Criminal Appeal emphasised the importance of general deterrence in such cases (at [42]) and held that the applicant's conduct involved a high degree of criminality, adding, "It is to be clearly understood that manslaughter is no less serious a crime because it is committed by the use of a motor vehicle": at [41].

The judge in *Lees v R* [2019] NSWCCA 65 was entitled to find the objective seriousness of the offence to be "of a very high order", and the dangerousness of the unlawful act "extreme" in circumstances where the applicant conceded she intended to drive into the deceased (her husband), which was very close to the intention required for murder (that is, an intention to inflict grievous bodily harm): at [56]–[57]. Had her actions not been spontaneous, the offence would likely have been one of murder rather than manslaughter: at [65].

See also the discussion of **Motor vehicle manslaughter** at [18-350].

[40-040] Discount for rejected offer to plead guilty to manslaughter

An offender convicted of manslaughter by a jury may receive a discount for offering to plead guilty to manslaughter when that offer was rejected by the Crown in preference to proceeding on a trial for murder: *Ahmad v R* [2006] NSWCCA 177 at [20]; *R v Nguyen* [2005] NSWSC 600 at [52]. As stated by Spigelman CJ in *R v Forbes* [2005] NSWCCA 377 at [121], "it is relevant to take into account an offer of a plea of guilty for the crime for which a person is ultimately convicted." Statements to similar effect can be found in *R v Cardoso* [2003] NSWCCA 15 at [19]–[21]; and *R v Oinonen* [1999] NSWCCA 310 at [15]–[18]. However, the discount is only available if the offer is made on terms which fully disclosed the circumstances and degree of culpability intended to be acknowledged by the plea. This facilitates comparison with the outcome of the trial: *Merrick v R* [2017] NSWCCA 264 at [117], [121]–[122]. In *Merrick v R*, the offender was denied a discount after being convicted of an alternative charge of manslaughter because his initial plea offer was conditional on an undefined statement of facts, which was not capable of acceptance by the Crown and did not demonstrate a willingness to admit the facts eventually found by the jury: at [109]–[110], [120].

[40-050] Joint criminal enterprise

An offender's liability for manslaughter may arise from a joint criminal enterprise or an extended joint criminal enterprise. Although not directly responsible for inflicting fatal injuries, an offender whose liability arises from an extended joint criminal enterprise may receive a significant sentence: see for example, *R v Diab* [2005] NSWCCA 64 (non-parole period of 6 years, balance of 3 years); *R v Taufahema* [2007] NSWSC 959 (non-parole period of 7 years, balance of 4 years). An aider and abetter is not necessarily less culpable than a principal: *GAS v The Queen* (2004) 217 CLR 198 at [23].

[40-060] Accessories after the fact to manslaughter

Accessories after the fact to manslaughter are liable to a statutory maximum of 5 years: s 350, *Crimes Act 1900*.

In the remarks on sentence in *R v Walsh* [2004] NSWSC 111 at [3]–[4], Howie J observed:

> The maximum penalty for manslaughter is imprisonment for 25 years and that for being an accessory after the fact to manslaughter imprisonment for 5 years. This maximum penalty for the latter offence is in my view completely inadequate to deal with the

> criminality that such an offence might involve. In my view it says nothing about the very grave seriousness of assisting a person who the offender knows has unlawfully taken the life of another human being.
>
> In many cases, the criminality of an accessory after the fact to manslaughter will be the same as that of a person convicted of being an accessory after the fact to murder.

The discrepancy between the maximum penalties has also been observed by Studdert J in *R v Abdulrahman* [2007] NSWSC 578 at [9].

[40-070] Infanticide

Section 22A(1) of the *Crimes Act 1900* provides:

1. A woman is guilty of infanticide and not of murder if —

   (a) the woman by an act or omission causes the death of a child, in circumstances that would constitute murder, within 12 months of giving birth to the child, and

   (b) at the time of the act or omission, the woman had a mental health impairment that was consequent on or exacerbated by giving birth to the child.

Section 22A(3) provides that a woman found guilty of infanticide is to be sentenced as though she had been found guilty of manslaughter. Accordingly, the maximum penalty for infanticide is therefore 25 years imprisonment.

In *R v Cooper* [2001] NSWSC 769, the offender received a four-year good behaviour bond for the infanticide of her seven-month-old daughter. Simpson J emphasised that imposing a non-custodial sentence was an unusual course: at [5]–[6]:

> Where the court takes an unusual course such as imposing a non-custodial sentence where the death of a human being has been caused the community is entitled to a full explanation. What must never be lost sight of is that, at the heart of this case, is the loss of life of a seven month old child. The loss of human life is something to be treated with utmost gravity. Where the life lost is that of a baby, completely defenceless, and at the hand of her mother, from whom she could ordinarily expect nurture and care, the obligation on the courts to signify its respect for the sanctity of life and to punish those who wrongfully take it is so much greater. I am fully conscious of previous statements of this court and other courts emphasising the importance of the recognition of the gravity of offences of homicide.
>
> Equally, of course, I am conscious that s 22A was inserted into the Act as long ago as 1951 in order to recognise a perceived phenomenon relating to the effects, in some instances, of childbirth. The legislature then identified infanticide as a form of homicide having particular characteristics and a particular genesis which therefore justifies, in an appropriate case, a different approach to sentencing. This is an appropriate case. That the maximum penalty applicable is the maximum penalty applicable to an offence of manslaughter in no way negates the recognition given to the particular circumstances that go to make up the offence of infanticide.

Section 22A is rarely utilised. According to the statistics recorded in the Judicial Information Research System, there has only been one case of infanticide between January 2006 and September 2018. The offender received a suspended sentence. In an

earlier case, *R v Pope* [2002] NSWSC 397, the offender, who suffered from post-natal psychotic episodes and drowned her 12-week-old daughter in a baby bath, received a three-year good behaviour bond.

[40-075] Cause of loss of foetus (death of pregnant woman)

Section 54B(1) of the *Crimes Act 1900* provides that a person commits the offence of causing the loss of a foetus (death of pregnant woman) if:

(a) the person's act or omission constitutes an offence under a homicide provision (the "relevant homicide provision"), and

(b) the victim of the offence is a pregnant woman, and

(c) the act or omission includes causing the loss of the pregnant woman's foetus.

The maximum penalty is 3 years' imprisonment: s 54B(3).

To be charged with an offence against s 54B(1), the person must also be charged with a relevant homicide provision in relation to the same act or omission: s 54B(2). "Homicide provision" is defined to include manslaughter: s 54B(6). These provisions apply to offences committed on/after 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act 2021*: Sch 1[2].

For the offence of causing the loss of a foetus where the pregnant woman is injured, see **Assault, wounding and related offences** at [50-070] **Cause loss of a foetus**. See also [18-310] **The statutory scheme for dangerous driving offences**.

[The next page is 25001]

Assault, wounding and related offences

[50-000] Introduction and statutory framework

This chapter deals with the key personal violence offences under the *Crimes Act 1900*, listed below:

Offence	Section	Penalty (Max)
Common assault	s 61	2 yrs
Assault with intent to commit a serious indictable offence	s 58	5 yrs
Assault occasioning actual bodily harm	s 59	5 yrs
Assault occasioning actual bodily harm in company	s 59(2)	7 yrs
Reckless wounding	s 35(4)	7 yrs/SNPP 3 yrs
Reckless wounding in company	s 35(3)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm	s 35(2)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm in company	s 35(1)	14 yrs/SNPP 5 yrs
Wound or inflict grievous bodily harm with intent to cause grievous bodily harm or resist arrest	s 33(1)–(2)	25 yrs/SNPP 7 yrs
Use or possess weapon to resist arrest	s 33B(1)	12 yrs
Assault causing death	s 25A(1)	20 yrs
Assault causing death when intoxicated	s 25A(2)	25 yrs
Choke, suffocate or strangle	s 37(1A)	5 yrs
Choke, suffocate or strangle being reckless as to rendering other unconscious etc	s 37(1)	10 yrs
Choke, suffocate or strangle and render unconscious, with intent to commit serious indictable offence	s 37(2)	25 yrs
Administer intoxicating substance	s 38	25 yrs

There are also specific offences of assaulting law enforcement officers and frontline emergency and health workers under Pt 3 Div 8A, with penalties ranging up to 14 years (see **[50-120]**).

In general terms, personal violence offences may be differentiated according to the degree of harm inflicted upon the victim and the intention of the offender, ranging from common assault to those offences where the offender has the intention to inflict a particular type of harm, such as the intentional infliction of grievous bodily harm.

A heavier maximum penalty applies to certain offences due to the occupational status of the victim.

[50-020] Offences of personal violence generally viewed seriously

Offences of personal violence cover a wide spectrum of behaviour and consequences. Such offences are viewed very seriously by the courts. Deterrence is an important consideration, particularly in cases involving violence on the streets: *R v Mitchell* [2007] NSWCCA 296 at [29]; *R v McKenna* [2007] NSWCCA 113 at [2], [33]–[35], and unprovoked attacks on people going about their ordinary business: *R v Woods* (unrep, 9/10/90, NSWCCA), per Lee CJ at CL. The assault causing death offences under s 25A *Crimes Act 1900* (see [50-085]) were enacted in 2014 because of a concern about unprovoked serious assaults.

[50-030] The De Simoni principle

The *Crimes Act 1900* creates an escalating statutory scheme for assault and wounding offences. The principle that a court cannot take into account as an aggravating factor a circumstance that would warrant conviction for a more serious offence (*The Queen v De Simoni* (1981) 147 CLR 383 at 389 quoted in *Elias v The Queen* (2013) 248 CLR 483 at fn 65) is an important consideration when sentencing for offences of personal violence — both in terms of the nature of the injury inflicted and the intention or mental element with which the offence is committed.

The *De Simoni* principle is discussed further below in relation to particular offences.

[50-040] Factors relevant to assessment of the objective gravity of a personal violence offence

There are three factors particularly relevant to assessing the objective gravity of a personal violence offence: the extent and nature of the injuries; the degree of violence; and the mental element of the offence. These factors are elaborated upon below and, where relevant, discussed further under each particular offence.

Extent and nature of the injuries

The nature of the injury caused to the victim will, to a very significant degree, determine the seriousness of the offence and the appropriate sentence: *R v Mitchell* [2007] NSWCCA 296 at [27]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *R v Zhang* [2004] NSWCCA 358 at [4]. However, there is no rule or principle which mandates that the nature of the injuries sustained will be the most important factor or necessarily determine the assessment of the objective seriousness of the offence: *Waterfall v R* [2019] NSWCCA 281 at [33], [35]. In general terms, the graver the injury, the more serious the offence. An offence may be characterised as falling close to the worst of its kind by reason of the injuries inflicted upon the victim.

Degree of violence

The degree of violence used or ferocity of the attack is a material consideration on sentence: *R v Bloomfield* (1998) 44 NSWLR 734 at 740; *R v Zhang* [2004] NSWCCA 358 at [18]. This is so even if the consequences of the attack on the victim are minimal: *R v Kirkland* [2005] NSWCCA 130 at [33] per Hunt AJA.

Conversely, a victim may suffer very serious injuries but the violence used may have been slight: *R v Bloomfield*, above, at 740.

Intention/mental element

The intention with which the offender inflicts harm is also an important consideration. This factor is referred to in the discussion of particular offences, below.

[50-050] Common assault: s 61

Section 61 *Crimes Act 1900* provides, "Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years". An assault may be established by proof of either physical contact (battery), or an act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence: *R v Knight* (1988) 35 A Crim R 314 at 316–317; *Barton v Armstrong* [1969] 2 NSWLR 451 at 454–455; *R v Venna* [1976] QB 421; *R v McNamara* [1954] VLR 137.

Extent of injury

As a charge of common assault does not involve actual bodily harm, an offence is not mitigated by virtue of the fact the injuries suffered by the victim were minor: *R v Williams* (unrep, 30/5/94, NSWCCA). The offence in that case was found to be objectively serious, as the offender had punched the victim in a cold and calculated manner.

Degree of violence

The criminality in a s 61 offence is not generally mitigated on account of there being minimal violence. In *R v Lardner* (unrep, 10/9/98, NSWCCA) it was held that a submission to that effect "overlooks the fact that the degree of violence involved in common assault cases is invariably moderate, because if the violence is more severe it causes actual bodily harm or wounding and results in a more serious charge."

In *R v Abboud* [2005] NSWCCA 251, the offender assaulted his partner on three separate days by punching, choking, grabbing her face, kicking and biting. It was accepted that the criminality and circumstances involved in the assaults were of the most serious kind for an offence under s 61: *R v Abboud* at [17], [33].

De Simoni considerations

In *R v Lardner* (unrep, 10/9/98, NSWCCA) the court considered whether the sentencing judge infringed the *De Simoni* principle by taking into account matters which constituted the more serious offence of assault occasioning actual bodily harm. It was observed that "bodily harm" includes any hurt or injury calculated to interfere with the health or comfort of the victim; it need not be permanent but must be more than merely transient or trifling. Physical and emotional reactions to an assault such as difficulty sleeping, memory problems, anxiety and poor concentration were therefore matters properly taken into account in sentencing for common assault. However, a psychiatric condition could constitute "actual bodily harm" and such a condition should not be taken into account in sentencing for common assault.

Evidence which seeks to demonstrate actual bodily harm should not be admitted on sentence for common assault. In *R v Abboud* [2005] NSWCCA 251 at [19], the court said:

> It is impermissible for the Crown to tender, or for a court to admit, evidence in sentencing proceedings for common assault which evidence seeks to demonstrate actual bodily harm. While it may be that this occurs because of agreement relating to a plea on a lesser charge, it is still impermissible and if it is not possible to adduce material relevant to the sentencing without also adducing irrelevant material the matter should be adjourned in order to be dealt with properly. The adducing of such material has become a common occurrence which is to be deprecated.

[50-060] Assault occasioning actual bodily harm: s 59

Assault occasioning actual bodily harm attracts a maximum penalty of 5 years imprisonment, or 7 years if committed in company: s 59.

Extent of the injury and degree of violence

Section 59 does not define actual bodily harm. Typical examples of injuries that are capable of amounting to actual bodily harm include scratches and bruises: *McIntyre v R* (2009) 198 A Crim R 549 at [44]. Actual bodily harm will likely have been occasioned

where a victim has been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind: *Li v R* [2005] NSWCCA 442 at [45]. The degree of violence involved in an assault is a material consideration in sentencing: *R v Bloomfield* (1988) 44 NSWLR 734 at 740. In that case, a single punch led to very severe injuries occasioned by the victim falling on his head. The sentencing judge properly gave considerable weight to the serious injuries occasioned by the assault, but erred in not considering the limited degree of violence involved. Likewise, an offence may be objectively serious due to the nature of the assault notwithstanding minor injuries: see *R v Burke* [2001] NSWCCA 47 at [17].

De Simoni considerations

The phrase "bodily harm" is to be given its ordinary meaning. It includes "any hurt or injury calculated to interfere with the health or comfort of the victim": *R v Lardner* (unrep, 10/9/98, NSWCCA) per Dunford J at 4. In *McIntyre v R* at [44], Johnson J held:

> It need not be permanent, but must be more than merely transient or trifling — it is something less than *"grievous bodily harm*", which requires really serious physical injury, and "*wounding"*, which requires breaking of the skin …

There is no need to prove a specific intent to cause actual bodily harm for an offence under s 59: *Coulter v The Queen* (1988) 164 CLR 350. The prosecution need only prove that the accused intentionally or recklessly assaulted the victim and that actual bodily harm was occasioned as a result: *R v Bloomfield* (1998) 44 NSWLR 734 at 737.

An act forming the basis of an offence under s 59 may result in serious injuries. Care must be taken not to infringe the principle in *De Simoni* by taking into account injuries and a state of mind which would justify a more serious offence: *R v Overall* (1993) 71 A Crim R 170 at 175; *R v Baugh* [1999] NSWCCA 131 at [35].

An offence under s 59 does not require that the Crown prove the offender intended, or was reckless as to, causing actual bodily harm, whereas an offence under s 35 requires proof that the accused realised the possibility that grievous bodily harm or wounding (as the case may be) may possibly be inflicted upon the victim and yet went ahead and acted as he or she did: *Blackwell v R* [2011] NSWCCA 93 at [82], [120], [170].

[50-070] Recklessly causing grievous bodily harm or wounding: s 35

Section 35 sets out the following offences and maximum penalties:

(1) recklessly causing grievous bodily harm in company: 14 yrs (SNPP 5 yrs),

(2) recklessly causing grievous bodily harm: 10 yrs (SNPP 4 yrs),

(3) reckless wounding in company: 10 yrs (SNPP 4 yrs),

(4) reckless wounding: 7 yrs (SNPP 3 yrs).

There are two categories of offence depending upon the type of injury inflicted with corresponding higher maximum penalties. The Crown must prove the accused caused grievous bodily harm to (s 35(1), (2)) or wounded (s 35(3), (4)) a person and was reckless as to causing actual bodily harm: see *Chen v R* [2013] NSWCCA 116 at [66] and the *Criminal Trial Courts Bench Book* at [4-080] **Recklessness (Malice)**.

Standard non-parole periods

The standard non-parole periods are indicated above and apply to offences "whenever committed": *Crimes (Sentencing Procedure) Act 1999*, Sch 2, Pt 17.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Extent and nature of injuries

Generally speaking, the seriousness of the offence will significantly depend upon the seriousness of the wounding: *McCullough v R* [2009] NSWCCA 94 at [37]. The injury inflicted is not the only factor in determining the seriousness of an offence under s 35. The nature of the attack and surrounding circumstances are highly relevant: *R v Channells* (unrep, 30/9/97, NSWCCA); *McCullough v R* at [37]. In *R v Douglas* [2007] NSWCCA 31 at [12], it was held that the number of blows and the circumstances in which they were delivered were relevant to the objective seriousness of the offence.

Grievous bodily harm

Section 4(1) defines "grievous bodily harm" to include any permanent or serious disfiguring of the person, the destruction of a foetus, and any grievous bodily disease. At common law, the words "grievous bodily harm" are given their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" simply means "really serious": *DPP v Smith* [1961] AC 290; *Haoui v R* (2008) 188 A Crim R 331 at [137], [160]; *Swan v R* [2016] NSWCCA 79 at [54]–[63].

The way in which grievous bodily harm may be inflicted varies substantially: *R v Kama* [2000] NSWCCA 23 at [16]. The seriousness of an offence under s 35 may be assessed by reference to the viciousness of the attack and severity of the consequences: *R v Kama* at [17].

In *R v Esho* [2001] NSWCCA 415 at [160], the court held the offence was properly characterised as a "worst case" having regard to the number of participants and the ferocity of an attack upon the victim. It is not necessary for the injuries caused to the victim to be of the "worst type" for an offence to fall into the "worst case" category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256); the nature of the offender's conduct may bring it within that category: *R v Westerman* [2004] NSWCCA 161 at [17].

In *Kanengele-Yondjo v R* [2006] NSWCCA 354, the offender was sentenced for two offences of maliciously inflicting grievous bodily harm. The offender infected two victims with HIV, knowing he was carrying the virus. The court agreed with the sentencing judge's assessment of the offences as "heinous crimes which showed a contemptible and callous disregard" for the lives of the victims: *Kanengele-Yondjo v R* at [15]–[16], [50]. The offences were rightly described as falling within the worst case category: *Kanengele-Yondjo v R* at [17]. The expression "worst case category" should now be avoided: see *The Queen v Kilic* at [18].

Wounding

"Wounding" is not defined in the *Crimes Act*. It was been defined at common law to involve the breaking of the skin: *R v Shepherd* [2003] NSWCCA 351 at [31]; *Vallance v The Queen* (1961) 108 CLR 56 at 77; *R v Hatch* [2006] NSWCCA 330 at [16]; *R v Devine* (1982) 8 A Crim R 45 at 47, 52, 56.

The consequences of a wounding can vary widely: *R v Hatch*, above, at [17]; and may be quite minor: *R v Hooper* [2004] NSWCCA 10 at [36]. It need not involve the

use of a weapon: *R v Shepherd*, above at [32]. A case involving significant wounding does not by virtue of that factor alone mean the offence attracts the maximum penalty. The offender's mental state is a relevant factor, particularly if there is a degree of cognitive disturbance and an absence of premeditation: *R v Aala* (unrep, 30/5/96, NSWCCA).

De Simoni considerations

Although the same penalty applied for the separate offences under (now repealed) s 35(a), malicious wounding, and s 35(b), malicious wounding with intent to inflict grievous bodily harm, it was not permissible to sentence an offender for injuries not charged where those injuries were more serious: *McCullough v R* (2009) 194 A Crim R 439. Howie J said at [39]: "To sentence for the infliction of grievous bodily harm on a charge of wounding, seems to me to eradicate the difference between the two offences". Similar logic must apply to the offences created in s 35(2) and (4).

A sentencer must be careful to differentiate between an offence under s 35 and an offence under s 33 which involves specific intent. That does not mean there is no "room for a 'worst case' under s 35 without crossing the boundary of s 33": *R v Esho* [2001] NSWCCA 415 at [160].

As the more serious offence under s 33 requires proof of an intention to inflict grievous bodily harm, there is no breach of *De Simoni* by taking into account in sentencing for an offence under s 35 that the offender intended to inflict actual bodily harm: *R v Channells* (unrep, 20/9/97, NSWCCA); *R v Driscoll* (unrep, 15/11/90, NSWCCA).

Offences under s 35 carry higher maximum penalties where the offence is committed in company: s 35(1), (3). It is a breach of the *De Simoni* principle to treat the circumstance of being in company as an aggravating feature when sentencing an offender for the basic offence: *R v Tran* [2005] NSWCCA 35 at [17].

[50-080] Wound or inflict grievous bodily harm with intent to do grievous bodily harm or resist arrest: s 33

Section 33 sets out the offences of wounding or inflicting grievous bodily harm with intent to cause grievous bodily harm (s 33(1)(a)–(b)) and wounding or inflicting grievous bodily harm with intent to resist or prevent lawful arrest or detention (s 33(2)(a)–(b)). The maximum penalty is 25 years imprisonment for each offence.

For definitions of "grievous bodily harm" and "wounding" see [50-070], above.

Standard non-parole periods

A standard non-parole period of seven years applies to s 33 offences committed on or after 1 February 2003: *Crimes (Sentencing Procedure) Act 1999*, ss 54A–54D.

For discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

General sentencing principles

For a useful summary of the relevant sentencing principles see *AM v R* [2012] NSWCCA 203 at [67]–[74].

The maximum sentence of 25 years imprisonment indicates the seriousness with which an offence under s 33 is regarded: *R v Zhang* [2004] NSWCCA 358 at [28]; *R v Watt* (unrep, 2/4/97, NSWCCA); *R v Zamagias* [2002] NSWCCA 17 at [11]. It is the longest determinate sentence available for an offence in the *Crimes Act 1900*: *R v Hookey* [2018] NSWCCA 147 at [57].

A breadth of conduct and consequences is comprehended by s 33: *R v Williams* [2004] NSWCCA 246 at [51]; *Heron v R* [2006] NSWCCA 215 at [54]. It is important for the sentencer to analyse the facts of each case. Notwithstanding the circumstances giving rise to the offence vary widely and the range of culpability is vast, some assistance may be gained from considering the sentences imposed in other cases to achieve consistency: *Newman v R* [2015] NSWCCA 270 at [19].

In *Kennedy v R* [2008] NSWCCA 21 it was held that the offender's psychological condition — not just the physical act — is relevant in determining the objective seriousness of an offence under s 33: at [41]. However, in *Muldrock v The Queen* (2011) 244 CLR 120, the High Court appear to exclude an offender's mental condition from an assessment of objective seriousness: at [54]–[55].

Extent and nature of the injuries

In respect of injuries for offences under s 33, subss (1)(a) and (2)(a) relate to wounding and subss (1)(b) and (2)(b) relate to grievous bodily harm.

In *Maybury v R* [2022] NSWCCA 233, the sentencing judge did not err in assessing a s 33(1)(a) offence's objective seriousness by finding the injuries amounted to grievous bodily harm. When sentencing for such an offence, the correct approach involves:

(i) identifying and taking into account the wounding as well as those injuries related to or closely connected with the actions causing them so as to properly inform a determination of the nature and extent of those wounds and their consequences (*Bourke v R* [2010] NSWCCA 22 at [53]; *Adams v R* [2011] NSWCCA 47; *Cao v R* [2020] NSWCCA 223); and

(ii) considering the extent of the grievous bodily harm, if any, in order to properly evaluate the intention to inflict grievous bodily harm element of the offence (*Bourke v R* at [72]): *Maybury v R* at [115].

In this case, the offender was not tried for a s 33(1)(b) offence.

In *R v Williams* [2004] NSWCCA 246, the fact the injury consisted of a single superficial stab wound was taken into account in holding that the lengthy sentence imposed at first instance was not warranted. The wound was not life threatening and did not cause any lasting physical damage: *R v Williams* at [54].

The extent of the injuries may bring an offence into the very serious category. In *R v Mitchell* [2007] NSWCCA 296, the victim suffered a serious brain injury and was reduced to a vegetative state after a brutal attack. Howie J said at [27]:

> A very important aspect of an offence under s 33 is the result of the offender's conduct. The nature of the injury caused to the victim will to a very significant degree determine the seriousness of the offence and the appropriate sentence. This is not to underestimate the intent component of the offence, after all that is the element that makes the offender liable to a maximum penalty of 25 years as opposed to 7 years for a s 35 offence. But

> there is less scope for variation in the nature of the intention to do grievous bodily harm when determining the seriousness of a particular instance of the offence than there is for variation in the nature of the injury inflicted. …

In *R v Kirkland* [2005] NSWCCA 130 and *R v Bobak* [2005] NSWCCA 320 (two offenders jointly involved in maliciously inflict grievous bodily harm with intent), the victim was attacked with a hammer and left with extremely serious physical and mental injuries. Both cases were characterised as at the very upper end of the range of seriousness, while falling short of a worst case: *R v Kirkland* at [36]; *R v Bobak* at [32]. Similarly, in *R v Nolan* [2017] NSWCCA 91, an assault leaving an infant with horrific injuries and permanent brain damage was characterised as being in the "high range" (at [73]) but did not warrant the maximum penalty because of the offender's favourable subjective case (at [67]–[68]).

In *R v Hookey* [2018] NSWCCA 147, an unprovoked road rage case, where the offender alighted his car and stabbed the victim three times with a knife, with no provocation, the court found the objective circumstances of the case were extremely serious and the victim's injuries so serious, only luck prevented his death. Although, in the particular circumstances of that case, the court was satisfied the sentence imposed at first instance was manifestly inadequate, the residual discretion not to intervene was exercised. Rothman J said "if it were not for the subjective circumstances, I could not imagine, given the need for general and specific deterrence in particular, that a sentence lower than 8 years would be appropriate: at [64].

The objective gravity of an offence under s 33 "is not determined merely by considering the injuries": *Vragovic v R* [2007] NSWCCA 46 at [32]. In that case, the circumstances of the offence, including the fact that the victim was a 57-year-old female, attacked with a metal club in her home, and that the assault was premeditated and involved repeated blows, justified the sentencing judge's characterisation of the offence as "near the top of the range of seriousness": *Vragovic v R* at [32]–[34]. Nor must a judge be satisfied beyond reasonable doubt as to precisely how the injury was sustained because it may not be possible for the court to determine the precise mechanism by which the offender injured the victim: *R v Nolan* at [72].

Even where the injuries fall into the lower end of the range of grievous bodily harm, the circumstances in which they were inflicted may still warrant the characterisation of the offence as serious: *R v Testalamuta* [2007] NSWCCA 258 at [31].

An offence may be aggravated by the infliction of an injury that exceeds the minimum necessary to qualify as grievous bodily harm: *R v Chisari* [2006] NSWCCA 19 at [22]; *R v Jenkins* [2006] NSWCCA 412 at [13]; *R v Zoef* [2005] NSWCCA 268 at [123]. Any injury in excess of the bare requirements of grievous bodily harm can be taken into account as a matter of aggravation: *Heron v R* [2006] NSWCCA 215 at [49]. A sentencing judge should not speculate as to what might have occurred had the victim not received medical assistance: *Heron v R* at [49].

Intention

The mental element of an offence under s 33 is the intention that the harm inflicted be grievous bodily harm, differentiating the offence from the less serious offence under s 35: *R v Wiki* (unrep, 13/9/1993, NSWCCA). The degree of harm intended in a particular case may make the absence of premeditation less significant: *R v Zamagias* [2002] NSWCCA 17 at [13]–[14].

The degree of harm intended or foreseen by the offender, as evidenced by the offender's conduct, was considered in *R v Mitchell* [2007] NSWCCA 296. The victim was reduced to a vegetative state following a brutal and sustained attack as he lay unconscious on the ground. Howie J said at [35]:

> The Judge took into account as a mitigating factor that the respondents did not intend the degree of harm that was caused to the victim. That consideration would be understandable in a case where the injury far outweighed what might have been envisaged as the consequence of the behaviour causing it. Such a consideration might be relevant in the case of, for example, a single punch to the face that results in the victim falling to the ground and suffering very grievous injuries as a consequence. But in this case the respondents indulged in … a brutal and sustained attack upon a defenceless person by kicking or stomping on his head and body while he was lying on the ground. The fact that the respondents might not have foreseen that the consequence of such serious conduct was to have left the victim in a vegetative state is of little, if any, weight in my opinion.

Degree of violence

The degree of violence used or the ferocity of the attack is a material consideration on sentence: *R v Zhang* [2004] NSWCCA 358 at [18]. The consequences to the victim are not the only important factor and the acts of the offender which led to those consequences should also be considered: *R v Kirkland* [2005] NSWCCA 130 at [33].

Cases that attract the maximum

See generally the discussion with regard to the worst case category at [10-005] **Cases that attract the maximum**: see also *The Queen v Kilic* (2016) 259 CLR 256.

In *R v Baquayee* [2003] NSWCCA 401, the court held that the combination of the use of a handgun (an aggravating feature) and the severity of the wounds placed the crime in the worst case category. The sentencing judge should have considered imposing the maximum sentence: *R v Baquayee* at [12].

In *R v Stokes and Difford* (1990) 51 A Crim R 25, it was held that the repeated attack on a fine defaulter by prison inmates, rendering the victim a quadriplegic, fell within the worst case category: *R v Stokes and Difford* at 34.

De Simoni considerations

In *R v Pillay* [2006] NSWCCA 402, the offender was acquitted of attempted murder (s 27) and convicted of maliciously wound with intent to inflict grievous bodily harm. The sentencing judge erred in taking into account, as aggravating factors, the pre-meditation and planning of the offence whereby the offender had forced the victim to write a false suicide note. Such factors implicitly ascribed an intention to murder and breached the principle in *De Simoni*: at [16].

In *Maybury v R*, the offender was convicted of a s 33(1)(a) wounding offence and the sentencing judge did not breach the principle in *De Simoni* in assessing the offence's objective seriousness by finding the victim's injuries inflicted in one violent attack amounted to grievous bodily harm. All of the injuries sustained properly informed the nature and extent of the wounds and their consequences, and the intention to inflict grievous bodily harm element of the offence: at [115]–[116], [123]–[124].

Double counting

The actual or threatened use of violence cannot be considered as an aggravating factor of an offence under s 33 as the infliction of actual violence is an element of the offence of malicious wounding: *R v Cramp* [2004] NSWCCA 264 at [53]–[58]; *R v LNT* [2005] NSWCCA 307 at [28]. In *R v Hookey* [2018] NSWCCA 147 the judge erroneously found the "use of a weapon" was an element of the offence under s 33(1)(a). However, if it is taken into account in determining the objective seriousness of the offence, it cannot be counted again as an aggravating feature under *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(c): *R v Hookey* at [44], [67].

[50-085] Assault causing death: s 25A

Section 25A(1) creates an offence of assault causing death. A person is guilty of such an offence if:

(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and

(b) the assault is not authorised or excused by law, and

(c) the assault causes the death of the other person.

The maximum penalty for the offence is 20 years imprisonment.

Assault causing death while intoxicated

Section 25A(2) sets out the aggravated form of the s 25A(1) offence. A person aged 18 or above who commits an offence under s 25A(1) when intoxicated commits an offence under s 25A(2).

The maximum penalty for an offence under s 25A(2) is 25 years imprisonment.

Section 25B(1) sets a mandatory minimum sentence of imprisonment of not less than 8 years and further provides that any non-parole period is also required to be not less than 8 years. Section 25B(2) provides that "… nothing in section 21 (or any other provision) of the *Crimes (Sentencing Procedure) Act 1999* or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period)".

Section 25A(3) provides that an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault. Section 25A(4) further provides that it is not necessary for the Crown to prove that the death was reasonably foreseeable for the purposes of the basic or aggravated offence.

[50-090] Use weapon/threaten injury to resist lawful apprehension: s 33B

Last reviewed: March 2024

Section 33B provides it is an offence to use, attempt to use, threaten to use, or possess an offensive weapon or instrument, or threaten injury to any person or property with any of the following states of mind:

- intent to commit an indictable offence
- intent to prevent or hinder lawful apprehension or detention
- intent to prevent or hinder investigation.

The maximum penalty is 12 years, or 15 years if committed in company.

General sentencing principles

In *R v Hamilton* (1993) 66 A Crim R 575, Gleeson CJ said 581:

> … offences against s 33B, which make it unlawful to use an offensive weapon or instrument with intent to prevent lawful apprehension, are regarded by the Court extremely seriously. It is incumbent upon the Court in dealing with offences of this nature to show an appropriate measure of support for police officers who undertake a difficult, dangerous and usually thankless task.

Remarks to similar effect were made in *R v Barton* [2001] NSWCCA 63 at [33].

General deterrence must play a significant role in the sentencing of offenders for offences contrary to s 33B: *Sharpe v R* [2006] NSWCCA 255 at [72]. In *R v Perez* (unrep, 11/12/91, NSWCCA), a case involving the driving of a vehicle towards police officers, Kirby P (with whom Gleeson CJ and Campbell J agreed) said at pp 20–21:

> The provision of the specific offence found in s 33B of the *Crimes Act* was obviously intended by Parliament to keep our community free of just the kind of conduct of which the jury convicted the appellant in this case … If in such circumstances, persons defy the instructions of police officers to halt and use motor vehicles or other weapons in an attempt [to] prevent detention, they must expect heavy punishment. Nothing else will mark society's disapproval of the objective features of such offences … Only by imposing severe punishment will courts reflect the seriousness which Parliament has attached to such offences by the specific provisions of s 33B of the *Crimes Act*. Only in that way may the message of deterrence be sent from the courts to people who are tempted to act as the appellant did.

The threat of violence constituted by an offender using an offensive weapon to prevent lawful apprehension cannot be considered an aggravating factor of an offence under s 33B(1)(a) as this is an essential element of that offence: *R v Franks* [2005] NSWCCA 196 at [26]–[27]; s 21A(2) *Crimes (Sentencing Procedure) Act 1999*. By contrast, that the victim is a police officer may be taken into account as an aggravating factor as s 33B was not enacted to specifically protect police and the offence contemplates a broad range of victims: *Courtney v R* [2022] NSWCCA 223 at [51]–[53].

Harm

In *R v Mostyn* [2004] NSWCCA 97, it was an aggravating factor that, as a result of the offence, the victim (a police officer) suffered from a Post Trauma Distress Disorder that left him permanently disabled so far as his police duties were concerned: *R v Mostyn* at [186].

Use of particular weapons

The brandishing of a firearm constitutes a serious form of the offence, even if the firearm is incapable of being discharged: *R v Mostyn* [2004] NSWCCA 97 at [187]. In *Curtis v R* [2007] NSWCCA 11, it was noted that the brandishing of knives was sufficient to constitute the offence. The offender's use of a knife to kill a police dog aggravated the offence and took it into the higher levels of objective seriousness: *Curtis v R* at [66]–[67].

Using a syringe to threaten a store's employees attempting to apprehend a shoplifter was characterised as "serious criminal responsibility" in *R v Carter* (unrep, 29/10/97, NSWCCA).

In *R v Sharpe* [2006] NSWCCA 255, it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of an offence under s 33B: *R v Sharpe* at [49]–[50].

De Simoni considerations

It is a breach of the principle in *De Simoni* to take into account that grievous bodily harm was occasioned for an offence under s 33B: *R v Kumar* [2003] NSWCCA 254 at [11].

[50-100] Choking, suffocating and strangulation: s 37

Section 37 provides for three separate choking offences. It is an offence under s 37(1A) *Crimes Act 1900* to intentionally choke, suffocate or strangle a person without consent. The maximum penalty is 5 years imprisonment.

Under s 37(1) it is an offence if a person:

- intentionally chokes, suffocates or strangles another person so as to render them unconscious, insensible or incapable of resistance; and
- is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

The maximum penalty is 10 years imprisonment.

Under s 37(2), an offence is aggravated by the fact that the choking, suffocating or strangling is done by the offender with the intention of enabling themselves to commit, or assisting another person to commit, another indictable offence (meaning an indictable offence other than an offence against s 37: s 37(3)).

The maximum penalty is 25 years imprisonment.

[50-110] Administer intoxicating substance: s 38

Section 38 *Crimes Act 1900* sets out an offence of administering an intoxicating substance with intent to commit an indictable offence. Before 28 March 2008, the offence was expressed in terms of administering "any chloroform, laudanum or other stupefying or over-powering drug or thing". The substitution of "intoxicating substance" (defined in s 4(1) to include alcohol, a narcotic drug or any other substance that affects a person's senses or understanding) is not expected to significantly affect the sentencing principles applicable to this offence. The maximum penalty remains at 25 years imprisonment.

In *R v Reyes* [2005] NSWCCA 218 Grove J said at [81] that "a gauge to the seriousness with which Parliament has regarded offences of this type can be found in the prescription of a maximum term of twenty five years imprisonment" and emphasised the importance of general deterrence in sentences for offences under s 38. Beazley JA said in *Samadi v R* (2008) 192 A Crim R 251 at [160] that the legislature and the courts do not think drink or food spiking is a "soft crime" and "[t]hose who are convicted of such offence should expect to be dealt with by the courts on the basis that it is a very serious crime."

A conviction for an offence under s 38 is often accompanied by a conviction for the indictable offence which motivated the commission of the s 38 offence. However, courts have emphasised the need to impose a salutary penalty for an offence under s 38 in its own right: *R v Lawson* [2005] NSWCCA 346 at [31]; *R v Dawson* [2000] NSWCCA 399 at [54]; *Samadi v R* at [160]. In *R v TA* (2003) 57 NSWLR 444 at [34], the court rejected the submission that there should be only slight accumulation of sentences:

> … committing sexual offences whilst the victim has been drugged adds a significant degree of culpability to the administration of the drug intending to commit the offence. … Furthermore, the deterrent effect of a slight accumulation, as proposed by the applicant, would be significantly eroded. Having administered the stupefying drug, the offender would then suffer little more punishment by moving to the next step and actually committing the intended or other sexual assaults. I consider that the distinction between the offences is real and punishment for both should reflect the considerable additional criminality involved in fulfilling the intention with which the drug is given.

An offence under s 38 is aggravated if the administration of the substance was "potentially injurious of itself": *R v TA* at [34]; see also *R v Bulut* [2004] NSWCCA 325 at [15].

[50-120] Assaults etc against law enforcement officers and frontline emergency and health workers

Pt 3 Div 8A *Crimes Act 1900* sets out offences for actions against law enforcement officers and frontline emergency and health workers.

Offence	Victim	Penalty (Max)
Hinder/resist, or incite another to hinder/resist, in execution/course of duty:	• police officer (s 60(1AA)); • law enforcement officer (s 60A(1AA); • frontline emergency worker (s 60AD(1)); • frontline health worker (s 60AE(1)).	20 pu and/or 1 yr
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty:	• police officer (s 60(1)); • law enforcement officer (s 60A(1)); • frontline emergency worker (s 60AD(2)); • frontline health worker (s 60AE(2)).	5 yrs
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty *during public disorder*:*	• police officer (s 60(1A)); • law enforcement officer (s 60A(1A)); • frontline emergency worker (s 60AD(3)); • frontline health worker (s 60AE(3)).	7 yrs
Assault causing actual bodily harm in execution/course of duty:	• police officer (s 60(2)); • law enforcement officer (s 60A(2)); • frontline emergency worker (s 60AD(4)); • frontline health worker (s 60AE(4)).	7 yrs
Assault causing actual bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(2A)); • law enforcement officer (s 60A(2A)); • frontline emergency worker (s 60AD(5)); • frontline health worker (s 60AE(5)).	9 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty:	• police officer (s 60(3)); • law enforcement officer (s 60A(3)); • frontline emergency worker (s 60AD(6)); • frontline health worker (s 60AE(6)).	12 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(3A)); • law enforcement officer (s 60A(3A)); • frontline emergency worker (s 60AD(7)); • frontline health worker (s 60AE(7)).	14 yrs

For these offences, an action is taken to be carried out against the specified victim in the execution/course of their duty, even if they are not on duty at the time, if it is carried out—

- as a consequence of, or in retaliation for, actions undertaken by the victim in the execution/course of their duty, or
- because the victim is a police officer, law enforcement officer or frontline emergency/health worker: see ss 60(4), 60A(4), 60AD(8), 60AE(8), respectively.

Assaults against police officers have long been treated as serious offences requiring condign punishment: *R v Crump* (unrep, 7/2/1975, NSWCCA). General and specific deterrence are important considerations in sentencing for such offences: *R v Myers* (unrep, 13/2/90, NSWCCA); *R v Edigarov* [2001] NSWCCA 436 at [42].

* "Public disorder" is defined in s 4 as a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations, including at a correctional centre or juvenile detention centre.

Standard non-parole periods

Under ss 54A–54D *Crimes (Sentencing Procedure) Act 1999*, the standard non-parole period of three years for s 60(2) offences and five years for s 60(3) apply to offences committed on or after 1 February 2003: see *Winn v R* [2007] NSWCCA 44; and *Kafovalu v R* [2007] NSWCCA 141. In *Kafovalu* it was held that the sentencing judge did not err in treating an offence under s 60(2) involving a single but heavy blow to the officer's head as one falling within the mid-range of objective seriousness.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Application for guideline judgment

In 2002, the Attorney General unsuccessfully sought a guideline judgment in relation to offences under s 60(1): *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515 at [64]. However, Spigelman CJ emphasised the importance of deterrence as a consideration in sentencing offenders for assault against police officers at [22] and [26]:

> Offences involving assault of police officers in the execution of their duty are serious offences requiring a significant element of deterrence in the sentences to be imposed. The community is dependent to a substantial extent upon the courage of police officers for protection of lives, personal security and property. The Courts must support the police in the proper execution of their duties and must be seen to be supporting the police, and their authority in maintaining law and order, by the imposition of appropriate sentences in cases where assaults are committed against police.
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> …
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> … significant risks are run by police officers throughout the State in the normal execution of their duties. The authority of the police, in the performance of their duties, must be supported by the courts. In cases involving assaults against police there is a need to give full weight to the objective of general deterrence and, accordingly, sentences at the high end of the scale, pertinent in the light of all the circumstances, are generally appropriate in such cases.

The court pointed out that these principles applied to sentencing in both the Local and District Courts: at [27]. The court also recognised that offences under s 60(1) encompass a wide range of behaviour, and that whether a custodial sentence is required will depend on the nature of the assault: at [38]–[39].

Serious cases under s 60(2)

In *Bolamatu v R* [2003] NSWCCA 58, the offender ran over a police officer while leaving the scene in a car. The police officer had stood in front of the car holding out her arm to signify "stop". The officer suffered grave injuries. It was held that this was "as reprehensible as [an offence under s 60(2)] can be, and therefore could be seen as demanding something like the maximum possible sentence": *Bolamatu v R* at [10].

De Simoni considerations

In *R v Pickett* [2004] NSWCCA 389, the offender pleaded guilty to assault occasioning actual bodily harm to a police officer (s 60(2)) after being originally charged with using an offensive weapon, namely a motor vehicle, with intent to avoid lawful apprehension (s 33B(1)). So long as the sentencing judge did not find that the motor vehicle was used

with the intention of avoiding lawful apprehension there would be no infringement of the *De Simoni* principle: at [14]. A finding that the offender had acted intentionally or deliberately did not necessarily entail a conclusion that he was guilty of the more serious offence under s 33B. There was no infringement of *De Simoni*. It was open to find there was an intention to commit the assault without taking the further step of concluding that there was also an intention in doing so to avoid lawful apprehension: *R v Pickett* at [16].

In *R v Newton* [2004] NSWCCA 47, the offender was charged with various offences including use of an offensive weapon to avoid lawful apprehension (s 33B) and assault police in execution of duty (s 58). The fact the offender was, around the time of the assault, armed with and brandishing knives was relevant to the objective gravity of the offence and did not infringe the *De Simoni* principle: *R v Newton* at [22]–[23]; cf *R v Simpson* [2001] NSWCCA 239 at [15]–[18].

[50-125] Assaults etc against persons who aid law enforcement officers, and other offences

A person who assaults a person who comes to the aid of a law enforcement officer who is being assaulted in the course of their duty is liable to 5 years imprisonment: s 60AB. It is also an offence to hinder or obstruct a person who comes to the aid of a law enforcement officer who is being hindered or obstructed in the course of their duty, punishable by 1 year imprisonment and/or 20pu: s 60AC.

Section 60B(1) sets out offences for assault etc against a person in a domestic relationship with a law enforcement officer. It is also an offence under s 60C to obtain personal information about law enforcement officers in certain circumstances. A maximum penalty of 5 years imprisonment applies to offences under these provisions.

[50-130] Particular types of personal violence

Domestic violence

For a discussion of the general sentencing approach to domestic violence, see **Domestic violence offences** at [63-500]ff.

The High Court has recognised that current sentencing practices for offences involving domestic violence have departed from past practices due to changes in societal attitudes to domestic relations: *The Queen v Kilic* (2016) 259 CLR 256 at [21]. Rigorous and demanding consequences for the perpetrators of domestic violence are necessary to protect partners, family members and the wider community: *Cherry v R* [2017] NSWCCA 150 at [78].

General deterrence, personal deterrence and denunciation are particularly important in cases of domestic violence: *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [82]–[84]; *Hurst v R* [2017] NSWCCA 114 at [166]; *Vragovic v R* [2007] NSWCCA 46 at [33]; *R v Hamid* (2006) 164 A Crim R 179 at [68]. The importance of these principles was reiterated in *R v JD* [2018] NSWCCA 233, where the offending was committed by the respondent against his wife and daughter over a six year period: at [80]–[81], [102].

The imposition of suspended sentences for three assault and wounding offences was found in *DPP v Darcy-Shillingsworth* at [85] not to reflect the community's interest in general deterrence in domestic violence cases. The criminal law must "play its part

in the endeavour to quell and redress violence of this nature … even when committed by a man with much to be said for his otherwise good character": *DPP v Darcy-Shillingsworth* at [108].

A prior relationship between the offender and the victim does not mitigate an offence of personal violence: *Raczkowski v R* [2008] NSWCCA 152 at [46]. An offence committed during a domestic relationship necessarily entails the abuse of a relationship of trust: *The Queen v Kilic* at [28]. A sentencing judge should not enter into a determination of the merits of matrimonial disputes: *R v Kotevski* (unrep, 3/4/98, NSWCCA). Distress at the breakdown of a relationship is no excuse for violence: *Walker v R* [2006] NSWCCA 347 at [7]. Nor should an indication of forgiveness on the victim's part be used to reduce an otherwise appropriate penalty, given that victims of domestic violence "may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them": *Shaw v R* [2008] NSWCCA 58 at [27]; *R v Quach* [2002] NSWCCA 173 at [28]: *R v Rowe* (1996) 89 A Crim R 467 at 472–473; *R v Fahda* [1999] NSWCCA 267 at [26]; *R v Berry* [2000] NSWCCA 451 at [32]. However, in *Shaw v R*, the victim's forgiveness and expression of ongoing support was given some weight on re-sentence because, in the particular circumstances of that case, it was an indication of the offender's favourable prospects of rehabilitation: *Shaw v R* at [45].

In *Hurst v R*, the underlying themes of the violent attacks on the victim, which included gratuitous cruelty, control, and an intention to humiliate and demean her, were said to demonstrate the very worst aspects of domestic violence and to indicate a very high level of moral culpability: *Hurst v R* at [162]–[164].

It is an aggravating factor if an offence is committed in breach of an Apprehended Domestic Violence Order (ADVO): *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]; *R v Rumbel* (unrep, 15/12/94, NSWCCA). Breaching an ADVO is distinct from a breach of conditional liberty simpliciter because it involves breaching an order specifically designed to protect the victim from further attacks: *Cherry v R*, above, at [80].

Section 12 *Crimes (Domestic and Personal Violence) Act 2007* provides for the recording of "domestic violence offences" on a person's criminal record when a person pleads guilty to or is found guilty of such an offence: s 12(2). If the court directs that an offence be recorded as a domestic violence offence, the prosecution may apply for further offences on the person's record to be so classified: s 12(3). In the Second Reading Speech to the Bill, it was said that having a conviction for domestic violence "would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court or a court making a bail determination".

A domestic violence offence is committed against a person with whom the offender has a domestic relationship. It is either a personal violence offence or an offence that arises substantially from the same circumstances as those from which a personal violence offence has arisen or is committed with the intention to coerce or control the victim or to cause that person to be intimidated or fearful (or both): s 11. A "domestic relationship" is defined in s 5. The definition of "personal violence offence" in s 4 includes all assault and wounding offences referred to in the list at [50-000] **Introduction and statutory framework**, except for the offences against s 25A *Crimes Act 1900*.

In addition, on convicting an offender of a domestic violence offence, a court must make an ADVO for the victim's protection unless satisfied an order is "not required": s 39 *Crimes (Domestic and Personal Violence) Act 2007*.

Child abuse

In *R v Smith* [2005] NSWCCA 286 Latham J said at [54]:

> Even when offences against children are committed as a result of momentary lapses of control (which was not the case here) this Court has stressed that appropriately severe sentences have an important deterrent function:
>
> > "Young children cannot protect themselves from the acts of adults. They cannot lodge complaints about criminal behaviour perpetrated upon them. They are entirely reliant upon their parents … to care for them and protect them. [Where] that protective trust [is] abused … the only protection which society can give to young children is the protection afforded by the courts: *R v Pitcher* 19/2/96 NSWCCA unreported."

Similar comments were made in *R v O'Kane* (unrep, 9/3/95, NSWCCA), a case involving seven counts of maliciously inflicting grievous bodily harm by the offender on his infant son:

> It is important that all in the community understand that children cannot be ill-treated, let alone be the victims of the malicious infliction of serious bodily harm. Personal problems on the part of adults do not excuse such conduct.

Prison officers

Personal and general deterrence are important considerations in sentencing for offences of violence against prison officers: *R v Davis* (unrep, 4/2/94, NSWCCA).

The vast power differential arising when a prison officer assaults an inmate is relevant to assessing the objective seriousness of the offence, particularly as it relates to matters of aggravation. Prison officers have authority over inmates who are entitled to assume such officers will not abuse that position of authority: *Waterfall v R* [2019] NSWCCA 281 at [34]–[37]. In that case, an appeal against a sentence of 5 years, 9 months imprisonment with a non-parole period of 3 years, 9 months was dismissed. The court concluded that while the sentence was substantial, it appropriately reflected the gravity of the offence: at [52]–[53].

Inmates

General deterrence is also important in cases of very serious violence in a prison and sentences for such offences must demonstrate that violence and disorder between prisoners is not tolerated. Prisoners are sentenced to be deprived of their liberty, not suffer brutality at the hands of other prisoners. It is material to the seriousness of an offence that an inmate is vulnerable because their movements are restricted: *Tohifalou v R* [2018] NSWCCA 283 at [40]–[41].

"Gang" assaults

In *R v Duncan* [2004] NSWCCA 431, Wood CJ at CL said at [218]:

> Young offenders who elect to respond to any form of confrontation between different groups, need to understand, with crystal clarity, that sentences of imprisonment await those who cause the confrontation to be elevated to one involving extreme violence. Particularly is that so if they band together, in a brutal and cowardly pack attack with weapons, on a single unarmed and defenceless victim.

[50-140] Common aggravating factors under s 21A and the common law

Certain objective aggravating factors frequently arise in the context of personal violence offences. These factors — which arise either at common law and/or under s 21A *Crimes (Sentencing Procedure) Act 1999* — are discussed here. For a further discussion of aggravating and mitigating factors, see **Objective factors** at [10-000] and **Section 21A factors** at **[11-000]**.

Weapons

The actual or threatened use of a weapon will generally aggravate a personal violence offence: s 21A(2)(c) *Crimes (Sentencing Procedure) Act 1999* — provided it does not constitute an inherent element of the offence.

While it is rare for an offence under s 33 not to involve the use of a weapon, the use of a weapon is not an essential element of that offence. Where a weapon has been used in the commission of an offence under s 33 it should be taken into account as an aggravating factor: *R v Chisari* [2006] NSWCCA 19 at [31]; *R v Deng* [2007] NSWCCA 216 at [7], [63]; *R v Dickinson* [2004] NSWCCA 457 at [23]–[24]; *Nowak v R* [2008] NSWCCA 89 at [17].

In *R v Sharpe* [2006] NSWCCA 255 (threaten use of weapon to resist arrest, s 33B(2)), it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of the s 33B(2) offence: *R v Sharpe* at [49].

Many objects not inherently answering the description "weapon" (for example, motor vehicles: *R v Barton* [2001] NSWCCA 63; *R v Kumar* [2003] NSWCCA 254), are nonetheless capable of being so regarded by virtue of their use as a weapon: *R v Smith* [2005] NSWCCA 286 at [38].

Knives etc

The Court of Criminal Appeal has frequently observed that the use of a knife is a feature which specially aggravates the seriousness of an offence: *R v Dickinson* [2004] NSWCCA 457 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]. The presence of a knife in an emotionally charged situation increases the danger of the situation and the penalty which is liable to be imposed: *R v Hampton* [1999] NSWCCA 341 at [10]. Any assault involving the use of a knife must be regarded as calling for a significant sentence, for the purposes of both specific and general deterrence: *R v Watt* (unrep, 2/4/97, NSWCCA). The degree of seriousness in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27].

In the case of a machete or meat cleaver, the abhorrence which the community holds in relation to the use of knives is compounded, having regard to the terrible wounds which can be inflicted with such weapons: *R v Zhang* [2004] NSWCCA 358 at [29]. A machete is to be considered a very dangerous weapon: *R v Drew* [2000] NSWCCA 384 at [15]. The use of a weapon such as a screwdriver is on par with the use of a knife: *R v Greiss* [1999] NSWCCA 230 at [13].

Firearms

In an offence under s 33, it is difficult to contemplate a more serious aggravating feature than the use of a handgun: *R v Baquayee* [2003] NSWCCA 401 at [12]. Where a firearm is used to inflict grievous injury, the sentence imposed should involve a substantial

component to reflect general deterrence: *R v Zoef* [2005] NSWCCA 268 at [124]. The courts must give a clear message to persons who are minded to use firearms to resolve disputes that they will be dealt with severely: *R v Micallef* (unrep, 14/9/93, NSWCCA). An offence that involves pointing a loaded firearm at anyone is particularly serious when done in circumstances of aggression or as an exercise of domination: *R v Do* [2005] NSWCCA 183 at [25].

Syringes

Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA); cited in the s 33B case of *R v Ston*e (1995) 85 A Crim R 436 at 438. Sentences should also recognise the fear instilled in victims by an offender who produces a syringe apparently filled with blood: *R v Carter* (unrep, 29/10/97, NSWCCA).

Glassing, broken bottles etc

An attack using a glass is serious: *R v Bradford* (unrep, NSWCCA, 14/2/95). So too, is the use of broken glass, which is a weapon capable of inflicting a life-threatening injury: *R v Zamagias* [2002] NSWCCA 17 at [14]. In a case where the victim was struck in the face with a glass during a hotel fight, and the victim's injuries were not long-term, it was doubted that the use of a glass should be equated in seriousness with the use of a knife or revolver: *R v Heron* [2006] NSWCCA 215 at [54]. In *Sayin v R* [2008] NSWCCA 307, cited with approval in *R v Miria* [2009] NSWCCA 68 at [17], Howie J stated at [47]:

> … "glassing", is becoming so prevalent in licensed premises that there are moves on foot to stem the opportunity for the offence to be committed by earlier closing times and the use of plastic containers. The courts clearly must impose very severe penalties for such offenders, but of course within the limits afforded by the prescribed maximum penalty.

Premeditated or planned offence/contract violence

The degree of premeditation or planning is a relevant factor when assessing the objective seriousness of an offence: *R v King* [2004] NSWCCA 444 at [174]; *Vragovic v R* [2007] NSWCCA 46 at [32] (both s 33 cases). Section 21A(2)(n) provides as an aggravating factor the fact that the "offence was part of a planned or organised criminal activity". The converse is a mitigating factor: s 21A(3)(b).

Unprovoked offence

The fact that an offence is unprovoked and unjustified is a matter to be taken into account when assessing its objective seriousness: *R v Matzick* [2007] NSWCCA 92 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]; *R v Mackey* [2006] NSWCCA 254 at [14] (all s 33 cases). Members of the public have a fundamental right to go about their business without fear of being attacked: *R v Woods* (unrep, 9/10/1990, NSWCCA); *Vaeila v R* [2010] NSWCCA 113 at [22]; *Mansour v R; Hughes v R* [2013] NSWCCA 35 at [43]; *R v Tuuta* [2014] NSWCCA 40 at [52]; *Kocyigit v R* [2018] NSWCCA 279 at [36].

Offence committed in company

It is an aggravating factor where the offence is committed in company: *R v Maher* [2005] NSWCCA 16 at [34]; s 21A(2)(e) *Crimes (Sentencing Procedure) Act 1999*.

The exception is where this factor is an element of the offence, for example, offences under ss 59(2), 35(1), 35(3) and 33B(2). Furthermore, it would be erroneous to take into account as an aggravating factor the commission of an offence in company where that factor would warrant a conviction for a more serious offence: *R v Tran* [2005] NSWCCA 35 at [17].

Vulnerable victim

Section 21A(2)(l) provides as an aggravating factor the fact "that the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)". The fact that the victim was a security officer is an aggravating factor pursuant to s 21A(2)(l): *R v Do* [2005] NSWCCA 183.

In *Nowak v R* [2008] NSWCCA 89, the judge erred in finding that it was an aggravating factor that the victim was "vulnerable in the extreme" on the basis that the victim was unarmed when struck by a man wielding a bottle. It was observed, "All victims are, to some extent at least, vulnerable. But that is not the sense in which the expression is to be understood in the present context": at [28]. Reference was made in that case to *R v Tadrosse* (2005) 65 NSWLR 740, where it was said that s 21A(2)(l) "is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender": at [26].

The fact that the victim was unarmed would not generally constitute an aggravating factor under s 21A(2)(l), although such vulnerability may arise from defencelessness or helplessness: *Morris v R* [2007] NSWCCA 127 at [15]. However, there may be greater scope for a finding of vulnerability at common law on the basis that the common law survives the introduction of s 21A (s 21A(1)(c)); see *R v Porter* [2008] NSWCCA 145 at [87]. In *R v Esho* [2001] NSWCCA 415 the court held that the fact that the applicant, who was armed with a knife, knew that the victim was defenceless, was a factor that aggravated the offence: *R v Esho* at [142].

Commission of offence in victim's home

The commission of the offence in the security of the victim's home aggravates an offence: *R v Pearson* [2002] NSWCCA 429 at [90]; *R v Achurch* [2004] NSWCCA 180 at [33]; *R v Brett* [2004] NSWCCA 372 at [46]; *R v Hookey* [2004] NSWCCA 223 at [18]; s 21A(2)(eb) *Crimes (Sentencing Procedure) Act 1999*. See further the discussion in **Section 21A factors "in addition to" any Act or rule of law** at [11-105].

Gratuitous cruelty

Section 21A(2)(f) provides that an offence is aggravated if it involves gratuitous cruelty. Gratuitous cruelty requires more than an offence being committed without justification and causing great pain: *McCullough v R* [2009] NSWCCA 94 at [30]. For offences that are by their nature violent, there needs to be something more than the offender merely having no justification for causing the victim pain: *McCullough v R* at [30]. For instance, the factor may be present in a case of malicious wounding due to the nature and purpose of the wounding, for example, it involved torture: *McCullough v R* at [31].

The 3½-year-old victim in *R v Olsen* [2005] NSWCCA 243 was found to have 57 injuries, including intra-retinal haemorrhages and flexion extension injuries to the

neck indicating that he had been severely shaken. The child was also suffering from dehydration. The injuries inflicted included bite marks and indicated that there had been a large number of forcible impacts with the child's body. It was held that the sentencing judge correctly found that the offence involved gratuitous cruelty: at [17].

Punching and kicking a pregnant woman in the abdomen causing her foetus to miscarry constitutes gratuitous cruelty: *R v King* [2004] NSWCCA 444 at [139].

In *R v Smith* [2005] NSWCCA 286 it was held that the throwing of hot water onto a child did not constitute gratuitous cruelty. Latham J said at [37] that gratuitous cruelty:

> … is less likely to be present where an intentional act gives rise to injuries which were contemplated by the offender as possible, but no more, as opposed to offences involving deliberate, calculated torture or where the type and degree of harm inflicted is part of the offender's desire to degrade and humiliate the victim. Of course, it is not possible to neatly define the categories of offences in which gratuitous cruelty will feature. However, it was open to his Honour to regard this offence as lacking that factor, particularly where his Honour had found the Respondent reckless as to the harm caused by his actions.

Substantial harm

Section 21A(2)(g) *Crimes (Sentencing Procedure) Act 1999* provides as an aggravating factor that "the injury, emotional harm, loss or damage caused by the offence was substantial." The converse is a mitigating factor under s 21A(3)(a).

Since inflicting of grievous bodily harm is an element of offences under both s 35(1)–(2) and s 33(1)(b) and (2)(b), the bare fact that grievous bodily harm was caused cannot be treated as an aggravating factor of itself: *R v Zoef* [2005] NSWCCA 268 at [123]; *R v Cramp* [2004] NSWCCA 264 at [65] (s 33 cases); *R v Heron* [2006] NSWCCA 215 at [49]; *Nowak v R* [2008] NSWCCA 89 at [19]–[26] (s 35). However, where the extent of the victim's injury significantly exceeds the minimum necessary to qualify as grievous bodily harm, the injury may constitute an aggravating factor: *R v Zoef*, above, at [123] (where the victim suffered permanent paralysis); *R v Chisari* [2006] NSWCCA 19 at [22] (where the victim was required to undergo surgery, had ongoing medical problems and was unable to work).

In *R v Heron* [2006] NSWCCA 215, it was held that the sentencing judge also erred in having regard to the potential effect of the injury by speculating as to what might have happened had first aid not been provided. The potential of the injury was not a matter which could be properly taken into account for the purposes of s 21A(2)(g). What might have occurred had timely first aid not been provided is an irrelevant consideration when applying s 21A(2)(g): at [49].

[50-150] Intoxication

Last reviewed: March 2024

Personal violence offences are on occasion accompanied by some level of intoxication on the part of the offender. An offender's intoxication may constitute an aggravating factor, or it may have no impact on the sentencing exercise.

Before the introduction of s 21A(5AA) *Crimes (Sentencing Procedure) Act 1999*, an offender's intoxication, whether by alcohol or drugs, could explain an offence but ordinarily did not mitigate the penalty. Section 21A(5AA) confirms and extends the

common law principles as to the relevance of an offender's intoxication at the time of the offence; the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor. Section 21A(6) provides that self-induced intoxication has the same meaning as it has in Pt 11A *Crimes Act 1900*. See further discussion at **[10-480] Self-induced intoxication**.

Intoxication may be an aggravating factor because of the recklessness with which the offender became intoxicated or if it involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence: *R v Fletcher-Jones* (1994) 75 A Crim R 381 at 387; *Gordon*, above, at 467; *Coleman*, above at 327; *R v Hawkins* (1993) 67 A Crim R 64 at 67; *R v Jerrard* (1991) 56 A Crim R 297 at 301. The commission of an offence while intoxicated may also warrant greater emphasis being placed on general deterrence: *R v Mitchell* [2007] NSWCCA 296 at [29].

[50-160] Common mitigating factors

Certain objective mitigating factors which may arise with relative frequency in the context of personal violence offences are discussed here. For detailed discussion of mitigating factors, see **Objective factors** at **[10-000]** and **Section 21A factors** at **[11-000]**.

Injury or harm not substantial

The fact that the victim's injuries healed or were not substantial may be taken into account in the offender's favour: *R v Shauer* [2000] NSWCCA 91 at [13]; s 21A(3)(a) *Crimes (Sentencing Procedure) Act 1999*.

Provocation

Section 21A(3)(c) *Crimes (Sentencing Procedure) Act 1999* provides that it is a mitigating factor where the offender was provoked by the victim into committing the offence. In *R v Ferguson* [1999] NSWCCA 214 at [29], Smart AJ stated: "It is of the essence of provocation that the acts of others cause offenders to lose their self control and embark upon criminal conduct often of the utmost gravity".

Provocation can reduce the objective criminality appreciably: *R v Ferguson*, above, at [29]; see for example, *R v Fragoso* (unrep, 24/2/94, NSWCCA). In *R v Ryan* [2006] NSWCCA 394, the fact that the offence of maliciously inflict grievous bodily harm (s 35) was triggered by what both offenders reasonably thought had been a sexual assault on one of their partners was held to be a mitigating factor under s 21A(3)(c): at [28]. On the other hand, it was held in *R v Mitchell* [2007] NSWCCA 296 at [30] that a vicious attack in retribution for alleged prior sexual abuse was "of limited mitigating value".

The extent to which provocation constitutes a mitigating factor depends on the relationship and proportion between the provocative conduct and the offence. In *R v Buddle* [2005] NSWCCA 82, Wood CJ at CL said at [11]:

> While the presence of provocation was an important aspect in assessing the applicant's objective criminality, and while it provided a motive for what might otherwise have been an incident of unexplained or random violence, it did not excuse his conduct. It is not the case that the victim of a crime can take the law into his own hands and exact physical revenge. Both personal and general deterrence therefore had a role to play in sentencing the applicant.

In some cases the offender's conduct will be so disproportionate to the provocation that it will be open to find that there was no mitigation: *R v Mendez* [2002] NSWCCA 415 at [16]. In *Shaw v R* [2008] NSWCCA 58 at [26], it was held that "relationship tension and general tension" in the context of domestic violence offences did not constitute provocative conduct such as to amount to mitigation.

[The next page is 30001]

Firearms and prohibited weapons offences

[60-000] Introduction

The section discusses offences relating to the use, possession, manufacture, purchase and supply of firearms and other weapons in New South Wales under the following Acts:

- *Firearms Act 1996*, ss 7, 7A, 36(1), 50A, 51(1A), 51(2A), 51D(1), 51D(2), 51F, 51H
- *Crimes Act 1900*, ss 33A, 93G, 93GA
- *Weapons Prohibition Act 1998*, s 7
- For Commonwealth offences related to firearms trafficking see Pt 9.4 *Criminal Code* (Cth).

Although the commentary in this chapter is organised by reference to particular offences, it is clear from the caselaw that general sentencing principles, particularly in relation to deterrence and assessing objective seriousness, may apply regardless of the particular offence.

[60-010] Offences under the Firearms Act 1996

The *Firearms Act 1996* (the *Firearms Act*) repealed the *Firearms Act 1989* and was introduced as part of a national campaign to implement firearms control following the Port Arthur massacre: *R v Cromarty* [2004] NSWCCA 54 at [15]; *Luu v R* [2008] NSWCCA 285 at [32]. Offences in the *Firearms Act* regulate the unauthorised possession, use, purchase, manufacture and supply of firearms. In the Second Reading Speech introducing the Firearms Bill, the then Police Minister explained the rationale for the new offences: "This legislation puts the public's right to safety before the privilege of gun ownership." (NSW, Legislative Assembly, *Debates*, 19 June 1996, p 3204.)

[60-020] Principles and objects of the Act

The *Firearms Act* stipulates principles and objects at s 3 "which the courts must seek to implement" (*R v Tolley* [2004] NSWCCA 165 at [53]); which require "strict control" (*R v Cromarty* [2004] NSWCCA 54 at [67]); *Luu v R* [2008] NSWCCA 285 at [32]); and "strict adherence" (*Cramp v R* [2008] NSWCCA 40 at [52]). Section 3 provides:

> (1) The underlying principles of this Act are:
>
> (a) to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and
>
> (b) to improve public safety:
>
> (i) by imposing strict controls on the possession and use of firearms, and
>
> (ii) by promoting the safe and responsible storage and use of firearms, and
>
> (c) to facilitate a national approach to the control of firearms.

(2) The objects of this Act are as follows:

(a) to prohibit the possession and use of all automatic and self-loading rifles and shotguns except in special circumstances,

(b) to establish an integrated licensing and registration scheme for all firearms,

(c) to require each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm,

(d) to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms,

(e) to ensure that firearms are stored and conveyed in a safe and secure manner,

(f) to provide for compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms.

Depending on the nature of evidence concerning an offender's mental state, issues of public safety arising from the possession of a loaded pistol may justify a significant allowance for personal and general deterrence when considering an appropriate sentence: *Thalari v R* (2009) 75 NSWLR 307 at [93].

[60-025] Definitions

Section 4(1) of the Act defines a firearm as "a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive". The definition includes a blank fire firearm or air gun, but not anything declared by the regulations not to be a firearm (*Firearms Regulation 2017*, cl 4).

"Prohibited firearm" means a firearm described in Sch 1: s 4(1). "Pistol" and "prohibited pistol" are defined separately in ss 4 and 4C. The primary difference between the two is calibre size and pistol length.

Any collection of component parts that, if assembled, would be a firearm or prohibited firearm (or would be a firearm or prohibited firearm if it did not have something missing, or a defect or obstruction in it, or if it were not for the fact something has been added to it) is taken to be a firearm or prohibited firearm: s 4(2)(c).

Special provisions related to imitation firearms are in s 4D. An "imitation firearm" does not include any object produced and identified as a children's toy: s 4D(4). See *Darestani v R* (2019) 100 NSWLR 461 at [60]–[67] which considers the operation of the exception.

[60-030] Unauthorised possession or use: ss 7(1), 7A(1) and 36(1)

Part 2 Div 1 of the Act is headed "Requirement for licence or permit". The Division contains two sections, ss 7(1) and 7A, each with at least two substantive offences.

"A person must not possess or use a firearm unless authorised to do so by a licence or permit": s 7A(1). The maximum penalty is 5 years imprisonment. No standard non-parole period is specified.

"A person must not possess or use a pistol or prohibited firearm unless authorised to do so by a licence or permit": s 7(1). The maximum penalty is 14 years imprisonment. A standard non-parole period of 4 years applies.

Offences related to the registration of firearms are in Pt 3, Div 2 of the Act. "A person must not supply, acquire, possess or use a firearm that is not registered": s 36(1). The maximum penalty, if the firearm concerned is a pistol or prohibited firearm, is 14 years imprisonment. A maximum penalty of 5 years applies in any other case.

The offences under ss 7A(1), 7(1) and 36(1) are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1 Table 2 Part 4 *Criminal Procedure Act 1986*. JIRS sentencing statistics reveal that summary disposition is the most frequent mode of dealing with possession offences where it is the principal charge. A court dealing with an offence on indictment may have regard to the fact the offence could have been dealt with summarily but only in the circumstances outlined in *Zreika v R* [2012] NSWCCA 44 at [107]–[109].

Where an offender is convicted of unauthorised possession of a firearm under ss 7–7A *Firearms Act* and also convicted of discharging that firearm under s 93G *Crimes Act*, these should be regarded as distinct offences with separate criminal elements and generally not part of one course of conduct: *Rickaby v R* [2007] NSWCCA 288 at [17]–[19].

[60-040] Assessing the objective seriousness of possession/use

Johnson J referred to the policy reasons behind s 7(1) *Firearms Act* and matters relevant to the seriousness of the offence in *Ayshow v R* [2011] NSWCCA 240 at [64]–[73].

The importance of assessing the seriousness of an offence by reference to the principles and objects set out in s 3 was addressed in *R v Tolley* [2004] NSWCCA 165 where Howie J said at [53]:

> The courts must seek to implement the policy of the existing legislation and that is to control the possession and use of firearms in the community by honest citizens, and not simply to disarm the criminally minded.

Latham J said in *R v Krstic* [2005] NSWCCA 391 at [14] that "the policy of the legislature evinced by the enactment of the offence and a maximum penalty of 14 years imprisonment is to deter and punish possession of firearms per se". See also *R v AZ* [2011] NSWCCA 43 at [73].

Part of the rationale behind s 7(1) was explained by Hulme J in *R v Najem* [2008] NSWCCA 32 at [40]:

> That rationale includes at least a recognition that firearms and pistols, if possessed, are liable to be used, and if used, are liable to be a source of great danger or damage. It includes also a recognition that not all persons can be relied on to avoid or minimise such danger and not misuse the weapons and that misuse, even without discharge, is liable to amount to a great infringement of others [sic] rights.

The importance of giving full weight to the intent of the legislature, when the offender was a member of a criminal gang and prohibited by a firearms prohibition order from possessing a firearm, was addressed in *Chandab v R* [2021] NSWCCA 186 at [81] where Wilson J said:

> Firearms in the hands of those not permitted to possess them, and even more so in the hands of the criminally minded who may be the subject of a prohibition order, represent a clear and profound threat to the safety of the community. No doubt for this reason,

> and despite the relatively low standard non-parole period that applies to such offences, the maximum penalty … reflects the seriousness with which the Parliament and the community view firearms offences. The rule of law and the safety of others equally are imperilled by the unauthorised possession of firearms, and such offences must be treated as serious contraventions of the criminal law — to punish offenders, to deter others, and to protect the community.

An offender's criminality is more serious where he or she possesses a firearm as part of their involvement in crimes such as trading in illegal drugs: *R v Amurao* [2005] NSWCCA 32 at [69]; *R v Mehcur* [2002] NSWCCA 56 at [25]; *Luu v R* [2008] NSWCCA 285 at [32]; *R v AZ* at [76]; *SY v R* [2020] NSWCCA 320 at [30]; and serious assaults: *R v Najem* [2008] NSWCCA 32 at [41]. In *Amurao*, Hulme J said at [69]:

> It behoves the Courts to discourage any tendency for such objects to become just tools of trade for those whose activities are outside the law.

Possession of a concealed weapon, such as a keyring pistol which was not capable of lawful use, is a significant offence: *R v AZ* at [77]; *Cao v R* [2013] NSWCCA 321 at [35].

The court in *R v Najem* held that the judge was correct in implicitly accepting that the respondent's criminality was exacerbated by the fact that the pistol was loaded, in his possession, and available for use at the scene where a violent crime was carried out (by a co-offender): at [42].

The unauthorised possession of a loaded firearm that has had its serial number removed may be consistent with it being used for criminal purposes: *Yang v R* [2007] NSWCCA 37 at [18]; see also *Chandab v R* at [75]. It is impermissible, however, to sentence an offender on the basis that their possession was for an illegal purpose that would have amounted to a more serious unproven offence. This would infringe the *De Simoni* principle: *R v Thurgar* (unrep, 17/12/90, NSWCCA); *R v Harris* [2001] NSWCCA 322 at [37]–[38]. However, a finding that an offender must have known it was likely prohibited weapons and firearms would be used in connection with serious criminal activity did not infringe the *De Simoni* principle and was "plainly inescapable": *KC v R* [2009] NSWCCA 110 at [10].

The court in *Atkinson v R* [2014] NSWCCA 262 held (by majority) that the sentencing judge had not erred in finding the possession of two pistols for the criminal enforcement of debts was within the "worst case" category (as that concept was understood before *The Queen v Kilic* (2016) 259 CLR 256): *Atkinson v R* at [2], [86]. Simpson J, at [4], regarded the applicant's argument that he acquired weapons for on-sale as superfluous: possession for on-sale (which would clearly have been to the criminal milieu) was no better or worse than possession for criminal activity.

In *Z v R* [2015] NSWCCA 274, it was not an error for the sentencing judge to have regard to the applicant's membership of, and participation in, an outlaw motorcycle gang, and his possession and use of firearms as a means to advance the perceived interests of that gang. The context of the applicant's possession of a loaded and unsecured firearm was a relevant sentencing consideration: at [99]–[100]; see also *Raniga v R* [2016] NSWCCA 36 at [43].

Possession even for non-criminal purposes is generally not regarded as a matter in mitigation. The fact possession of a prohibited firearm is for personal protection is not

a matter of significant, if any, mitigation: *R v Krstic* at [14]. Similarly, in *R v AA* [2006] NSWCCA 55, the respondent had possession of a prohibited pistol for self-protection following a severe assault. Rothman J stated at [46]:

> It cannot be emphasised enough that the rule of law and the authority of courts depends upon the proposition that persons do not take into their own hands the enforcement of the law, retaliation for past offences or protection by means inconsistent with the law. It is for law enforcement agencies to protect members of the community and it is for the courts to enforce the law.

The principles in *Krstic* and *AA* were applied by the court in *Thalari v R* (2009) 75 NSWLR 307 at [88]. See also *Chandab v R* at [58]–[60]] where Wilson J concluded that the principles in *AA* and *Thalari* should be given particular weight when the offender was precluded by a firearms prohibition order (see s 73) from having firearms and was also a member of a criminal gang.

In *Thurgar*, the offender offered no innocent explanation for possession of a pistol and failure to obtain a licence. In these circumstances Gleeson CJ said, "The judge was entitled to infer that such failure was deliberate": at [117]. Some weapons, by their nature, preclude an offender from offering an innocent explanation. For example, there is no legitimate purpose for possessing a sawn-off shotgun: *R v Harris*, above, at [38]; *Alrubae v R* [2016] NSWCCA 142 at [37].

In *Do v R* [2010] NSWCCA 182, the offender was in possession of a loaded and unsecured pistol in an urban area. The possession of the pistol created a high risk to the safety of the public and arresting officers even though it was not used. The court concluded, at [23], that the objective seriousness of this offence was very high: see also the related matter of *Tran v R* [2010] NSWCCA 183.

An offender's criminality is not necessarily affected by the length of time of their possession of the firearm. However, a very short period of possession may, in the circumstances of a case, reduce the seriousness of the offence: *R v Goktas* [2004] NSWCCA 296 at [26].

A firearm loaded with live rounds of ammunition may aggravate the seriousness of the possession: *R v Mitchell* [2002] NSWCCA 270 at [14]. In *Gall v R* [2015] NSWCCA 69, the offender's possession of a readily available, unsecured and loaded firearm in a domestic dwelling was a serious example of a s 7(1) offence, particularly given his son had killed a person with a firearm seven months earlier: at [222], [244]. By way of contrast, in *Barnes v R* [2022] NSWCCA 40, it was unfair for the sentencing judge to regard the fact ammunition of a similar calibre was found with the firearm (a sawn-off .22 rifle) as an aggravating factor when there was no evidence the ammunition could be used with the firearm and no evidence the firearm was in working order: at [59]–[60]. The offence in that case was one of possessing a shortened firearm contrary to s 62(1)(b).

It is a matter in aggravation where the unauthorised possession enables others in the community to make use of the firearms even though such a result is unintended: *Cooper v R* [2005] NSWCCA 428 at [20]. In *Cooper*, although the sentencing judge found the offender stole two pistols and three revolvers because the owner threatened to shoot the offender's cousin, and the offender said he intended to dispose of them safely, Barr J nonetheless described the offences as "serious ones of their kind": at [20].

Pointing a loaded pistol is a very serious offence — more so when the holder is intoxicated, suffering from a lack of judgement and is aggressive: *R v Do* [2005] NSWCCA 183 at [25]–[27]. Considerations of general deterrence and retribution require a substantial sentence for such conduct, especially where the pistol is actually used and serious injury is caused: at [27].

In *Cramp v R* [2008] NSWCCA 40 the offender, a proprietor of a firearms and security business, held a number of licences under the Act permitting him to possess and use various forms of firearms. Police conducted a firearms and security industry audit and found he was in possession of two pistols which were used in the security part of his business. Neither had been the subject of test firing and one was unregistered. The conviction and imposition of a s 9 bond for the s 7(1) offence had the effect that the applicant's licence for other firearms may not (as opposed to will not as erroneously submitted, see [45]–[47]) be renewed by the Commissioner of Police. The court held that the judge did not err in deciding not to impose a s 10 dismissal without conviction: at [48], [52]. The offences could not be characterised as trivial within the terms of s 10; nor were they "technical and clerical" in nature: at [44].

While extra-curial punishment can be taken into account in an appropriate case, it would be wrong for a court to impose a s 10 dismissal without conviction calculated to circumvent or influence the exercise of discretions of other statutory office holders responsible for the licensing provisions under the Act: *Cramp* at [51]. Rather, it is of fundamental importance that strict adherence to the firearms legislation be enforced. It is appropriate, if not inevitable, that a conviction be imposed: *Cramp* at [52]. Hulme J dissented (at [7]) on this aspect of the case:

> The likely impact of a decision to convict or, in the exercise of a statutory discretion not to convict, and the likely impact of any particular sentence is something to which regard should be had.

Cumulative sentences may be warranted where there are separate offences of possession under s 7(1) and the removal of a serial number: *R v Amurao* at [73]. As to setting an aggregate sentence see [7-505].

The standard non-parole period provision

A standard non-parole period of 4 years applies for s 7(1) offences committed on or after 21 August 2015. For offences committed on or after 1 February 2003 and before 21 August 2015, the standard non-parole period is 3 years. The standard non-parole period does not apply if the offence is dealt with summarily: *Crimes (Sentencing Procedure) Act 1999*, s 54D(2).

The court queried in *R v Najem* [2008] NSWCCA 32 at [38] the "two irreconcilable standards" of the (then) 3 year standard non-parole period and the 14 year maximum penalty for s 7 offences. Hulme J stated at [39]:

> One would fairly have expected that the standard non-parole period for an offence in such mid-range to be of the order of half of the maximum. Nothing in the Explanatory Memorandum to the Bill that led to the enactment of these sections or the Ministers' Second Reading speeches when introducing the Bill provides any assistance in answering the quandary.

Possession of prohibited firearms and good character

It cannot be said that offences of possession of prohibited firearms are committed frequently by persons of otherwise good character so as to fall within the category of

offence where less weight is afforded to an offender's prior good character: *Athos v R* (2013) 83 NSWLR 224 at [44]. A court can consider the question of the weight that should be attributed to an offender's good character but any reduction in weight cannot be on the basis of the type of offence that has been committed: *Athos v R* at [45].

Section 21A(2)

See generally [11-000] **Section 21A factors "in addition to" any Act or rule of law**. It is impermissible to have regard to an aggravating factor in s 21A(2) if it is an inherent characteristic of an offence: *Elyard v R* [2006] NSWCCA 43 at [9]–[10].

In *Gall v R* [2015] NSWCCA 69, the offender and his son were charged with multiple offences, including the unauthorised possession of a prohibited firearm, following a violent altercation with members of an outlaw motorcycle gang during which one gang member was shot. There had been no retaliatory action following that incident. Subsequently, a firearm was found, during a police search, on the kitchen table of the offender's home where, the sentencing judge found, it was readily accessible and loaded, available for use. The Court concluded that in the particular circumstances, it was not an error for the judge to conclude the offence was aggravated as the degree of planning (s 21A(2)(n)) went beyond what one would normally expect for an offence of that kind. The positioning of the firearm was well thought through — it was loaded and readily available for use: at [216]–[218].

See further discussion below under **Section 21A(2)** at [60-050].

[60-045] Section 50A: unauthorised manufacture of firearms

A person who manufactures a firearm, without being authorised by a licence or permit, is liable to a maximum of 10 years imprisonment: s 50A(1) *Firearms Act*. The maximum increases to 20 years where a person manufactures a pistol or prohibited firearm: s 50A(2). A standard non-parole period has not been been assigned to either offence. Given the definition of "manufacture" in s 50A(5) of "assemble a firearm from firearm parts", the criminality encompassed can extend from a very sophisticated operation at the one end of the spectrum to a relatively minor adjustment to a pre-existing firearm at the other: *Truong v R* [2013] NSWCCA 36 at [111]. A relevant factor in determining the objective seriousness of a particular offence is whether the firearm is in working order: *Truong v R* at [111]. Manufacturing offences which were committed as part of a small scale business to make and sell seven firearms, including two sub-machine guns with "devastating firing capabilities", were regarded as very serious in *Smart v R* [2013] NSWCCA 37 at [36]. This was particularly so where the manufactured sub-machine guns were destined for sale and, if they had been sold, two extremely dangerous weapons would have been delivered into the community, probably the criminal fraternity: *Smart v R* at [36].

[60-050] Section 51D: possession of more than three firearms

Section 51D prohibits the possession of more than three firearms if the firearms are not registered and the person is not licensed to possess them. The basic offence under s 51D(1) attracts a maximum penalty of 10 years imprisonment.

Section 51D(2) provides a higher maximum penalty of 20 years if a person is in possession of more than three firearms any one of which is a pistol or prohibited firearm. A standard non-parole period of 10 years imprisonment applies.

In the Second Reading Speech to the Bill which introduced the standard non-parole period for s 51D(2) and several other firearm offences, the Attorney General stated (NSW, Legislative Council, *Debates*, 17 October 2007, p 2667 at 2668):

> In particular, these serious offences of possession, sale and supply of firearms may lead to other crimes of ever escalating gravity, including firearms usage and ultimately crimes of violence including armed robbery and even murder.

Spigelman CJ explained the rationale behind s 51D in *R v Brown* [2006] NSWCCA 249 at [21]–[22]:

> When s 51D was introduced by the *Firearms Amendment (Public Safety) Act 2002*, the Minister said: "Firearm related crime is a major concern for both police and the community." The offence, in a series of offences relating to firearms in the *Firearms Act 1996*, is directed to persons who are engaged in the warehousing of firearms for sale. A person so engaged plays a critical role in the perpetration by other criminals of the worst crimes of violence in this community. The maximum sentence reflects the important role that such conduct plays in the injuries inflicted upon members of the community by deadly weapons.

Sentences imposed for such offences must reflect the legislative intention expressed in the Act, which is to eliminate firearms from the community unless their possession is expressly authorised, and "operate as real disincentives to those otherwise attracted to the illegal possession of firearms": *R v Mahmud* [2010] NSWCCA 219 at [71]. There is no discernible range of sentences for offences against s 51D(2) given the small number of decided cases: *Yammine v R* [2010] NSWCCA 123 at [52]; *Dionys v R* [2011] NSWCCA 272 at [45], [46]; *Taylor v R* [2018] NSWCCA 50 at [65].

Matters relevant to assessing the objective seriousness of an offence include: the number of firearms and the number which are prohibited or pistols, the nature and type of the firearms, the purpose for their possession, whether there is evidence showing any relationship between the possession of the firearms with the drug industry, the location of the property and the security under which the firearms are kept: *Mack v R* [2009] NSWCCA 216 at [40]; see also *R v Mahmud* at [62]–[66].

The offence in *Brown* "was a serious example of the offence under s 51D" (at [24]) since the offender "… intended to sell the firearms to criminals for profit. He had in his possession, for that purpose, an automatic self-loading rifle, which he called a 'machine gun' and which was clearly capable of inflicting serious injury and also some compact 'keyring' firearms, which were particularly dangerous by reason of their capacity for concealment." at [23]. Similarly in *R v Lachlan* [2015] NSWCCA 178, the respondent possessed the firearms to buy and sell for profit and was contributing to their potential use for purposes which may lead to serious injury or death: at [74]. By comparison, the offending in *Aird v R* [2021] NSWCCA 35, where the offender was in possession of two pen guns and seven low-calibre hunting rifles for more than 10 years (some of which were inherited), while serious, was less so than the cases involving holding firearms for the purpose of sale or storage because in those cases the risk they "might end up in the hands of criminals, and be used to perpetrate crimes of violence, is foreseeable and a likely outcome of the possession": at [45], [50]–[51].

The purpose of the prohibition under s 51D is broader than the punishment of criminals who warehouse and harbour illegal firearms. It extends to the stockpiling

of weapons by persons without any further criminal intent: *R v Cromarty* [2004] NSWCCA 54; applied in *Taylor v R* at [59]. This is because of the risk that the stockpile, if vulnerable, may inadvertently feed the market in illegal supply of firearms: *Cromarty* at [86]. There is a particular risk of firearm theft from remote rural properties by persons engaged in criminal activities, which may be relevant in assessing the objective seriousness of an offence: *Taylor v R* at [50], [52]; see also *Cornish v R* [2015] NSWCCA 256 at [74]. An offender is not less culpable for such an offence if they collect a substantial number of firearms for defensive purposes: *Yammine v R* at [42].

In *Dionys v R*, the s 51D(2) offence related to five firearms, one of which was a light machine gun. Another 89 weapons, some of which were semi-automatic, were included on a Form 1. In that case, the sheer number of weapons increased the objective seriousness of the offence as did the fact the offender's motivation was monetary gain. In such circumstances, general deterrence and denunciation required condign punishment: at [48].

In *R v Lachlan*, one factor which rendered the offence under s 51D(2) serious was that all of the firearms were in working order and none were stored securely, with two loaded and the remaining two in close proximity to ammunition: *R v Lachlan* at [73]. Further, s 51D(2) requires that at least one firearm is "prohibited", and in *R v Lachlan*, all four firearms were "prohibited firearms": at [71].

Shortened firearms have no legitimate purpose and are particularly dangerous due to their capacity for concealment, which makes them suited for serious criminal activity: *R v Lachlan* at [71], [72]; *R v Brown* [2006] NSWCCA 249; *El Jamal v R* [2017] NSWCCA 243 at [34]–[35]. The fact an offender themselves shortens a firearm, although not an element of the offence, may be taken into account as part of the context of the offending: *Weaver v R* [2021] NSWCCA 215 at [117].

Possessing a number of firearms knowing it is illegal to do so increases the objective seriousness of the offence: *Basedow v R* [2010] NSWCCA 76 at [20]; *Taylor v R* at [63]. The objective criminality of an offender who possesses a number of weapons because of a "fetish" is less serious than possession for a more sinister motive: *R v Mahmud* at [64].

The period of time an offender was in possession of the relevant firearms may be relevant to an assessment of the objective seriousness of the offence but if an offender wishes to argue the period of possession was so short as to make the offence less objectively serious then the burden of proof is on the offender: *Yammine v R* at [46]–[47].

Possessing unserviceable weapons is less objectively serious than the possession of serviceable weapons although the degree to which the weapon is unserviceable will be relevant: *R v Mezzadri* [2011] NSWCCA 125 at [19].

[60-052] Supply and acquisition of firearms

Part 6 *Firearms Act* contains a range of offences relating to the unauthorised supply and acquisition of firearms. These include supply to an unauthorised person (s 51(1), or s 51(1A) in the case of a pistol or prohibited firearm), acquisition of an unauthorised firearm (s 51A), and the supply of firearms on an ongoing basis (s 51B(1)).

Supply is defined under s 4(1) to mean "transfer ownership of, whether by sale, gift, barter, exchange or otherwise". "Acquire" means accept or receive supply of: s 4(1).

Deterrence

Spigelman CJ said in *R v Howard* [2004] NSWCCA 348 at [66]:

> Where it appears that there are elements within the community who refuse to accept that firearms offences must be regarded as serious, the objectives of general and personal deterrence are entitled to substantial weight in sentencing for such offences. The availability of such weapons poses a major threat to the community particularly where, as here, an accused is completely indifferent to the persons who were to acquire them. The community has determined that trade in such weapons on any other than a strictly regulated basis is to be regarded as a serious offence. That must be reflected in the sentence imposed.

Assessing seriousness of supply and acquisition offences

The number and quality of firearms purchased or sold is relevant to the gravity of the offence: *R v Dunn* [2003] NSWCCA 169 at [21].

Where an offender acts as an agent for others engaged in the business of illegally supplying weapons this will have a bearing on the determination of the objective seriousness of an offence: *R v Parkinson* [2010] NSWCCA 89 at [45], although note this discussion occurred in the context of a finding by the sentencing judge that the offence was "below the mid-range" and before the High Court decision in *Muldrock*.

It is an aggravating feature if:

- a person sells a weapon with a silencer and does not have any concern about the identity of the purchaser since "[a silencer] is quintessentially a feature of weapons used in violent crimes": *Howard*, above, per Spigelman CJ at [65]
- firearms are sold to members of an outlaw motorcycle gang: *R v Sward* [2014] NSWCCA 259 at [44].

An intermediary who arranges the unauthorised purchase or sale of firearms may not be substantially less culpable than the principal: *R v Mohamad* [2005] NSWCCA 406, Hidden J stated at [17]:

> Even if the applicant were acting as an intermediary, given the number of weapons involved and the surrounding circumstances, he could have been in no doubt that they were being purchased for an unlawful end. As his Honour pointed out, the provisions of the *Firearms Act* restricting the sale and purchase of weapons were born of the recognition of the association of "the unlawful disposal of firearms with the subsequent illegal use of those firearms by the criminal element". Involvement in that distribution as an intermediary may be, as his Honour recognised, "somewhat less culpable" than that of the purchaser, but not markedly so.

In *Dionys v R* [2011] NSWCCA 272, the court found the offence of selling firearms on an ongoing basis (s 51B(1)) was of substantial objective seriousness. The offender had sold five firearms, one of which was a light machine gun. The court said at [68]:

> The type and number of weapons sold is indicative of their being part of a substantial business of trading weapons without regard to the character of the purchaser and the

> inevitable consequence that some at least would end up in the hands of criminals. But for the true identity of the purchaser and the intervention of the police, the trade in weapons would have continued.

The offender in *R v Sward* was sentenced for four offences under s 51(1A)(a). The court concluded that imposing four equal and concurrent sentences did not take account of the additional criminality in the sale of four prohibited pistols: at [44].

In considering a submission concerning the degree of commonality between the offences under s 51B(1) and 51D(2) in *Dionys v R*, the court concluded the offences were quite different. Hoeben J, with whom McClellan CJ at CL agreed, said, at [61]:

> Count 1 deals with the sale of weapons on at least three occasions. Count 2 is directed to the warehousing of firearms for sale. While an element of possession and control is essential for a sale to take place, the offences themselves are qualitatively and in fact, different.

For a discussion of other factors relevant to the supply of prohibited firearms, see *Truong v R; Le v R; Nguyen v R* [2013] NSWCCA 36, where each offender had two counts of offending under s 51(1A).

Standard non-parole period

The unauthorised supply of a pistol or prohibited firearm under s 51(1A) or (2A), and supplying firearms on an ongoing basis (on three or more occasions within 12 months) under s 51B, each carries a maximum penalty of 20 years. A standard non-parole period of 10 years was also introduced for these offences on 1 January 2008. As to the application of the standard non-parole period see the discussion at [7-890]ff.

Section 21A(2) "without regard for public safety" and planning

Section 21A(2)(i) *Crimes (Sentencing Procedure) Act 1999* provides a court can take into account as matter in aggravation that "the offence was committed without regard for public safety".

In *MP v R* [2009] NSWCCA 226 the offender was charged with the common law offence of conspiracy to sell unregistered firearms. Over a lengthy period of time, the offender funded and made various arrangements related to the purchase of firearms interstate for sale in NSW. The court held that where an "inherent characteristic" of a particular offence exceeds the norm it may be taken into account as an aggravating factor within s 21A(2). The court concluded it was appropriate to take the disregard of public safety into account as an aggravating factor because "the longevity of the risk, the fact that in excess of 740 weapons were placed into circulation as a result of the applicant's participation in the conspiracy … overwhelmingly establish that the risk to the public brought about by this offence 'exceeds the norm'": at [37].

Similarly, the court concluded that the scale and extent of the conspiracy exceeded what could be regarded as the normal level of planning associated with a criminal activity: s 21A(2)(n). Justice Hoeben said, at [40]:

> The offence involved the acquisition of specific weapons, their modification, the preparation of false documents, the storage and transportation of weapons interstate, the identification of appropriate purchasers and the ultimate sale of specified weapons to these purchasers. Apart from the sophistication of these procedures, the sheer scale of the enterprise took it beyond the norm.

[60-055] Other miscellaneous offences

Each of the following offences are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1, Table 2, Pt 4 *Criminal Procedure Act 1986*.

Stolen firearms

It is an offence to use, supply, acquire or possess a stolen firearm or firearm part, or to give possession of a stolen firearm or firearm part to another person: s 51H(1). The maximum penalty is 14 years imprisonment.

The provision applies to a stolen firearm or firearm part whether it was stolen before or after the commencement of s 51H: s 51H(3). It is a defence if the defendant proves that they did not know, and could not be reasonably expected to have known, that the firearm or firearm part was stolen: s 51H(2).

Possession of digital blueprints for manufacture of firearms

A person must not possess a digital blueprint for the manufacture of a firearm on a 3D printer or on an electronic milling machine: s 51F(1). A maximum penalty of 14 years imprisonment applies. Innocent production, dissemination or possession, conduct engaged in for public benefit and approved research are available defences under s 51G.

The offences in ss 51H and 51F were inserted by the *Firearms and Weapons Prohibition Legislation Amendment Act 2015* and commenced on 24 November 2015.

Remote controlled possession and use of firearms

A person must not possess or use a firearm by remote control unless authorised by a permit. The maximum penalty is 5 years imprisonment, or 14 years if the weapon is a pistol or prohibited firearm: s 51I(1)–(2). These offences were inserted by the *Firearms and Weapons Legislation Amendment Act 2017* and commenced on 1 November 2017.

[60-060] Prohibited weapons offences under Weapons Prohibition Act 1998

The *Weapons Prohibition Act 1998* commenced on 8 February 1999 (GG No 15 of 5.2.1999, p 392) and was introduced to replace the "inadequate and outmoded" *Prohibited Weapons Act 1989* (Second Reading Speech, Weapons Prohibition Bill, NSW, Legislative Assembly, *Debates*, 22 October 1998, p 8912).

The principles and objects of the Act are outlined at s 3. The underlying principles confirm that the possession and use of prohibited weapons is a privilege that is conditional on the overriding need to ensure public safety. The specific objectives include to require each person under the authority of a permit to have "a genuine reason for possessing or using the weapon" and "to provide strict requirements that must be satisfied in relation to the possession and use of prohibited weapons."

Types of weapons

The term "prohibited weapon" is defined by s 4(1) as "anything described in Schedule 1." The weapons listed in Sch 1 include knives (cl 1), military style weapons (cl 1A), miscellaneous weapons such as spear guns, crossbows, batons and tasers (cll 2(4), (5), (17)–(18A)), imitations (cl 3) and handcuffs (cl 4(2)).

A "prohibited weapon" also includes any collection of disassembled parts which would, if assembled, be a prohibited weapon: s 4(2)(a1). Section 4(2)(a1) was inserted by the *Firearms and Weapons Legislation Amendment Act 2017*, in response to *Jacob v R* [2014] NSWCCA 65 where the majority concluded that an unassembled crossbow was not a prohibited weapon: at [16]; [141].

A hierarchy of prohibited weapons was recognised in *R v Williams* [2005] NSWCCA 355, where Simpson J said at [37]:

> Recourse to Schedule 1 of the Weapons Prohibition Act, which defines prohibited weapons, shows that a wide variety of items much more dangerous than a replica pistol are encompassed in the prohibition contained in s 7(1). These include flick-knives, ballistic knives, and a variety of other kinds of obviously dangerous knives, bombs, grenades, rockets, missiles and mines in the nature of explosives or incendiaries, flame throwers, darts, dart projectors, devices capable of administering electric shocks. The starting point for this offence was ten years out of a possible maximum of fourteen years. I would think that the replica pistol would be among the least dangerous of the weapons prohibited by s 7, which would put the applicant's offence at a lower point on the scale than his Honour appears to have treated it.

Possess or use a prohibited weapon: s 7(1)

Section 7(1) *Weapons Prohibition Act 1998* makes it an offence to "possess or use a prohibited weapon unless the person is authorised to do so by a permit." A holder of a permit commits an offence under s 7(2) if they possess or use the weapon for any purpose other than the "genuine reason" for possessing or using the weapon, or if they contravene any condition of the permit. Section 11 provides a list of nine "genuine reasons". Possession or use of a prohibited weapon for personal protection is generally not permitted as a genuine reason: s 11(3).

The maximum penalty for conviction on indictment is 14 years imprisonment. Where prosecuted on indictment, the offence carries a standard non-parole period of 3 years for offences committed before 21 August 2015, and 5 years for offences committed on or after 21 August 2015.

The offences under s 7 of the Act are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1, Table 2, Pt 4 *Criminal Procedure Act 1986*. JIRS sentencing statistics reveal that summary disposition is the predominant method of dealing with a possession offence where it is the principal charge.

RS Hulme AJ (Ward JA agreeing) in *Jacob v R* [2014] NSWCCA 65 recognised the difficulties in assessing objective seriousness given the wide variety of "prohibited weapons" encompassed by the Act, particularly given military style weapons are included and all weapons in the non-military category lack a common feature other than their capacity to assist in inflicting serious injury: at [180]–[184]. In that case, a sentence of 2 years, 6 months for possession of a slingshot was found to be manifestly excessive. While a slingshot could be fatal, particularly if used to fire a ball bearing, it is very unlikely to be so. In the scale of weapons, it falls a long way below military weapons: at [184]–[185].

An extendable baton, although dangerous and designed for concealment, falls towards the low end of the scale of weapons: *Marracos v R* [2008] NSWCCA 267 at [24]–[25]; *Leung v R* [2014] NSWCCA 44 at [73]. Similarly, the nature of the

taser possessed in *Tran v R* [2010] NSWCCA 183 rendered the offence in that case significantly below the middle range of objective seriousness: at [23]. However in *R v Lachlan* [2015] NSWCCA 178, the offender was in possession of a stun gun, extendable baton, knuckledusters and taser. The court noted that there could be no legitimate purpose for the possession of such weapons, and the ease of their concealment also made them particularly dangerous: at [78].

The court in *Jones v R* [2016] NSWCCA 230 rejected a submission that a custodial sentence was not warranted for possession of a set of knuckledusters which were home-made from solid metal with many jagged edges. The knuckledusters were capable of causing more serious (although not life-threatening) injuries than normal knuckledusters and the offence was therefore more objectively serious: at [13], [16].

However, in *R v Porte* [2015] NSWCCA 174, an 18-month ICO was held to be unwarranted for possession of a can of mace found at the offender's home, given his evidence that he acquired it at a trade fair and believed it legal to possess. There was no evidence of criminal purpose: at [27]. In re-sentencing, the court imposed a s 10A conviction with no further penalty: at [158].

The offender in *Della-Vedova v R* [2009] NSWCCA 107 was sentenced for possession of ten rocket launchers containing ten rockets acquired in his position as an army officer responsible for their destruction. Simpson J observed that although the sentencing judge made no express finding that the offences were in the worst case category, such a finding was open: at [77]. The offence involved a serious breach of trust resulting in the availability of the weapons on the black market; the offence was committed to enrich the offender; the weapons were dangerous and life threatening and the only reasonable use of them was for criminal or terrorist activities: at [84], [85]. Note: the expression "worst case category" should now be avoided, see *The Queen v Kilic* (2016) 259 CLR 256 at [18] and the discussion at [10-005] **Cases that attract the maximum**.

Where an offender is being sentenced for possession of a prohibited weapon as well as possession of a firearm (s 7 *Firearms Act 1996*) some accumulation may be warranted to reflect that there are separate and distinct weapons: *Tran v R* at [23].

Other offences under Weapons Prohibition Act

Other offences under the *Weapons Prohibition Act* include restrictions on the sale or purchase of prohibited weapons (ss 23, 23A, 23B), unauthorised manufacture of prohibited weapons (s 25A), possession or use of a prohibited weapon or military-style weapon by remote control without a permit (s 25D), possession of digital blueprints for manufacture of prohibited weapons (s 25B), breach of safe-keeping requirements (s 26), offences relating to permits (ss 20, 29–32), and offences against weapons prohibition orders (s 34).

Some offence provisions, such as ss 23A, 25A and 25D, provide maximum penalties which differ for military and non-military weapons. In those circumstances, an offence involving a non-military weapon must be assessed against the maximum, shorn of the impact of military weapons: *Jacob v R* [2014] NSWCCA 65 at [187].

Offences pursuant to ss 20, 23(1), 23A(1), 25B(1), 25D, 31 and 34 are also Table 2 offences under the *Criminal Procedure Act 1986*.

[60-070] Firearms offences under the Crimes Act 1900

Section 33A: discharge firearm with intent

Part 3 Div 6 *Crimes Act* contains firearms offences relating to acts causing danger to life or bodily harm. Section 33A(1) makes it an offence to discharge or attempt to discharge a firearm with intent to cause grievous bodily harm. Section 33A(2) creates an offence of discharging or attempting to discharge a firearm with intent to resist arrest. Both offences carry a maximum penalty of 25 years imprisonment, and for offences committed on or after 21 August 2015, a standard non-parole period of 9 years also applies.

The seriousness of an offence under s 33A(1) will be aggravated if substantial injury is sustained: *Melbom v R* [2011] NSWCCA 22 at [97]; *R v Tuala* [2015] NSWCCA 8 at [45]. In *Melbom v R*, where the offender fired a round of ammunition towards a group of people and hit an innocent bystander, the offence was found to be at the high end of the range: at [137].

Section 33B: use or possess weapon to resist arrest

See **Assault, Wounding and Related Offences** at [50-090].

Section 93G: causing danger with firearm

Offences relating to public disorder are found in Pt 3A *Crimes Act*. Division 2 deals with firearms offences relating to public order.

Section 93G(1)(a) prohibits the possession of a loaded firearm in a public place, or in any other place so as to endanger the life of another person. The community regards the crime of carrying a concealed weapon such as a pistol (under s 93G(1)(a)) as a very serious offence: *Saad v R* [2007] NSWCCA 98 at [38]. The reason for possession is relevant to an assessment of the objective seriousness of an offence. A common feature which elevates objective gravity, is that the offender possesses the firearm in connection with a criminal enterprise: *Sumrein v R* [2019] NSWCCA 83 at [34]–[36] (see also the discussion of the cases cited at [60-040] above), [45]. In *Sumrein v R,* the court found the judge erred by failing to take into account that the applicant's motive for obtaining the gun was to protect himself and his family because that was relevant to assessing the objective seriousness of the offence and the offender's moral culpability: at [45]–[46].

Section 93G(1)(b) prohibits the discharge of a firearm in or near a public place. Section 93G(1)(c) prohibits carrying or firing a firearm in a manner likely to injure any person or property, or with disregard for the safety of the offender or others. All three offences under s 93G have a maximum penalty of imprisonment for 10 years.

Parliament has treated the s 93G offences as more serious, because of their 10-year maximum penalty, than malicious wounding (now reckless wounding under s 35(4), with a maximum penalty of 7 years): *R v Cicekdag* [2004] NSWCCA 357. In that case, Hoeben J stated at [35] in relation to s 93G(1)(b):

> The problem with a projectile weapon, such as a firearm, is that once the projectile has been released it will travel a considerable distance and the firer has no control over its ultimate destination. Death or injury can result. This is particularly so where the discharge is indiscriminate in a public place and as happened here, a number of shots are fired.

In a case involving an offence under s 93G(1)(b), especially where more than one shot has been fired, the principle of deterrence and in particular general deterrence is of considerable importance: *Cicekdag*, above, at [38].

Motive is not a relevant consideration because the potential consequences of an offence are the same regardless: *Ah-Keni v R* [2020] NSWCCA 122 at [59]. In that case, the court found it was open for the sentencing judge to find the objective seriousness of an offence against s 93G(1)(b) was in the upper range: [58]–[59]. The intoxicated offender had, as a prank, produced a pistol in a taxi where it discharged without injuring anyone.

Lacking knowledge or experience in the use of a firearm is not a mitigating factor for an offence under s 93G(1)(b). In *R v Abdallah* [2005] NSWCCA 365 at [81], Simpson J stated:

> In a crowded venue, with a large number of people moving rapidly, the appellant, inexperienced in the use of firearms, picked up and fired a gun in the direction of the crowds of people. While, in one sense, his inexperience in the use of firearms might weigh in his favour, in another, it points the other way: the appellant did not know how to use the gun safely.

Discharging a firearm in the direction of another person will aggravate the seriousness of the offence: *R v Adams* [2004] NSWCCA 279 at [33], [36], where an offence called "fire firearm with disregard for safety" in the judgment is identified by court records as s 93G(1)(c). While an offence under s 93G(1)(c) is regarded as serious, in *R v Cahill* [2004] NSWCCA 451, the court found the judge erred in describing a s 93G offence as "almost in the same category as murder or manslaughter"; s 93G does not require injury, but there is the potential for it: at [17].

Where a charge under s 93G does not refer to a disregard for public safety as an element of the offence, such a circumstance may be an aggravating factor under s 21A(2)(i): *Haidar v R* [2007] NSWCCA 95 at [26]. (The specific wording of the charge in *Haidar* at [9] was to "endanger the safety" of another person, which is one form of the offence under s 93G(1)(c)).

The type of weapon fired in an offence under s 93G is relevant to the gravity of the conduct. In *Crago v R* [2006] NSWCCA 68, the firearm used was an air rifle and not the much more dangerous firearms that fall within the operation of the *Firearms Act*: at [47].

Section 93GA: firing at dwelling-houses or buildings

Section 93GA(1) makes it an offence to fire a "firearm at a dwelling-house or other building with reckless disregard for the safety of any person". The offence attracts a maximum penalty of 14 years imprisonment.

An offence under s 93GA(1A) was inserted by the *Crimes Legislation Amendment (Gangs) Act 2006* on 15 December 2006: a person must not fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person. A maximum penalty of 16 years applies.

On 9 April 2012, s 93GA(1B) was inserted by the *Crimes Amendment (Consorting and Organised Crime) Act 2012*. The provision makes it an offence for a person to

fire a "firearm at a dwelling-house or other building with reckless disregard for the safety of any person in the course of an organised criminal activity": s 93GA(1B). The maximum penalty is 16 years imprisonment.

It is not necessary, in the prosecution of any offence under s 93GA, to prove that a person was actually placed in danger by the firing of the firearm: s 93GA(2).

Standard non-parole periods were introduced for each offence under s 93GA on 21 August 2015. For offences committed on or after that date, a standard non-parole period of 5 years (s 93GA(1)) or 6 years (s 93GA(1A) or (1B)) applies.

Offences of the kind under s 93GA(1) require condign punishment: *Powell v R* [2014] NSWCCA 69 at [38]; *Raad v R* [2015] NSWCCA 276 at [32].

In *Powell v R*, the applicant and a co-offender had attended a boarding house to enquire as to someone's whereabouts. At least one shot was fired at the home from a shortened rifle. The court found that although a lengthy sentence for the dangerous and anti-social act was inevitable, a sentence of 9 years with a non-parole period of 5 years for a s 93GA(1) offence was outside the bounds of the sentencing discretion, though not to an extreme degree: at [30], [37].

In *Quealey v R* [2010] NSWCCA 116, the court found the sentencing judge did not err by characterising a s 93GA(1) offence as at "the upper end of the middle range" of objective seriousness, given a shotgun was discharged on two separate occasions at residential premises, in the knowledge four persons were inside, the first shot penetrating the house and the second in the constructive presence of the applicant's two year old granddaughter: at [18]–[19].

[The next page is 31001]

Damage by fire and related offences

[63-000] The statutory scheme

Part 4 Div 2 *Crimes Act 1900* contains offences of destroying or damaging property by means of fire: ss 195, 196 and 197. These offences are usually dealt with summarily: Sch 1 *Criminal Procedure Act 1986*. From 15 February 2008, the term "maliciously" in s 195 was replaced by the fault element — "intentionally or recklessly": *Crimes Amendment Act 2007*.

[63-010] Destroying or damaging by fire

The common law offence of arson was abolished by the *Crimes (Criminal Destruction and Damage) Amendment Act 1987*. The common law statements about arson assist in applying the purposes of punishment and also in assessing the objective seriousness of crimes committed under ss 195–198. In *Porter v R* [2008] NSWCCA 145, Johnson J said at [81]:

> The crime of arson may be committed in a variety of circumstances. It is an extremely serious and dangerous crime: *R v James* (1981) 27 SASR 348 at 351; *R v Davies* at 358 [44]. The motive of the offender is relevant to an assessment of the objective seriousness of the offence: *Newton v State of Western Australia* [2006] WASCA 247 at [13]. Courts have observed that arson is very easy to commit, usually with destructive (if not tragic) consequences: *R v Catts* (1996) 85 A Crim R 171 at 176; *Newton v State of Western Australia* at [12]. It has been said that arson is often a difficult crime to detect: *R v Davies* at 370 [97]. Consideration of factors such as these has led courts to emphasise the importance of general deterrence in arson cases.

Destroying or damaging by fire encompasses a vast array of criminal behaviour, particularly under s 195(1)(b): *R v Pitt* [2001] NSWCCA 156 at [29]. Factors relevant to assessing the objective seriousness of a given offence include:

- extent of the damage caused: *R v Elzakhem* [2008] NSWCCA 31 at [45]; *Porter v R* at [56]. For example, an offence may be considered serious where damage was done to a limited public resource such as public housing: *R v Pitt* at [27], or where it involved "substantial loss and personal stress" to small business owners: *Porter v R* at [83].
- potential risk of injury to other people: *Porter v R* at [80]; *R v Dinos* [1999] NSWCCA 208 at [8]–[10]
- possible spread of the fire: *R v Baker* [2000] NSWCCA 85 at [16]: *Porter v R* at [80]
- offender's knowledge of the financial effects of their conduct. For example, where the property is uninsured: *R v Priest* [2000] NSWCCA 27 at [14].
- offender's motive — although the lack of motive does not mitigate the seriousness of the crime: *R v Porter* at [81], [84]
- degree of planning and premeditation: *R v Karibian* [2007] NSWCCA 334 at [28], *R v VAA* [2006] NSWCCA 44 at [45].

[63-012] Section 197: dishonestly destroy or damage property and the De Simoni principle

Section 197(1) provides that a person who dishonestly, with a view to making a gain for that person or another, destroys or damages property is liable to imprisonment for 7 years (s 197(1)(b)) or where it was committed dishonestly and for financial gain, the maximum is imprisonment for 14 years (s 197(1)(b)). In *Ruge and Cormack v R* [2015] NSWCCA 153, the sentencing judge took into account as an aggravating factor, when sentencing Cormack, that he was aware Ruge wanted to commit an "insurance job". However, although Ruge was sentenced for an offence under s 197(1)(b), Cormack was only charged with an offence contrary to s 195(1A)(b) (damage or destroy property by means of fire in company, carrying a maximum penalty of 11 years with no element concerning financial gain). The court held that there was a breach of the principles in *The Queen v De Simoni* (1981) 147 CLR 383 because the judge took into account a circumstance of aggravation with which Cormack was not charged but which would render him liable to a more severe penalty under s 197(1)(b).

[63-015] Section 198: intention to endanger life and the De Simoni principle

Section 198 provides that a person who destroys or damages property intending, by the destruction or damage to endanger the life of another, is liable to imprisonment for 25 years. The offence only requires an intention to endanger life. It is a breach of the principle in *The Queen v De Simoni* (1981) 147 CLR 383 to take into account an intention to kill: *Cassidy v R* [2012] NSWCCA 68 at [6], [22]. The judge in *Cassidy* effectively sentenced the applicant for offences in Pt 3 Div 3 *Crimes Act* headed "Attempts to murder" (ss 27–30). Although those offences have the same maximum penalty as an offence under s 198, they attract standard non-parole periods and require an intention to kill. They are therefore "more serious" within the meaning of that term in *De Simoni*: Cassidy at [7], [26].

[63-020] Bushfires

It is an offence under s 203E *Crimes Act 1900* to intentionally cause a fire and to be reckless as to the spread of the fire to vegetation. The offence is punishable by up to 14 years' imprisonment, with a standard non-parole period of 5 years. The serious nature of the offence is reflected in the maximum penalty: *R v Mills* (2005) 154 A Crim R 40 at [53]. Although an offence may be committed without regard for public safety, this circumstance should not be given separate consideration as an aggravating factor under s 21A(2)(i) *Crimes (Sentencing Procedure) Act 1999*: *R v Mills* at [56].

In *R v Mills* at [54]–[57] the court found that two offences under s 203E(1) fell within the upper range of objective seriousness, subject only to the respondent's mental condition, which did not require substantial mitigation. The court outlined factors relevant to the seriousness of the offence at [55], including the damage caused, the offender's awareness of the potential harm caused by bushfires and his ongoing criminality.

[The next page is 31201]

Domestic violence offences

[63-500] Introduction

Domestic violence is accepted to be a blight on civil society. A court sentencing an offender for an offence committed in what is loosely described as a "domestic context" must apply specifically developed sentencing principles.

The High Court in *The Queen v Kilic* (2016) 259 CLR 256 at [21] recognised a societal shift in relation to domestic violence:

> … current sentencing practices for offences involving domestic violence depart from past sentencing practices for this category of offence because of changes in societal attitudes to domestic relations.

The community's concern at the level of domestic violence, generally inflicted by men against women, is given effect in sentencing by recognising the importance of general and specific deterrence. In that context, in *Yaman v R* [2020] NSWCCA 239 at [135] Wilson J (Fullerton and Ierace JJ agreeing) said:

> The right of all women to determine their own path in life must be protected and upheld by the courts. Where a woman's right is ignored or disregarded by an offender, that right must be vindicated, including by punitive and strongly deterrent sentences where necessary.

[63-505] Statutory framework

Last reviewed: March 2024

Definitions of "personal violence offence" and "domestic violence offence" are found in ss 4, 5, 5A, 11 *Crimes (Domestic and Personal Violence) Act 2007*. These definitions are used as a basis for applying provisions in the *Crimes (Sentencing Procedure) Act 1999* such as those discussed below.

A "domestic violence offence" is defined in s 11 *Crimes (Domestic and Personal Violence) Act* as an offence committed against a person with whom the offender has (or has had) a domestic relationship, being:

(a) a personal violence offence, or

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(b1) an offence under the *Crimes Act 1900*, s 54D(1) [see below at **[63-540] Abusive behaviour towards intimate partners**, an offence expected to commence between 1 February and 1 July 2024], or

(c) an offence, other than a personal violence offence, in which the conduct that constitutes the offence is domestic abuse.

Section 6A of the *Crimes (Domestic and Personal Violence) Act* provides the definition of "domestic abuse", and what may constitute domestic abuse. Section 6A was

introduced, and s 11(1)(c) replaced, by the *Crimes Legislation Amendment (Coercive Control) Act 2022*, and apply to behaviour (or alleged behaviour) that occurred, or an offence (or an alleged offence) that was committed, on or after 1 February 2024: *Crimes Legislation Amendment (Coercive Control) Act*, s 2; Sch 2[6].

"Domestic relationship" is broadly defined in s 5. The definition of "personal violence offence" in s 4 includes most of the assault and wounding offences referred to in the list in **Assault, wounding and related offences** at **[50-000]**. Section 12(2) provides that if a person pleads guilty to, or is found guilty of, an offence and the court is satisfied the offence was a domestic violence offence, the court must direct that the offence be recorded on the person's criminal record as a domestic violence offence.

Section 5A provides that a personal violence offence by a paid carer against a dependant is a domestic violence offence and an ADVO may be made for the dependant's protection. However, a personal violence offence committed by a dependant against a paid carer is not a domestic violence offence, although the paid carer may still apply for an APVO against the dependant.

The *Crimes (Sentencing Procedure) Act 1999* imposes several requirements on a court sentencing an offender for a domestic violence offence.

When a court finds a person guilty of a domestic violence offence, it must impose, under s 4A(1), either:

- a sentence of full-time detention, or
- a supervised order (being an intensive correction order (ICO), community correction order (CCO) or conditional release order (CRO) that includes a supervision condition).

However, the court may impose a different sentence if satisfied that it is more appropriate in the circumstances, and gives reasons for reaching that view: s 4A(2).

Additional requirements designed for the protection and safety of victims are set out in s 4B:

- an ICO cannot be imposed unless the court is satisfied the victim of the domestic violence offence, and any other person with whom the offender is likely to reside, will be adequately protected (whether by ICO conditions or otherwise): s 4B(1)
- a home detention condition cannot be imposed if the court reasonably believes the offender will reside with the victim of the domestic violence offence: s 4B(2)
- the court must consider the victim's safety before making either a CCO or CRO for a domestic violence offence: s 4B(3).

See also **Intensive Correction Orders (ICOs) (alternative to full-time imprisonment)** at **[3-600]**ff, **Community Correction Orders (CCOs)** at **[4-400]**ff and **Conditional Release Orders (CROs)** at **[4-700]**ff.

In addition, ss 39(1) and 39(1A) *Crimes (Domestic and Personal Violence) Act 2007* relevantly provide that following a guilty plea being entered by, or a finding of guilt being made in respect of, an offender who has committed a serious offence (defined in s 40(5)), a court must make a final apprehended violence order (AVO) for the victim's protection, regardless of whether an interim AVO has been made or

whether an application for an AVO has been made, unless satisfied that an order is "not required". For adult offenders sentenced to full-time imprisonment the ADVO must be for the period of imprisonment and an additional two years, unless there is good reason to impose a different period: ss 39(2A)–(2C). In terms of when an ADVO comes into force, s 39(2D) states:

> The date on which the apprehended domestic violence order comes into force may be a day before the day the person starts serving [their] term of imprisonment.

Domestic violence orders made in one State or Territory are now recognised in all other Australian jurisdictions as a consequence of the national recognition scheme given statutory effect in Pt 13B *Crimes (Domestic and Personal Violence) Act 2007* which enables the enforcement of the prohibitions and restrictions contained in interstate and foreign domestic violence orders.

[63-510] Sentencing approach to domestic violence

Last reviewed: August 2023

A comprehensive examination of the cases and legislation can be found in A Gombru, G Brignell and H Donnelly, "Sentencing for domestic violence*", Sentencing Trends & Issues*, No 45, Judicial Commission of NSW, June 2016. See also M Zaki, B Baylock, P Poletti, "Sentencing for domestic violence in the Local Court", *Sentencing Trends & issues*, No 48, Judicial Commission of NSW, July 2022.

The High Court in *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55] referred to the role of the criminal law in the context of domestic violence as including:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.
> …
>
> … A just sentence must accord due recognition to the human dignity of the victim of domestic violence and the legitimate interest of the general community in the denunciation and punishment of a brutal, alcohol-fuelled destruction of a woman by her partner. A failure on the part of the state to mete out a just punishment of violent offending may be seen as a failure by the state to vindicate the human dignity of the victim; and to impose a lesser punishment by reason of the identity of the victim is to create a group of second-class citizens, a state of affairs entirely at odds with the fundamental idea of equality before the law.

In assessing the crime before it, the court in *The Queen v Kilic* (2016) 259 CLR 256 treated the fact the respondent's offence involved domestic violence as a distinguishing aggravating circumstance of significance and, at [28], referred to: "… the abuse of a relationship of trust which such an offence necessarily entails and which ... must be deterred".

In *Cherry v R* [2017] NSWCCA 150, Johnson J at [78] (Macfarlane JA and Harrison J agreeing) said:

> It is undoubtedly the case that the criminal law, in the area of domestic violence, requires rigorous and demanding consequences for perpetrators for the purpose of protecting partners, family members and the wider community.

The importance of general deterrence in condemning such conduct was clearly explained by Wilson J (Fullerton and Ierace JJ agreeing) in *Yaman v R* [2020] NSWCCA 239 at [131] as follows:

> Offences committed by (mostly) men who … refuse to accept that a partner or former partner is entitled to a life of her own choosing, must be dealt with sternly by the courts, to mark society's strong disapprobation of such conduct, and to reinforce the right of women to live unmolested by a former partner. Offences involving domestic violence are frequently committed, and the criminal justice system must play a part in protecting those who have been or may be victims of it.

The denunciation of, and punishment for, "brutal" and "alcohol-fuelled" conduct in the context of a domestic relationship was considered to be particularly apt in *Ngatamariki v R* [2016] NSWCCA 155 at [73]. Serious domestic violence offences, such as the sustained offending over 6 years in *R v JD* [2018] NSWCCA 233, should attract appropriate sentences to maintain public confidence in the administration of justice: at [102]. Indeed, in sentencing a domestic violence offender, particularly a repeat domestic violence offender, specific and general deterrence are important factors, together with the requirement of powerful denunciation and the need for protection of the community: *R v Hamid* (2006) 164 A Crim R 179 at [86]. See also *Turnbull v R* [2019] NSWCCA 97 at [153].

While a background of childhood deprivation may reduce moral culpability making an offender unsuitable for general deterrence (see **[10-470] Deprived background of an offender**), in dealing with domestic violence offenders, victims are not to be treated as less worthy of protection, nor that the crimes against them found warranting less denunciation, because of factors personal to the offender: *Kennedy v R* [2022] NSWCCA 215 at [43].

The appropriate imposition of a conviction with no further penalty under s 10A for a domestic violence offence must be rare: *R v Sharrouf* [2023] NSWCCA 137 at [188]. See also *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [84]–[85], [107]–[108] where the court held that the sentences imposed for offences committed in a domestic violence context did not reflect the community interest in general deterrence.

The courts have recognised the special dynamics of domestic violence. A victim of a domestic violence offence is personally targeted by the offender and the offence is usually part of a larger picture of physical and mental violence in which the offender exercises power and control over the victim: *R v Burton* [2008] NSWCCA 128 at [97]; see also *R v JD* [2018] NSWCCA 233 at [92]. In most instances, the conduct typically involves aggression by men who are physically stronger than their victims, and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths: *Patsan v R* [2018] NSWCCA 129 at [39]–[40]; *Diaz v R* [2018] NSWCCA 33 at [5]; *R v Edigarov* [2001] NSWCCA 436 at [41].

Another common feature is that there may be a considerable delay between the offences and the victim making a complaint. However, such delay should not be held against a victim as it is a direct product of the nature of the offending. It would be incongruous for the offender to benefit from such delay: *Hurst v R* [2017] NSWCCA 114 at [132], see also [138].

The offender often has a genuine, albeit irrational, belief of being wronged by the victim and also believes the violence is justified: *Xue v R* [2017] NSWCCA 137 at [53];

Ahmu v R [2014] NSWCCA 312 at [83]. But a resort to violence is not justified even if the belief turns out to be correct: *Xue v R* at [53]; see also *Efthimiadis v R (No 2)* [2016] NSWCCA 9 at [86].

There is a continuing threat to the victim's safety even where the victim becomes estranged from the offender: *R v Dunn* [2004] NSWCCA 41 at [47]. The victim may forgive the offender against their own interests: *R v Glen* (unrep, 19/12/94, NSWCCA); *R v Rowe* (1996) 89 A Crim R 467; *R v Burton* at [105]. Sentencing courts must treat such forgiveness with caution and attribute weight to general and specific deterrence, denunciation and protection of the community: *R v Hamid* at [86]; *Simpson v R* [2014] NSWCCA 23 at [35]; *R v Eckermann* [2013] NSWCCA 188 at [55]; *Ahmu v R* at [83]. The attitude of the victim cannot interfere with the exercise of the sentencing discretion: *R v Palu* [2002] NSWCCA 381 at [37].

Particular care is required on the part of a court when it makes findings of fact concerning the aggravating factor that the victim was vulnerable. The judge erred in *Drew v R* [2016] 264 NSWCCA 310 by observing that the victim was vulnerable using generalisations about a culture of silence and ostracism within Aboriginal communities in relation to domestic violence: *Drew v R* per Fagan J at [8], Gleeson JA agreeing at [1], N Adams J at [84]. Such a finding was not open on the evidence in the case: *Drew v R* at [3]–[4]. Further, the aggravating factor of vulnerability under s 21A(2)(l) *Crimes (Sentencing Procedure) Act 1999* is only engaged where the victim is one of a class that is vulnerable by reason of some common characteristic: *Drew v R* at [8]. See N Adams J's discussion of the cases in *Drew v R* at [75]–[78].

However, a finding that the victim was vulnerable in the more general sense of being under an impaired ability to avoid physical conflict with the offender or defend herself in the event of such conflict was well open on the evidence: *Drew v R* at [5], [8]. It was a circumstance of the offence, relevant to determining the appropriate sentence, that because of the victim's emotional and intimate attachment to the offender she was less likely than any other potential victim to avoid him or put herself out of harm's way: *Drew v R* at [7]. That individual vulnerability had, in practical terms, the same consequence for assessment of the objective seriousness of the offence: *Drew v R* at [8].

Domestic violence is addressed elsewhere in the publication as follows:

- **Purposes of sentencing** at **[2-240]** To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)
- **Victims and victim impact statements** at **[12-850]** The relevance of the attitude of the victim — vengeance or forgiveness (Domestic violence)
- **Section 21A factors "in addition to" any Act or rule of law** at **[11-090]** Section 21A(2)(d) — the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)
- **Particular offences**
  - **Break and enter offences** at **[17-050]** The standard non-parole period provisions (Domestic violence)
  - **Detain for advantage/kidnapping** at **[18-715]** Factors relevant to the seriousness of an offence (Detaining for advantage and domestic violence)

– **Sexual assault** at **[20-775]** Factors which are *not* mitigating at sentence (The relevance of a prior relationship)

– **Murder** at **[30-047]** Murders committed in the context of domestic violence

– **Assault, wounding and related offences** at **[50-130]** Particular types of personal violence (Domestic violence)

[63-515] Apprehended violence orders

In *Browning v R* [2015] NSWCCA 147 at [5], the court affirmed Spigelman CJ's observations in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [20] concerning the objectives of the statutory scheme at the time which made provision for apprehended violence orders:

> The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.

See the *Local Court Bench Book* for procedures with regard to apprehended violence orders from **[22-000]**ff.

[63-518] Impact of AVO breaches on sentencing

Section 14(1) *Crimes (Domestic and Personal Violence) Act 2007* provides for the offence of contravening an apprehended violence order (AVO). Section 14(4) provides:

> Unless the court otherwise orders, a person who is convicted of an offence against subsection (1) must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.

An offence committed in breach of an AVO is a significant source of aggravation: *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]. Such offences are not offences committed in breach of conditional liberty simpliciter; they breach a form of conditional liberty designed to protect the same victim from further attacks by the offender: *Cherry v R* [2017] NSWCCA 150 at [80]. There is a particular need to show there will be a heavy price to pay for indulging in domestic violence particularly when court orders have been issued to prohibit such violence, lest such orders are seen to be, and become, wholly futile: *Turnbull v R* [2019] NSWCCA 97 at [153].

It is also a significant aggravating factor under s 21A(2)(j) *Crimes (Sentencing Procedure) Act 1999* if an offender commits offences whilst on conditional liberty for offences arising from breaches of an AVO order: *Jeffries v R* [2008] 185 NSWCCA 144 at [91]; *Browning v R* [2015] NSWCCA 147 at [8].

Offences committed in breach of an AVO and the offence of breaching an AVO, involve separate and distinct criminality. There is no duplicity in imposing distinct

sentences for each offence: *Suksa-Ngacharoen v R* [2018] NSWCCA 142 at [131]. Breaches of an AVO should ordinarily be separately punished from an offence occurring at the same time. In *Suksa-Ngacharoen v R* at [132], when discussing the criminality inherent in a breach of an ADVO, Wilson J (Leeming JA and Bellew J agreeing) said:

> The criminality of breaching an ADVO rests in the complete disregard for an order of a court, conduct which has the practical effect of undermining the authority of the courts, and preventing the courts from extending effective protection to persons at risk of harm from another. The legislative intent of the scheme for apprehended domestic violence orders is to permit a court to restrain the conduct of an individual who poses a risk to a person with whom he or she is or was in a domestic relationship. If the authority of the courts in making these orders is simply ignored … the law and the courts are diminished, and the capacity for the courts to protect vulnerable individuals is impeded. Conduct which involves deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence that occurs at the same time, always having regard to the requirements of the totality principle as set out in *Pearce v The Queen* (1989) 194 CLR 610.

[63-520] Stalking and intimidation

Section 13(1) *Crimes (Domestic and Personal Violence) Act 2007* contains an offence of stalking or intimidating another person with the intention of causing the other person to fear physical or mental harm. Section 13(3) provides that a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person. A person who attempts to commit such an offence is liable to the same penalty as if the person had committed the offence itself: s 13(5). The offence of intimidation is one of "specific intent" under s 428B *Crimes Act 1900* and, therefore, an offender's intoxication can be considered for the purposes of determining criminal liability: *McIlwraith v R* [2017] NSWCCA 13 at [39]–[42]. However, an offender's intoxication at the time of the offence cannot be relied upon as a matter of mitigation at sentence: s 21A(5AA) *Crimes (Sentencing Procedure) Act*; see also *Cherry v R* at [81] in the context of self-induced intoxication because of drug use.

See **[11-335] Special rule for intoxication**.

[63-540] Abusive behaviour towards intimate partners

Last reviewed: March 2024

The *Crimes Legislation Amendment (Coercive Control) Act 2022* (the Act) relevantly amends the *Crimes Act 1900* to create a new offence of abusive behaviour towards intimate partners.

The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former intimate partner, with the intention of coercing or controlling that person: s 54D(1). Sections 54F and 54G provide definitions for "abusive behaviour" and "course of conduct" respectively. Section 54E provides for a defence to the new offence. A suggested direction and accompanying notes regarding the new offence are provided in the *Criminal Trial Courts Bench Book* at **[5-2010]**, **[5-2020]** respectively.

The new offence provisions are expected to commence between 1 February and 1 July 2024 and will only apply to conduct occurring on or after the commencement of the amendments: the Act, s 2; Sch 1[2].

The maximum penalty for the new offence is 7 years imprisonment: s 54D(1). It is a Table 1 offence and may be dealt with summarily.

For a discussion of the reforms and the new offence, see R Hulme and E Sercombe, "Introducing the NSW coercive control reforms" (2023) 35(10) *JOB* 101. The Judicial Information Research System's Coercive Control resource may be accessed at https://jirs.judcom.nsw.gov.au/menus/coercive_control.php for JIRS subscribers.

A suggested direction and accompanying notes regarding the new offence are provided in the *Criminal Trial Courts Bench Book* at **[5-2010]**ff.

[The next page is 32201]

Commonwealth drug offences

[65-100] Criminal Code offences

Last reviewed: November 2023

Commonwealth serious drug and precursor (chemical substances used in making illicit drugs) offences are found in "Serious drug offences" Pt 9.1 Criminal Code (Cth). The offences fall into two broad groups:

1. import-export offences, including possession in this context (Div 307), and import-export offences involving children (Div 309, ss 309.12–309.15); and
2. offences arising in a domestic context, including trafficking controlled drugs (Div 302), commercial cultivation of controlled plants (Div 303), selling controlled plants (Div 304), commercial manufacture of controlled drugs (Div 305), pre-trafficking controlled precursors (Div 306), possession offences (Div 308), and drug offences involving children (Div 309, excluding ss 309.12–309.15, Div 310).

For Commonwealth drug offences the pure quantity of the drug is the critical amount: see **Quantity and purity of drug**, below, at **[65-130]**.

Aggregation provisions enable quantities of drugs, plants, or precursors from the same occasion or different occasions (within seven days) to be combined: (Div 311).

The import-export offences are the most commonly prosecuted offences, but many of the principles discussed in these cases are relevant to all Commonwealth drug offences. These principles include: the importance of general deterrence (see **[65-110]**); the significance of the drug quantity and the offender's role in the offence as key determinants of objective seriousness (see **[65-130]**); the fact prior good character may carry less weight than for other offences (see **[65-140]**. Division 307 also includes offences relating to the possession (and attempted possession) of imported drugs. A sentencing court must be astute when sentencing an offender charged with such discrete offences not to also punish that offender for the drug's importation: see discussion at **Different offences and De Simoni** at **[65-130]**.

Offences arising in the domestic context tend to have fewer comparative sentencing cases. This issue is discussed at **[65-150] Achieving consistency**.

For a discussion of the rationale for the introduction of the new offences and a brief outline of relevant provisions, see Ch 2 "Commonwealth serious drug offences framework" in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Summary disposal

Commonwealth indictable and summary offences are defined respectively in ss 4G and 4H *Crimes Act 1914* (Cth). Section 4J provides for indictable offences to be dealt with summarily if certain conditions are met. Unless there is provision to the contrary, offences with a maximum penalty of greater than 10 years are strictly indictable.

[65-110] The requirements of s 16A Crimes Act 1914 (Cth)

Section 16A(1) *Crimes Act 1914* (Cth) requires a court to "impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". This subsection does not stand alone but must be read in conjunction with s 16A(2), which obliges a court sentencing a federal offender to take into account such matters identified as are "relevant and known to the court".

See **[16-025] Section 16A(2) factors** in **Sentencing Commonwealth offenders**. See also Ch 4 "The relevant sentencing principles" in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Johnson J summarised the relevant sentencing principles for Commonwealth serious drug offences in *R v Nguyen; R v Pham* [2010] NSWCCA 238 at [72]. That summary has been referred to with approval in Victoria in *R v Nguyen* (2011) 31 VR 673 at [33] and in Queensland in *R v Hill* [2011] QCA 306 at [277].

The importance of deterrence

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held at [64] that the difficulty of detecting the offence of being knowingly concerned in the importation of heroin and the great social consequences flowing from its commission, suggest that deterrence is to be given chief weight in the sentencing task and that stern punishment will be warranted in almost every case. The majority identified other features of the offence at [64]:

> Those features will also include those that differentiate between particular cases: the quantity of drug involved, the offender's knowledge about what was being imported, the offender's role in the importation, the reward which the offender hoped to gain from participation. All these are matters properly to be taken into account in determining a sentence.

The significance of general deterrence in the context of serious drug offences irrespective of an offender's role and because of the pernicious nature of the drug trade has been repeatedly emphasised by appellate courts: *R v Chen* [2002] NSWCCA 174 at [286]; *R v Riddell* [2009] NSWCCA 96 at [57]–[58]; *Nguyen v R* (2011) VR 673 at [34]; *DPP (Cth) v Bui* (2011) 32 VR 149 at [38]–[39].

In very limited circumstances, such as when an offender comes forward to assist law enforcement authorities to frustrate the completion of a drug offence, deterrence may be of less significance: *RCW v R (No 2)* [2014] NSWCCA 190 at [74]. In such circumstances the offender should be sentenced "to provide an example of what might become of someone who has the good conscience to come forward and assist … in order to thwart serious criminal activity".

Non-custodial sentences for drug importation must be restricted to truly exceptional cases: *R v Wong and Leung* (1999) 48 NSWLR 340 per Spigelman CJ at [104]; *R v Fabian* (unrep, 16/10/92, NSWCCA) per Sully J.

[65-130] Objective factors relevant to all Commonwealth drug offences

For a discussion of the use of appellate cases and statistics in sentencing for drug offences, see **Special Bulletin 9 — November 2015 The Queen v Pham [2015] HCA**

39 and **Special Bulletin 10 — December 2015 Post The Queen v Pham (2015) 90 ALJR 13 appellate cases**. The latter Bulletin has a collection of intermediate appellate cases for importing a marketable quantity of a border controlled drug which has regard to *The Queen v Pham* (2015) 256 CLR 550.

Quantity and purity of drug

While Parliament distinguishes between the maximum sentence that may be imposed for both Commonwealth and State offences on the basis of quantity, for Commonwealth offences the relevant quantity refers to the pure weight of the narcotic: *R v King* (1978) 24 ALR 346.

The lists of applicable trafficable, marketable and commercial quantities for each type of border controlled, or controlled, drug are set out in the *Criminal Code Regulations* 2019 (Cth): see Pt 3, Div 1 and Schs 1 and 2. The amounts for Commonwealth drug offences are based on the pure amount of the drug.

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal erred in offering a grid founded entirely on the gravity of the offence, as measured only by the weight of narcotic concerned and against which future sentences were to be judged: at [71]. The starting point given by the Court of Criminal Appeal was based on the false premise that the gravity of the offence can usually, or perhaps even always, be assessed by reference to the weight of the narcotic involved: at [73]; see also Kirby J at [135].

The matters properly taken into account in fixing a sentence include the quantity of the drug involved, the offender's knowledge and role in the importation and the offender's anticipated reward from participating. Weight is not the chief factor to be considered in fixing a sentence: *Wong v The Queen* at [67]ff.

Both Parliament and the courts have eschewed the approach that penalties should be proportional to quantity: *R v Doan* (unrep, 27/9/1996, NSWCCA); *R v Postiglione* (1991) 24 NSWLR 584; *R v Schofield* [2003] NSWCCA 3. In *R v Vo* [2000] NSWCCA 440, Wood CJ at CL said at [32]:

> Error can enter into the sentencing process if an attempt is made thereafter to graduate sentences by some mathematical exercise referable to the precise quantity involved or known by the offender to have been imported.

However, that there is some relationship between the quantity of drug involved in the offence and the sentence ultimately imposed is reflected by the statement of the majority in *Wong v The Queen* at [64]:

> In general, however, the larger the importation, the higher the offender's level of participation, the greater the offender's knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that comparisons are to be made between examples of the offence and the sentences that are or were imposed.

See also: *Tyn v R* [2009] NSWCCA 146 at [28]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [307]. In *R v Nguyen* [2005] NSWCCA 362 at [110], Howie J concluded that in an appropriate case the quantity involved might place an offence in the worst

case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). His Honour's approach was endorsed by the WA Court of Appeal in *Sukkar v R (No 2)* [2008] WASCA 2 at [46].

In *Wong v The Queen* at [68], the court recognised that not all offenders involved in importation of narcotics will know or even suspect how much pure narcotic is being imported but the size of an importation has increased significance when an offender does have some knowledge of the quantity involved.

In addition, as Greg James J observed in *R v Soonius* (unrep, 29/5/98, NSWCCA) in referring to reliance being placed upon quantity alone:

> The very provisions of the *Crimes Act 1914*, and in particular s 16A, speak against such a simplistic approach. The quantities involved must be considered along with all the matters to which a court's attention is directed by the Act and by principle.

Importing more than one border controlled drug

Whether importing more than one kind of border controlled drug on the same occasion significantly increases the overall criminality of the offending conduct depends on the facts of the particular case. Some degree of accumulation is not necessarily required where the importation of more than one type of drug is the subject of separate counts. The guiding principle is to ensure the total effective sentence properly reflects the overall criminality involved in all the offences: *MEG v R* [2017] WASCA 161 at [22].

Prohibition on harm-based categories

Any attempt to rank the seriousness of narcotics either under the *Customs Act 1901* (Cth) or the *Criminal Code* (Cth) is inappropriate. In *Adams v The Queen* (2008) 234 CLR 143, Gleeson CJ, Hayne, Heydon, Crennan and Kiefel JJ stated at [10]:

> … Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme.

The High Court in *Adams v The Queen* rejected the appellant's assertion that he should have been sentenced on the basis that MDMA was less harmful than heroin: at [9]–[10].

In *R v Corbett* [2008] NSWCCA 42 (decided before *Adams v The Queen*), the sentencing judge erred by concluding that "GBL is a drug of a lesser order than the so called 'hard drugs'": at [4]. The many border controlled drugs and quantities listed in s 314.4 *Criminal Code* (Cth) "are only connected by the common thread of legislative proscription": at [45]. Harrison J stated at [47]:

> Except by reference to quantity, there would appear to be no scope for judicial or forensic enquiry about the individual characteristics of any of the listed substances. For example, even with the benefit of the most highly respected expert opinion that listed substance "A" is socially, pharmacologically, or in every other relevant way wholly benign or alternatively exceedingly dangerous, there does not appear to be a legitimate avenue for the use of that information to inform the sentencing discretion or to substantiate a submission.

Notwithstanding these statements of principle, past analysis of the sentences imposed for offences involving different types of drugs suggest that there is some difference

of treatment, in terms of the sentence imposed, based on drug type. See "Ch 6 Sentencing patterns for the period 2008–2012" in particular at 6.3.11–6.3.12 in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014. See also *DPP (Cth) v Maxwell* [2013] VSCA 50; *R v Hill* [2011] QCA 306.

Role of offender and level of participation

In order to determine an offender's culpability in an importation offence it is essential for the sentencer, if possible, to determine the offender's role in the criminal enterprise: *R v Laurentiu* (unrep, 1/10/92, NSWCCA); *R v Bimahendali* [1999] NSWCCA 409. The shortcomings of attempting to categorise the role of the offender were recognised by the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, in *Olbrich v The Queen* (1999) 199 CLR 270 at [14]:

> However, the utility of such an exercise is necessarily limited by the extent to which the material facts are known. What may be a convenient shorthand method of describing the facts of particular cases should not be elevated to an essential task to be undertaken in every case, regardless of whether that is possible or appropriate.

Sometimes, the offender's role is not known to the court. In such cases, the court is not obliged to find facts favourable to the offender or to accept his or her version of events: *Olbrich v The Queen* at [27]–[28]. In *Giles-Adams v R* [2023] NSWCCA 122, very little was known about the criminal enterprise responsible for the attempted importation and it was held the sentencing judge erred in finding the applicants had "intermediate-level" roles in the absence of evidence as to the identity/roles of others involved and other features of that enterprise: at [112]–[115].

It is accepted that the offender's role and level of participation in the criminal enterprise are more important than the mere quantity of drugs, subject to the recognition that the gradation of seriousness is reflected in the increase in statutory maximum penalties as the quantity of drug increases: *R v MacDonnell* [2002] NSWCCA 34. The quantity of the drug remains material, given that the size of the profit and the harm inflicted are likely to be proportional to the weight of the drug: *R v Stanbouli* [2003] NSWCCA 355 at [102].

In *R v Stanbouli*, Spigelman CJ at [3], with whom Carruthers AJ agreed at [179], held that life imprisonment should be reserved as "the norm" for those at the top of the importation hierarchy, rather than those who "provide important assistance", as Hulme J held at [113]. Note the schedule of cases assembled by Hulme J at [144]–[170], including several where sentences of life imprisonment were imposed on offenders described as "mid-level executives". See **Mandatory Life Sentences under s 61** at **[8-600]**.

In *R v Flavel* [2001] NSWCCA 227, the court rejected a submission that the categorisation of the offender's role as a mid-level manager in the importation of 117 kg of pure cocaine called for the imposition of less than the statutory maximum penalty. The court upheld a sentence of life with a non-parole period of 25 years as being within the sentencing judge's discretion. Similarly, in *R v Gonzales-Betes* [2001] NSWCCA 226, the court upheld the sentence of life with a non-parole period of 22 years for a co-offender regarded as a "mid-level" executive, "not the ring leader, chief executive or chairman of the board" in the same importation.

Distinguishing between "couriers" and "principals"

In *Olbrich v The Queen* (1999) 199 CLR 270, the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, recognised that a distinction between "couriers" and "principals" may usefully describe different kinds of participation in a single enterprise of importation. However, too much reliance should not be placed upon these terms when sentencing a particular offender. The majority said at [19]:

> Further, it is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a "courier" or a "principal" must not obscure the assessment of what the offender did.

The importance of this principle and the difficulty of making an assessment of a particular offender's role were reiterated in *Kuo v R* [2018] NSWCCA 270 at [118] and in *Klomfar v R* [2019] NSWCCA 61 at [40]. Drug syndicates, which by their nature are secretive, do not operate transparently and the "rank" of a drug offender within the criminal organisation is necessarily opaque and "more a matter of speculation than a process of rationally drawing inferences": *Kuo v R* at [118], [123]. It remains important for a sentencer to focus on what the offender actually did: *Kuo v R* at [118]; see also *Kook v R* [2001] NSWCCA 122 at [15].

Couriers, and those low in the drug hierarchy, generally receive a lesser sentence than persons at a higher level: *Tyler v R* [2007] NSWCCA 247 at [79]; *R v Chea* [2008] NSWCCA 78 at [34]. Justice Simpson explained in *Tyler v R* at [79]–[80]:

> Those low in the hierarchy, such as couriers, are usually to be sentenced less harshly, because, although they are of fundamental importance in the execution of the object of the conspiracy — in a drug importation conspiracy, without couriers, no drug could or would be imported — they have no managerial or decision making function; and, experience shows, usually derive the least monetary reward.
>
> By contrast, those who have managerial or decision making functions are seen to occupy a more senior position, and, accordingly, to be more culpable. A relevant factor here is the level of profit to be derived.

Nonetheless, there is no inevitable correlation between an offender said to be in the lower echelon of a hierarchy, and the severity of the punishment they can expect to, and will, receive: *Klomfar v R* at [41].

Couriers involved in the same importation can be differentiated on the basis of their reward: *Seng v R* [2007] NSWCCA 335. At first instance, the applicant in *Seng v R* was sentenced by the same judge to an identical non-parole period as the co-offender, and a head sentence of only 6 months less. The couriers travelled on the same flight after ingesting pellets of heroin but the Court of Criminal Appeal found that their roles were materially different. The co-offender participated in the importation for significant financial reward, being promised a cash payment of $30,000 to $35,000, and he secured the applicant's involvement, whereas the applicant acted out of a sense of obligation to a man higher in the enterprise: at [22]. The applicant's financial gain amounted to payment of his expenses while he stayed in Cambodia for a month, and the airfare to Australia which would allow him to see his son.

Role and conspiracies

The Court of Criminal Appeal in *Tyler v R* [2007] NSWCCA 247 confirmed that the relevance of the offender's role in sentencing for drug conspiracies refers to

the seniority of the offender whose sentence is under consideration: at [79]. The court found that the sentencing judge erred in assessing the role of one co-offender, Chalmers, who booked flights and obtained tickets for the courier (the other co-offender, Tyler), as being relatively minor in the overall operation. The judge also found that the role of Chalmers was diminished by his lack of involvement in travelling overseas to obtain the drugs. Ordinarily, those who carry the drugs are at the bottom of the hierarchy, while those in higher positions distance themselves from physical contact with the drugs: at [75]. To treat Tyler as more culpable because of his close physical connection to the drugs inverts the conventional approach to blameworthiness in drug conspiracies: at [76]. Justice Simpson stated at [83]–[84]:

> Identifying the "role" of a participant by reference to his position in the organisational hierarchy is a very different proposition from isolating the precise physical acts that can be attributed to the particular offender, and selecting the punishment by reference solely to those isolated acts. It would be quite artificial, and contrary to the very concept of a conspiracy, to dissect with precision the physical acts of each of the conspirators, and to sentence that conspirator for those acts alone. That would be a negation of the complex inter-connection between the various participants, and the organisational nature of a conspiracy. It would represent too literal an application of the decisions that identify the "role" of any participant as a relevant factor in the sentencing exercise. It would be to ignore the essential feature of the offence of conspiracy — the agreement to participate in an organised criminal activity.
>
> That is not to say that the physical acts of the offender whose sentence is under consideration are irrelevant. They are relevant, as one part of a complex tapestry: see *R v Nguyen* [2005] NSWCCA 362; 157 A Crim R 80 at [102]. That, in my opinion, is the first, and most fundamental, flaw in the approach to sentencing here taken.

Different offences and De Simoni

There has been a debate about the extent to which a judge can take into account at sentence facts relating to an importation when an offender is charged with a possession offence (and attempted possession): *El-Ghourani v R* [2009] NSWCCA 140. The starting point is that there is no obligation to inquire about the course of events before or after an offence and it is wrong to sentence an offender for criminality for which they have not been charged: *El Jamal v R* [2021] NSWCCA 105 at [24], [26]; [64]; *The Queen v Olbrich* (1999) 199 CLR 270 at [18], [22]; *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

However, some circumstances relating to the process of the drug's importation may also be relevant to a charge of possession: *El-Ghourani v R*, per Spigelman CJ at [30]. His Honour said at [33] that:

> … the act of possession can be attended by a wide range of moral culpability. The circumstances in which a person charged with a possession offence came into possession of the offending matter, and what it was that the person intended to do with that matter, can all be relevant to determining the degree of moral culpability attached to the act of possession itself.

Having regard to the broader circumstances or overall context of an offender's involvement in a drug importation for a possession offence is not inconsistent with *The Queen v Olbrich* provided the sentencing judge focuses on the crime charged and does not treat complicity in the uncharged importation as an aggravating factor: *El-*

Ghourani v R [2009] NSWCCA 140 at [30]; *The Queen v Olbrich* at [18] referring to *The Queen v De Simoni*. Prosecuting authorities have an obligation not to seek to rely on circumstances as aggravating the possession offence, where those circumstances constitute proof of a distinct charge: *El Jamal v R* at [64] per Garling J (Payne JA and Wright J agreeing).

It is not always easy to distinguish between permissible and impermissible evidence concerning an importation when an offender is only charged with possession: *El Jamal v R* at [32], referring to *Balloey v R* [2014] NSWCCA 165 at [24]. The judge must keep firmly in mind that the offender is not charged with importing the drugs and acknowledge that the evidence could not be used to impose a greater penalty on the offender: *R v Guiu* [2002] NSWCCA 181 at [2]–[3]; *El-Ghourani v R* at [6], [9], [32]. In *El Jamal v R*, the Court of Criminal Appeal found the sentencing judge erred by making frequent references to "the importation offence" and placing importance on the findings about the offender's role in the uncharged importation: at [38]. Likewise, the judge in *R v Bousehjin* [2003] NSWCCA 86 erred by incorrectly focusing on the uncharged importation and failing to focus on the attempted possession offence: at [26]. By contrast, the judge in *El-Ghourani v R* stated that the offender "was acting as a principal in Australia in this importation" but correctly maintained the focus on the possession charge: at [35].

[65-140] Subjective factors

Assistance to authorities

In sentencing federal offenders, ss 16A(2)(h) and 16AC (previously s 21E) *Crimes Act 1914* (Cth) provide statutory obligations for an offender's assistance to authorities to be taken into account.

Assistance to authorities takes on particular significance in importation offences because of the "notorious difficulties of detecting the crime of importation": *R v Wong and Leung* (1999) 48 NSWLR 340. The fundamental importance of general deterrence in sentencing drug offenders, at whatever level in the hierarchy, gives way to the greater community interest in allowing a significant discount for assistance by couriers whose implication of principals contributes to the disruption of drug importation networks: *R v Perrier (No 2)* [1991] 1 VR 717 at 725.

However, as was said by Gleeson CJ in *R v Gallagher* (1991) 23 NSWLR 220 at 232:

> Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which support the principles set out above, it constitutes an affront to community standards

ZZ v R [2019] NSWCCA 286 is an importation case under s 307.2 of the *Criminal Code* (Cth), in which fresh evidence established that the applicant's assistance to the authorities was of much greater value than was thought at the time of sentence: at [30]. Evidence of events post-sentencing is only admissible to determine whether to quash a sentence in confined circumstances. One exception is to show the true significance of facts in existence at the time of sentence: *ZZ v R* at [20]–[22]; *R v Smith* (1987)

44 SASR 587 at 588; *Khoury v R* [2011] NSWCCA 118 at [113]. In resentencing the applicant, the initial discount of 25% for the plea of guilty was increased 35% to also take account of the assistance: *ZZ v R* at [33].

See **Power to Reduce Penalties for Assistance to Authorities** for constraints on the application of the discount at **[12-200]**ff and *Co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC* at **[16-025] Section 16A(2) factors** for a discussion of the relevant principles.

Entitlement to discount and extent of the benefit

In *R v A* [2004] NSWCCA 292, Wood CJ at CL said at [25]:

> The availability of a discount for assistance, depending on its worth, in order to foster the interests of law enforcement and to recognise the contrition involved as well as the potential risks to the offender, is well recognised: *R v Salameh* (1991) 55 A Crim R 384, *R v Gallagher* (1991) 23 NSWLR 220, *R v Cartwright* (1989) 17 NSWLR 243 and *R v Dinic* NSWCCA 3 September 1997. It is important, if the purpose for allowing a discount is to be achieved, that the offender standing for sentence be clearly appraised of the fact that a benefit was conferred.

While entitlement to a discount does not necessarily depend on the effectiveness of the information supplied, the value of the assistance is relevant to the evaluation of the discount. In *R v Barrientos* [1999] NSWCCA 1, Abadee J reviewed the authorities on assistance in Commonwealth offences, including *R v Dinic* (1997) 149 ALR 488 and *R v Cartwright* (1989) 17 NSWLR 243, and said at [47]:

> Thus in the determination of any discount the relevance and importance of the benefits flowing from assistance is important: see also *R v Gallagher* (1991) 23 NSWLR 220. There is no fixed tariff for assistance given. Where there is significant assistance the amount "customarily given in New South Wales which with few exceptions, appears to range from 20 per cent to 50 per cent": see *R v Chu* per Spigelman CJ at 6–7. That said, the law does not mandate the identification of a precise discrete quantifiable discount for assistance or that the assistance falls within the range. The matter of that discount or its quantification will depend upon a number of factors and the facts of the particular case under consideration. I do not see the authorities suggesting that once any assistance is found then the allowance for such must reflect a range. The worth of the assistance may take it below the range. Whether it does is a matter of fact to be evaluated in accordance with the proved circumstances of the case.

Good character

Good character carries less weight in crimes involving drugs than for many other offences: *R v Leroy* [1984] 2 NSWLR 441 per Street CJ at 446–447. This principle is usually of particular relevance in relation to drug couriers involved in importation where persons with clear records are selected so as to not attract suspicion: *R v Lopez-Alonso* (unrep, 7/3/96, NSWCCA); *R v Salgado-Silva* [2001] NSWCCA 423.

In *R v X* [2002] NSWCCA 40, the court rejected a submission that, as good character has limited significance in crimes involving drugs, then having a previous conviction cannot be of major significance in determining an appropriate sentence. On the contrary, Smart AJ said at [57] that:

> This does not follow. Having a conviction for a previous serious drug offence is significant for sentencing purposes.

[65-150] Achieving consistency

The primary responsibility of a sentencing judge is to ensure that the sentence imposed on an offender is consistent with others and the primary mechanism for achieving this is through the application of the relevant sentencing principles: *Hili v The Queen* (2010) 242 CLR 520 at [40]; *Barbaro v The Queen* (2014) 253 CLR 58 at [26].

In *Barbaro v The Queen*, the High Court held (at [40]) that the prosecutor's duty to assist the court on sentence did not extend to providing the court with an available range of sentences but that that practice was to:

> … be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less comparable cases.

The synthesis of "raw material" which includes sentencing statistics and information about the sentences imposed in comparable cases is the task of the sentencing judge: *Barbaro v The Queen* at [41]. See *Achieving consistency in sentencing* in **Relevance of decisions of other State and Territory courts** at **[16-035]**.

In *Wong v The Queen* (2001) 207 CLR 584, the High Court overturned the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* (1999) 48 NSWLR 340. In their joint judgment, Gaudron, Gummow and Hayne JJ held at [87] that, not only was there no jurisdiction or power to issue the guideline, but the principles which informed its construction were flawed by the error in selecting weight of the narcotic as the chief factor in sentencing.

As to the continuing usefulness of the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* see in particular *Guideline judgments and s 16A* in **General sentencing principles applicable** at **[16-010]** and *Impact of repeal of s 16G* in **Remissions** at **[16-060]**.

A number of intermediate appellate decisions concerning Commonwealth serious drug offences annex comparative case schedules: see, for example, *R v Lee* [2007] NSWCCA 234; *Law v R* [2006] NSWCCA 100; *R v To* [2007] NSWCCA 200; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *DPP (Cth) v Maxwell* (2011) 31 VR 673; *OPQ v R* [2012] VSCA 115; and *Pham v R* [2014] VSCA 204. These schedules may usefully promote sentence consistency at a national level because they can inform a court of national sentencing practice: *DPP (Cth) v De La Rosa* at [193]. However, it would be wrong to use schedules, such as the one reproduced in *DPP (Cth) v De La Rosa*, by endeavouring to fit an offender into one of the nominated categories, because of the individual nature of each sentencing exercise: *R v Holland* [2011] NSWCCA 65 at [3].

In *R v Maldonado* [2009] NSWCCA 189 at [54], the court accepted that cases decided in respect of different offences under the Code with the same maximum penalty provided "a rough guide to the range of sentences imposed for Commonwealth offences".

For some of the newer offences in Pt 9.1 Criminal Code (Cth), such as manufacturing or trafficking controlled drugs, it is also open to a sentencing judge to have regard to sentences imposed for the more established Commonwealth drug offences and to seek guidance from the long-established State equivalent offences: see *R v Cheung* (2010) 203 A Crim R 398 at [130]–[131]; *R v Nakash* [2017] NSWCCA 196 at [18].

However, in *Rajabizadeh v R* [2017] WASCA 133, the WA Court of Appeal observed that equating sentences for Commonwealth offences with similar State offences to achieve consistency was wrong as a matter of principle and that attempting to achieve consistency with the State offences in each jurisdiction could result in inconsistency between States in sentences for the same federal offence due to differing maximum penalties and sentencing ranges: *Rajabizadeh v R* at [68]. Given the sentencing framework under Pt IB *Crimes Act 1914* (Cth) applies, in the absence of comparable cases, an assessment of the sentence imposed must have regard to the maximum penalty, the seriousness of the offence, the relevant mandatory factors set out in s 16A(2) *Crimes Act* and any other relevant aggravating or mitigating factors: *Rajabizadeh v R* at [71].

See further the discussion at 5.3.2.3 concerning the use of comparable cases in Ch 5: **The imperative of achieving reasonable consistency** in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

[The next page is 32301]

Money laundering

[65-200] The Commonwealth statutory scheme

The Commonwealth money laundering offences are found in Ch 10, Pt 10.2, Div 400, ss 400.3–400.9 Criminal Code 1995 (Cth). The name of Pt 10.2 is "Money laundering".

When a court is sentencing for any of these offences, the relevant statutory provisions are of particular importance. The statutory scheme has a graduated series of offences varying in gravity depending on the value of money or property and the offender's state of mind: *R v Li* (2010) 202 A Crim R 195 at [17]-[19], [41].

Sections 400.3–400.9 provide for a number of different offences, the seriousness of which is indicated by the maximum penalty, the amount of money involved and the mental (fault) element to be proved for the particular offence. Each offence is concerned with money or property that is the proceeds of crime or money or property that is to become an instrument of crime. The greater the sum of money involved the more serious the offence as indicated by a higher maximum penalty: *R v Ansari* (2007) 70 NSWLR 89 at [122]; *R v Li* at [41]. It is the primary identifier of what is the maximum penalty for an offence: *R v Huang* (2007) 174 A Crim R 370 at [34]; *R v Li* at [41]; *R v Guo* (2010) 201 A Crim R 403 at [87], [89]. The value of money or property and the offender's state of mind are the principal differentiating factors in determining the seriousness of these offences: *R v Guo* at [85]-[91]; *R v Li* at [18], [41]; *R v Ansari* at [122].

The considerations relevant to the seriousness of a Commonwealth money laundering offence were summarised in *R v Ly* (2014) 241 A Crim R 192 at [86] with reference to several cases.

[65-205] Breadth of conduct caught

The money laundering offences are broad with the capacity to apply to a large range of activities relating to money or other property to be used in connection with, or arising from, serious crime. The offences are not only concerned with the source of the money or property dealt with but also its ultimate use. The offences cover money obtained illegally or to be used for illegal purposes or dealt with in a manner that is illegal. At the Commonwealth level, these offences "constitute a 21st century response to antisocial and criminal conduct commonly with international elements": *R (Cth) v Milne (No 1)* [2010] NSWSC 932 at [164], adopted in *Milne v R* (2012) 219 A Crim R 237 at [132]–[135]; *R v Ansari* (2007) 70 NSWLR 89 at [119]–[122]. See also *Thorn v R* (2009) 198 A Crim R 135 at [30], [31].

The breadth of conduct caught by these offences makes it difficult to identify an offence falling within the worst category of its kind (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256): *R v Ansari* at [120]. In *R v Ansari*, Howie J identified possible factual scenarios encompassed by these types of offences: from those situations where the money that was being dealt with was to be used for the purposes of terrorism, to money obtained as a result of drug activity (which he thought the most obvious example), to money legitimately earned but being dealt with in such a way as to disguise its source to, for example, defraud the tax office:the [120].

Examples of conduct that have given rise to a money laundering offence are: making numerous transfers of funds overseas in amounts less than $10,000 using numerous false identities (*Jimmy v R* (2010) 77 NSWLR 540); an elaborate tax avoidance scheme involving the establishment of sham companies and the making of cash payments to workers in a chicken factory (*R v Guo* (2010) 201 A Crim R 403); organising a number of people to make cash deposits totalling $15 million which was directly or indirectly transferred overseas (*R v Nguyen* (2010) 204 A Crim R 246); swapping shares in one company for shares in another without a change in legal ownership which was intended to avoid capital gains tax liability (*Milne v R*); receiving money for the provision of child pornography material to others and the transfer of a significant portion of that money overseas to others involved in the offence (*Dennison v R* [2011] NSWCCA 114); laundering the proceeds of a fraud perpetrated on a superannuation scheme by exchanging funds in a bank account for gambling chips which were later cashed in (*Wang v R* [2013] NSWCCA 2); completing and lodging numerous tax returns using the personal identity details of other people (including their tax file numbers) and claiming, and receiving, tax refunds on the basis of falsely inflated tax payments and deductions (*R v Ly* (2014) 241 A Crim R 192).

The offending in *Dickson v R* [2016] NSWCCA 105 is an example of very serious money laundering. The offender was sentenced to 12 years for that offence (against a maximum penalty 25 years). It involved the offender controlling the movement of over $63 million overseas, of which over $19m was distributed to the offender or entities associated with him. The money was obtained from a complex tax fraud scheme he had devised and in respect of which he was separately charged.

[65-210] Sentencing range

At this stage, sentencing decisions for money laundering offences provide assistance as to statements of general principle but do not identify a range of appropriate sentences: *R v Li* (2010) 202 A Crim R 195 at [40]; *R v Guo* (2010) 201 A Crim R 403 at [86]; *Milne v R* (2012) 219 A Crim R 237 at [291]; *Ihemeje v R* [2012] NSWCCA 269 at [86]. The existing cases provide no more than an indication of developing sentence practice: *R v Li* at [40]; *R v Nguyen* (2010) 204 A Crim R 246 at [58]. The offences "comprehend such a wide range of criminality that there is bound … to be an appreciable variation in the length of sentences within and between them": *R v Li* at [41]. This wide range of circumstances means that comparisons with the sentences imposed in other money laundering cases are of limited assistance: *Wang v R* [2013] NSWCCA 2 at [33]. The Victorian Court of Appeal confirmed in *Majeed v R* [2013] VSCA 40 that the sentences for s 400.3 offences in previous decisions "are too few in number to provide anything but the broadest outline of the appropriate range of sentence": at [40].

Notwithstanding the difficulties associated with identifying a sentencing range, the sentences imposed in past matters may assist a court in determining the appropriate sentence. So much is apparent from the court's careful examination of past money laundering cases, its discussion of the relevant sentencing principles and of the interrelationship between the two in light of the particular circumstances of the offence and offender in *R v Ly* (2014) 241 A Crim R 192 at [88]ff. See also *Dickson v R* [2016] NSWCCA 105, where the court undertook a similar exercise to determine a Crown appeal against sentence: *Dickson v R* at [187]–[192].

[65-215] The application of the De Simoni principle to the statutory scheme

As to the general issues which may arise in relation to the application of the principle in *The Queen v De Simoni* (1981) 147 CLR 383 see [1-500]. The *De Simoni* principle will arise because of the way the Div 400 offences have been structured. There is a direct connection between the offender's state of mind (established by proving the relevant fault element) and the maximum penalty. For example, the maximum penalty for an offence against s 400.3(1), where the prescribed fault element is intention, is 25 years whereas when the prescribed fault element is recklessness (as in s 400.3(2)) the maximum penalty is 12 years. Section 5.4(4) Criminal Code provides that proof of intention or knowledge will also satisfy the fault element of recklessness. A failure to maintain the distinction between a less serious offence involving recklessness and a more serious offence involving belief contravenes the *De Simoni* principle: *Chen v R* [2009] NSWCCA 66 at [23]; *R v Ansari* (2007) 70 NSWLR 89 at [131]. In *Chen v R*, while the judge's finding that the applicant knew the funds were illegally obtained influenced his resolution of the dispute concerning the applicant's role it had no other bearing on his assessment of the offender's criminality and, accordingly, did not breach the *De Simoni* principle: at [25]. Although the sentencing judge in *Wang v R* [2013] NSWCCA 2 referred to the offender's knowledge, his Honour specifically recognised the distinction in *Chen v R* between the offence involving recklessness and the more serious offence involving belief: *Wang* at [42]–[43]. A finding that the offender knew the origin of the money involved was drug trafficking would offend the *De Simoni* principle because it amounted to finding the offender had committed a more serious offence: *R v Viana* [2008] NSWCCA 188 at [30]. However, finding the offender was reckless as to the source of the funds being the importation or sale of drugs did not infringe that principle: *R v Viana* at [30] and [31]. In *Shi v R* (2014) 246 A Crim R 273, the sentencing judge was found to have committed a *De Simoni* error by taking into account, for an offence contrary to s 400.9 (which only requires that it may be reasonable to suspect that the money or property is the proceeds of crime), that the offender had known that the money was the proceeds of crime.

[65-220] General deterrence

Any sentence must reflect general deterrence to a very significant degree because, notwithstanding the varying degree of gravity, money laundering is serious criminal activity and justifies severe punishment: *R v Huang* (2007) 174 A Crim R 370 at [36]; *R v Guo* (2010) 201 A Crim R 403 at [91], [103]; *Majeed v R* [2013] VSCA 40 at [39], [44]. General and specific deterrence is of particular importance where there is a pattern of illegal activity by an offender over an extended period using false identities: *R v Guo* at [96]; *Van Haltren v R* (2008) 191 A Crim R 53 at [87].

[65-225] Factual findings as to role and what the offender did

A significant consideration for the court is the role played by the offender where a criminal hierarchy has been discovered. An analogy has been drawn between money laundering offences and drug importation offences. Both usually reveal a hierarchy of persons involved in the conduct with different roles to play and different gains to be made from the commission of the offence: *R v Ansar*i (2007) 70 NSWLR 89 at [119]; *R v Assafiri* [2007] NSWCCA 159 at [17]. Sentences should be higher for offenders

who obtain higher rewards and have a lower risk of detection than persons lower in the hierarchy whose criminality is lesser and who run a higher risk of detection: *Ihemeje v R* [2012] NSWCCA 269 at [63], [87]. The most important consideration when sentencing for a money laundering offence is to consider what the offender did because there may be little evidence concerning the organisation behind the offence, the source of the funds or the ultimate use to be made of them: *R v Ansari* at [119]; *R v Guo* (2010) 201 A Crim R 403 at [88]; *The Queen v Olbrich* (1999) 199 CLR 270 at [19]. Where there is no evidence about the offender's knowledge as to the source of the funds, the purpose of dealing with them, or their ultimate destination, the court must deal with the matter on the basis of objective facts proved by evidence: *R v Ansari* at [124]; *Ungureanu v R* [2012] WASCA 11 at [42].

[65-230] Relevance of offender's belief and fault element

An important consideration is the offender's belief as to the source of the funds regardless of whether the offender is charged with an offence concerned with the proceeds of crime or an offence concerned with property being used as an instrument of crime. Where it is the latter, the belief as to the source of the funds or its nature is less relevant because those offences are directed to the use to be made of the funds: *R v Huang* (2007) 174 A Crim R 370 at [32]–[33]; *R v Guo* (2010) 201 A Crim R 403 at [89]; *Ungureanu v R* [2012] WASCA 11 at [43], [91]. The offender's understanding of the destination of the money or the purposes for which it was to become an instrument of crime is also relevant although this is not decisive of the seriousness of the particular offence or appropriate penalty: *R v Huang* at [33]. In *R v Huang*, the offender's belief that he was actively involved in dealing with the money to evade the payment of tax was a significant aggravating factor.

The offender in *Majeed v R* [2013] VSCA 40 argued that the sentence imposed on him for dealing with more than $1,000,000 and being reckless as to whether that was the proceeds of crime was manifestly excessive given the maximum penalty, his role and his strong subjective case. The submission was rejected on the basis that the offender's mental state was "at the highest end of recklessness". Given the type of criminal activity in which he was involved (the central contact between a drug trafficking syndicate and a money laundering syndicate), a sentence amounting to more than 50% of the maximum penalty of 12 years was not excessive: [42], [43], [51].

[65-235] Other factors

The number of transactions and the period over which the transactions occurred are significant because they indicate the extent of the offender's criminality: *R v Huang* (2007) 174 A Crim R 370 at [35]; *R v Li* (2010) 202 A Crim R 195 at [41]; *R v Guo* (2010) 201 A Crim R 403 at [87], [89]. Generally, a number of transactions involving small amounts of money will be more serious than a single transaction of a larger amount as the latter may be seen as an isolated offence: *R v Huang* at [35]. Whether the money or property belongs to the offender or someone else, the degree of planning involved and the actual loss that resulted are important: *R v Li* at [41]; *R v Guo* at [87].

The use of false identities to facilitate the criminal activity elevates the objective criminality of an offence: *R v Guo* at [96].

[65-240] Character

An offender's prior good character is of less significance than might otherwise be the case when the activity is engaged in for profit, over a significant period of time and involves a large number of transactions: *R v Huang* (2007) 174 A Crim R 370 at [36]; *R v Guo* (2010) 201 A Crim R 403 at [89].

[65-245] Relevance of related offences

Sentences imposed for structuring offences under the *Financial Transaction Reports Act 1988* (Cth) are not a "helpful guide" to the appropriate sentences for the more serious offences in Div 400. This is not just because of the different maximum penalties prescribed for the different offences but because, depending on the extent of activity engaged in by an offender and their knowledge of the purpose of particular transactions, the criminal activity may be imbued with a completely different complexion": *R v Huang* (2007) 174 A Crim R 370 at [37]; *R v Edwards; Ex parte Director of Public Prosecutions (Cth)* (2008) 183 A Crim R 83 at [21].

[65-250] Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Last reviewed: March 2024

Offences against ss 142–143 *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AMLCTF Act) and s 31 *Financial Transaction Reports Act 1988* (Cth) (FTR Act) involve the transfer of amounts of less than $10,000 to avoid reporting requirements. They are often referred to as "structuring offences" and fall within "money laundering" offences: *R v Guo* (2010) 201 A Crim R 403. Although the offences in each Act address similar criminality, the AMLCTF Act extended the regulatory regime in the FTR Act to address the changing nature of financial transactions: Second Reading Speech. Since the AMLCTF Act's introduction, such criminal conduct is generally prosecuted under ss 142–143 of that Act.

The objects of the AMLCTF Act are listed in s 3(1) and include, generally, the prevention of money laundering and financing of terrorism by imposing obligations on the financial and gambling sectors and other professionals or businesses that provide particular services. Although the decisions referred to below relate to the FTR Act, they may provide guidance in relation to the AMLCTF Act.

Sentencing decisions for financial reporting offences provide assistance by way of stating the general sentencing principle but do not identify a range of sentence: *R v Guo* at [97].

Justice Johnson summarised the relevant sentencing principles for these offences in *R v Guo* at [92]-[97] as follows:

- Such offences are difficult to detect and call for a significant degree of general deterrence: *R v Guo* at [94]; *R v Au* [2001] NSWCCA 468 at [7]; *R v Narayanan* [2002] NSWCCA 200 at [89]; *R v Rule* [2003] NSWCCA 97 at [9]–[10]; *R v Edwards; Ex parte DPP (Cth)* (2008) 183 A Crim R 83 at [2].
- The use of a false identity to facilitate the criminal activity can elevate the level of objective criminality. General and specific deterrence are particularly important

where there is a pattern of illegal activity by an offender over an extended period using a false identity: *R v Guo* at [96]; *Van Haltren v R* (2008) 191 A Crim R 53 at [87].

- The Act is a useful tool against the anti-social practices of organised crime and public corruption, including exploitation of workers in circumstances constituting an offence against the Act: *R v Guo* at [95]; *R v Edwards* at [3].

[The next page is 32401]

Conspiracy

[65-300] Introduction

The courts have developed a number of specific principles concerning the factors a court should take into account when sentencing for conspiracy offences.

The High Court (Gummow, Hayne, Crennan, Kiefel and Bell JJ in a joint judgment, Heydon J agreeing) explained the nature of the crime of conspiracy and what must be proved in *The Queen v LK* (2010) 241 CLR 177 at [141]:

> the prosecution must establish that the accused entered into an agreement with one or more other persons and that he or she and at least one other party to the agreement intended that the offence particularised as the object of the conspiracy be committed pursuant to the agreement. Proof of the commission of an overt act by a party to the agreement conditions guilt and is placed on the prosecution to the criminal standard.

The Crown does not have to prove a causal nexus between the conspiracy and its object. The focus of the conspiracy is what the conspirators intended to bring about, not whether the object was achieved: *Dickson v R* [2016] NSWCCA 105 at [104]–[105].

Conspiracy is a continuous crime, extending over the period of agreement until the police intervene or the objective of the agreement is achieved: *R v Masters* (1992) 26 NSWLR 450 at 458.

For State offences the common law offence of conspiracy applies unless a statute provides otherwise: see **NSW statutory conspiracy offences** at [65-400]. The penalty for common law conspiracy is at large. Section 11.5 Criminal Code (Cth) applies in the case of offences against the Commonwealth subject to any specific offence provisions. The words "conspires" and "conspiracy" in s 11.5(1) are to be understood as fixed by the common law subject to express statutory modification: *The Queen v LK* at [107].

[65-320] Overt acts in furtherance of the conspiracy

The degree to which a sentencing judge can make findings of fact about, and take into account, evidence concerning acts undertaken in furtherance of a conspiracy will often be in issue. The court is not confined to consideration of the agreement itself: *Savvas v The Queen* (1995) 183 CLR 1 at 8. The general principle is that where a court is sentencing for the crime of conspiracy, it may take into account the overt acts of the conspiracy insofar as they bear upon the "content and duration and reality of the conspiracy" and indicate the true nature of and degree of criminality involved in the conspiracy: *R v Savvas (No 2)* (1991) 58 A Crim R 174 at 178; *Savvas v The Queen* at 11, 13, 17; *Truong v The Queen* (2004) 223 CLR 122 at [37]; *Ansari v R* (2007) 70 NSWLR 89 at [133].

The court may refer to what was actually done in the transaction of the conspiracy and may take into account the fact that the object of the conspiracy was implemented: *Savvas v The Queen* at 7–8; *R v DW* (2012) 221 A Crim R 63. The conspiracy does not end with the making of the agreement it continues as long as there are two or more parties to it intending to carry it out: *DPP v Doot* [1973] AC 807 at 823 quoted

with approval in *Savvas v The Queen* at 8. In *Savvas v The Queen*, the High Court held that notwithstanding the offences charged were conspiracies, the sentencing judge was entitled to take into account that the heroin was in fact imported and distributed pursuant to the conspiracy, and that the appellant was involved in those events: *Savvas v The Queen* at 7, 9. To do so did not contravene the principle in *The Queen v De Simoni* (1981) 147 CLR 383. The sentencing judge was not confined to sentencing the appellant on the narrow basis of what he actually physically did. However, the High Court noted at 8:

> The line is sometimes a fine one to walk but it has to be walked if a conspiracy charge is brought and the accused is convicted.

In *Truong v The Queen* (2004) 223 CLR 122, the High Court applied *Savvas v The Queen* at [37]:

> *Savvas* is authority for the proposition that, if [*Truong*] had been tried for, and convicted of, conspiracy rather than the substantive offences, the kidnapping and the killing would have been matters for the sentencing judge to take into account, being aspects of "the degree of criminality involved in the appellant's participation in the conspiracy".

In many cases the overt acts in furtherance of the conspiracy constitute a substantial part of the evidence from which the existence of the agreement in question is to be inferred: *R v Savvas (No 2)* (1991) 58 A Crim R 174 at 176.

However, where a court imposing a penalty for conspiracy, takes into account the overt acts of the conspiracy, it would be wrong to impose a further penalty with respect to those acts. Prosecutions for conspiracy and for a substantive offence ought not result in a duplication of penalty: *The Queen v Hoar* (1981) 148 CLR 32 at 38.

The fact that an attempt is foiled does not lessen the seriousness of what was intended to be achieved by the conspiracy. For example, in *Thangavelautham v R* [2016] NSWCCA 141, a conspiracy to defraud case, the court held that in circumstances where the object of the conspiracy was to obtain the details of a significant number of individuals' credit card information, it was not required that the applicant be sentenced by reference to a single offence under s 192E *Crimes Act 1900*: *Thangavelautham v R* at [84].

[65-340] Yardstick principle — maximum penalty for substantive offence

Where the conspiracy relates to a specific statutory offence, the maximum penalty for the substantive offence should be used as a yardstick during the sentencing process: *The Queen v Hoar* (1981) 148 CLR 32 at 39; *Vella v R* [2015] NSWCCA 148 at [143]. The penalty for the conspiracy should generally not exceed that provided for the substantive offence: *The Queen v Hoar* at 40; *Verrier v DPP* (1967) 2 AC 195. However, in exceptional cases, the element of concert may justify a more severe penalty for the conspiracy than for the substantive offence: *The Queen v Hoar* at 38; *Thangavelautham v R* [2016] NSWCCA 141 at [81]. Further, where the conspiracy is to commit a number of offences, then the court should have regard to the maximum penalty that can be imposed with respect to each of those offences: *The Queen v Hoar* at 40.

The NSW Court of Criminal Appeal affirmed the "yardstick" principle described in *The Queen v Hoar* in *Bell v R* [2009] NSWCCA 206 at [3] and *Pettersen v R*

[2013] NSWCCA 20. In *Pettersen v R* at [8], a conspiracy to break, enter and steal, the court held that the penalty for a common law conspiracy is at large subject only to a requirement that the sentence imposed not be excessive.

In some cases, the result of an instinctive synthesis of all the relevant factors may result in a sentence at or close to the maximum penalty for the substantive offence: *Dickson v R* [2016] NSWCCA 105 at [170]–[171]. In *Dickson v R*, the sophistication, planning and complexity of a conspiracy to defraud the Commonwealth under s 135.4 Criminal Code (Cth) justified the finding that the offence was in the "worst category of cases": *Dickson v R* at [167].

[65-360] Role of the offender

A relevant consideration in sentencing for conspiracy, particularly where the conspiracy relates to a drug offence, is the role played by the offender: *Tyler v R* (2007) 173 A Crim R 458 at [78]; *The Queen v Olbrich* (1999) 199 CLR 270 at [19]; an assessment of culpability of each offender requires precise identification of his or her criminal conduct constituting the offence: *R v Shore* (1992) 66 A Crim R 37. However, when identifying the role of a participant in a conspiracy by reference to their position in the organisational hierarchy, the precise physical acts of the participant are relevant only as one part of a complex tapestry. To isolate the physical acts of the conspirator and sentence them for those acts alone would be artificial and ignore the complex interconnection between participants and the organisational nature of a conspiracy. Further, it ignores the essential feature of the offence of conspiracy – the agreement to participate in an organised criminal activity: *Alpha v R* [2013] NSWCCA 292 at [70].

In *Diesing v R* [2007] NSWCCA 326, the court referred to *Tyler v R* and stated at [80] that their findings:

> … do not seek to punish the applicant for offences with which he was not charged … They reflect upon the degree of the criminality involved in the applicant's participation as a principle in a conspiracy, extending over five months and constituting a large-scale commercial operation spanning two states.

Those who play an authoritative or managerial role in a conspiracy to import prohibited drugs will usually receive a greater sentence than those whose role is less: *Alpha v R* at [69]; *Tyler v R* at [79]–[80]. Conversely, couriers will usually be sentenced less harshly than those who occupy more senior positions: *Tyler v R* at [79]–[80]. To treat an offender as more culpable because of his or her close physical connection to the drugs would invert the conventional approach to blameworthiness in drug conspiracies: *Tyler v R* at [76].

However, there is a danger in describing the offender's role in terms of "further offences committed by the prisoner" as this has the potential to give rise to a belief that the prisoner is being dealt with for something which has not been the subject of a charge: *Savvas v The Queen* at 7. When sentencing for conspiracy cases care must be taken not to breach the principle in *The Queen v De Simoni* (1981) 147 CLR 383 by punishing an offender for an offence for which he or she has not been convicted.

If an offender enters into an agreement but chooses to abandon any participation in the substantive offence, that fact can be taken into account as a matter in mitigation: *Savvas v The Queen* (1995) 183 CLR 1 at 7; and see M Wasik, "Abandoning criminal

intent" (1980) *Crim LR* 785 referred to in *R v Wright* (unrep, 8/7/97, NSWCCA). The fact that the conduct contemplated is impossible has also been taken into account in mitigation: *R v El Azzi* (2001) 125 A Crim R 113 at [42].

[65-380] Standard non-parole period provisions

The standard non-parole period provisions do not apply to offenders charged with common law conspiracy: *Diesing v R* [2007] NSWCCA 326 at [55]; *Greenaway v R* [2013] NSWCCA 270 at [34]; *SAT v R* [2009] NSWCCA 172 at [51]. There is a 10-year standard non-parole period for the offence of conspiracy to murder under s 26 *Crimes Act 1900*: see "Conspiracy to murder" in **NSW statutory conspiracy offences** at [65-400].

[65-400] NSW statutory conspiracy offences

Drug conspiracy offences

Section 26 *Drug Misuse and Trafficking Act 1985* provides that a person who conspires with another person or other persons to commit an offence under Division 2 of Part 2 is guilty of an offence and liable to the same punishment, pecuniary penalties and forfeiture as the person would be if the person had committed the first-mentioned offence.

For drug conspiracy offences reference should be made to the relevant offence provision and **Section 26 — Conspiracy offence** at [19-855].

Conspiracy to murder

As to conspiracy to murder see **Conspiracy/solicit to murder: s 26, Crimes Act 1900** at [30-090].

Firearms

See *MP v R* [2009] NSWCCA 226 and s 51C *Firearms Act 1996*: conspiring to commit offence outside NSW.

[65-420] Commonwealth conspiracy offences

Commonwealth conspiracy offences are addressed by statute. Section 11.5 *Criminal Code* (Cth) (Conspiracy) sets out the statutory requirements governing conspiracy in respect of Commonwealth offences. For example, s 11.5(1) provides that a person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Commonwealth legislation also provides a number of specific conspiracy offences including conspiracy to defraud the Commonwealth under s 135.4 *Criminal Code* (Cth) (previously ss 29D and 86 *Crimes Act 1914* (Cth)). In sentencing for this offence, the court can have regard to the diminution of the maximum penalty from 20 years under the old statutory regime (s 86) to 10 years under the new regime (s 135.4(3) *Criminal Code* (Cth)) as reflecting a change in attitude towards fraud on the part of the legislature: *R v Ronen* (2006) 161 A Crim R 300 per Spigelman CJ at [76] and

R v Boughen (2012) 215 A Crim R 476. See also *Agius v The Queen* (2013) 248 CLR 601; *Vella v R* [2015] NSWCCA 148; *Liles v R* (Cth) [2014] NSWCCA 289; *R v Mereb* [2014] NSWCCA 149; *Sakovits v R* [2014] NSWCCA 109; *Elomar v R* [2014] NSWCCA 303.

For a "worst category" case of conspiracy to defraud the Commonwealth under s 135.4 Criminal Code (Cth), see *Dickson v R* [2016] NSWCCA 105.

Sections 41 and 42 *Crimes Act 1914* (Cth) provide for the offence of conspiracy to pervert the course of justice.

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Appeals

para

Appeals

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Appeals

[70-000] Introduction

This chapter first discusses sentence appeals for matters dealt with on indictment and then appeals from the Local Court. A creature of statute, the precise nature of a sentence appeal depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321 at [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8].

[70-020] Section 5(1)(c) severity appeals

Section 5(1)(c) *Criminal Appeal Act 1912* provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave.

Time limits and applications out of time

The provisions of the *Criminal Appeal Act* and the Criminal Appeal Rules (repealed but now see Supreme Court (Criminal Appeal) Rules 2021, with similar provisions) relating to time limits and applications out of time are explained in *Kentwell v The Queen* (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) *Criminal Appeal Act* requires notice of intention to apply for leave to appeal to be given within 28 days from the date of sentence. If notice is not given by the defendant, the applicable period for a notice of appeal is three months after the sentence: r 3.5(2)(b) Supreme Court (Criminal Appeal) Rules 2021. A notice of appeal against a sentence under s 5D *Criminal Appeal Act* must be filed 28 days after the sentence: r 3.5(3). If a notice of appeal is filed after the time for filing has expired, the application for leave may only be made with the leave of the Court: r 3.5(5). The Court has a discretion to dispense with the rules in particular cases: r 1.4.

Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

An application should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: *Kentwell v The Queen* at [4], [30], [44]; *O'Grady v The Queen* (2014) 252 CLR 621 at [13]. In considering whether to grant an extension of time a court must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: *Kentwell v The Queen* at [32].

The prospect of success of the appeal is relevant. This involves considering the merits of an appeal. That issue is addressed by reference to s 6(3) *Criminal Appeal Act*: *Kentwell v The Queen* at [33]–[34]. As to the approach the court must take to s 6(3), see further below at **[70-040]**.

The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for

leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: *Lowe v R* [2015] NSWCCA 46 at [14].

[70-030] The ordinary precondition of establishing error

Severity appeals under s 5(1)(c) *Criminal Appeal Act 1912* are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. Nor is an appeal the occasion for revising and reformulating the case presented below: *Zreika v R* [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish the sentencing judge made an error in the exercise of their discretion: *House v The King* (1936) 55 CLR 499 at 505. In *Markarian v The Queen* (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

See also the explanation of specific error in *Kentwell v The Queen* (2014) 252 CLR 601 at [42].

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons: *Hili v The Queen* at [59].

Failure to attribute sufficient weight to an issue

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in *House v The King* (1936) 55 CLR 499: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [48].

Such a ground of appeal has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: *DF v R* [2012] NSWCCA 171at [77]; *Hanania v R* [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: *Hanania v R* at [33].

Failure of defence to refer to matters at first instance later relied upon

It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the

sentencing judge: *Stewart v R* [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: *Stewart v R* at [56], citing *Zreika v R* [2012] NSWCCA 44.

Errors of fact and fact finding on appeal

Factual findings are binding on the appellate court unless they come within the established principles of intervention: *AB v R* [2014] NSWCCA 339 at [44], [50], [59]; *R v Kyriakou* (unrep, 6/8/87, NSWCCA); *Skinner v The King* (1913) 16 CLR 336 at 339–340; *Lay v R* [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: *AB v R* at [52], [59]; *R v O'Donoghue* (unrep, 22/7/88, NSWCCA); *Kentwell v The Queen* (2014) 252 CLR 601 at [35]; *Hopley v R* [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of *House v The King* (1936) 55 CLR 499 as a ground of appeal: *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24]; *Camm v R* [2009] NSWCCA 141 at [68]; *Cao v R* [2010] NSWCCA 109 at [48].

It is incumbent on the applicant to show that the factual finding was not open: *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: *AB v R* at [59]. The court cannot review the finding of fact made and substitute its own findings: *R v O'Donoghue* at 401.

In *Clarke v R* [2015] NSWCCA 232 at [32]–[36] and *Hordern v R* [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of *R v O'Donoghue* and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view has failed to receive support in subsequent judgments of the court: see *Yin v R* [2019] NSWCCA 217 at [27]; *Gibson v R* [2019] NSWCCA 221 at [2]–[6]; *TH v R* [2019] NSWCCA 184 at [1]; [22]–[23].

If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: *R v MD* [2005] NSWCCA 342 at [62]; *R v Merritt* (2004) 59 NSWLR 557 at [61]; *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24].

There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: *Lay v R* at [51]; *Aoun v R* [2011] NSWCCA 284. Where a factual error has been made in the *House v The King* sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: *Lay v R* at [53] applying *Kentwell v The Queen* at [40]–[43].

[70-035] Appellate review of an aggregate sentence

Last reviewed: November 2023

A court may impose an aggregate sentence when sentencing an offender for multiple offences: *Crimes (Sentencing Procedure) Act 1999*, s 53A(1). See **[7-505] Aggregate sentences**.

In *JM v R* [2014] NSWCCA 297, the seminal case on aggregate sentencing, R A Hulme J (Hoeben CJ at CL and Adamson J agreeing) at [3] set out nine propositions established by the cases considering s 53A: see **[7-507] Settled propositions concerning s 53A**. His Honour set out "further propositions" in relation to appellate review of aggregate sentencing (numbering continues from [39] (see **[7-507]**), case references omitted):

> 10 Another benefit of the aggregate sentencing provision is that it makes it easier on appeal to impose a new aggregate sentence if one of the underlying convictions needs to be quashed …
>
> 11 The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence …
>
> 12 Even if the indicative sentences are assessed as being excessive, that does not necessarily mean that the aggregate sentence is excessive …
>
> 13 A principal focus of determination of a ground alleging manifest inadequacy or excess will be whether the aggregate sentence reflects the totality of the criminality involved … This Court is not in a position to analyse issues of concurrence and accumulation in the same way that it can analyse traditional sentencing structures …
>
> 14 Erroneous specification by a sentencing judge of commencement dates for indicative sentences (such as there being gaps between the expiry of some indicative sentences and the commencement of subsequent sentences) are immaterial and may be ignored as being otiose …
>
> 15 A failure of a judge to specify a non-parole period in the indicative sentence for a standard non-parole period offence will not lead to an appeal being upheld. Failure to do so does not invalidate the sentence: s 54B(7). Setting non-parole periods for the indicative sentences for standard non-parole period offences would have no effect upon the aggregate sentence imposed.

The principle or ultimate focus of the appeal is against the aggregate sentence, not the individual indicative sentences: *Lee v R* [2020] NSWCCA 244 at [32], *R v Kennedy* [2019] NSWCCA 242 at [78]; *DS v R* [2017] NSWCCA 37 at [63]–[64]; *JM v R* at [40] (proposition 11). However, in determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences and to "potentials for accumulation" although without beginning and end dates for each indicative sentence, it may be more difficult to demonstrate a relevant error: *Lee v R* at [32], *JM v R* at [40] (propositions 11 and 13); *Gibson v R* [2019] NSWCCA 221 at [88]. Propositions 11, 12 and 13 were also affirmed in *Kerr v R* [2016] NSWCCA 218 at [114] and in *Kresovic v R* [2018] NSWCCA 37 at [42].

[70-040] Section 6(3) — some other sentence warranted in law

Section 6(3) *Criminal Appeal Act 1912* provides:

> On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

It is only open to the CCA to quash the sentences if it is of the opinion stipulated in s 6(3) as one "that some other sentence ... is warranted in law and should have been passed": *Elliott v The Queen* (2007) 234 CLR 38 at [34].

The phrase "is warranted in law" assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it: *Elliott v The Queen* at [36]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act 1999* provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Once a specific error of the kind identified in *House v The King* (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: *Kentwell v The Queen* (2014) 252 CLR 601 at [42] citing Spigelman CJ in *Baxter v R* [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: *Baxter v R*. It is not necessary to determine whether the error had an actual effect on the sentence, only that it had the capacity to do so: *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]–[13]; *Tomlinson v R* [2022] NSWCCA 16 at [200]. In this context use of the term "material" to distinguish between errors impacting on the sentencing discretion and those that do not should be avoided: *Newman (a pseudonym) v R* at [11]; *Ibrahim v R* [2022] NSWCCA 134 at [24].

The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: *Kentwell v The Queen* at [42]; *Thammavongsa v R* [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made at the end of the process required under s 6(3) to check that the sentence arrived at by the appellate court does not exceed the original sentence: *Thammavongsa v R* at [5]–[6].

Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: *Kentwell v The Queen* at [42].

In *Lehn v R* (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the sentencing exercise, the court is required under s 6(3) to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: *Lehn v R* at [68]. The High Court in *Kentwell v The Queen* at [42] held that the CCA's task on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome, but to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: *Lehn v R* at [77] quoting

Kentwell v The Queen. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: *Lehn v R* at [78].

Where error may not require re-exercise of sentencing discretion

There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: *Lehn v R* (2016) 93 NSWLR 205 at [72]. For example, where an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: *Lehn v R* at [72]. In *Greenyer v R* [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court. A similar arithmetical error was found to affect the non-parole period in *Li v R (Cth)* [2021] NSWCCA 100 and was corrected without the court proceeding to re-sentence: at [58]; [66]; [71].

The sentencing error in *Lehn v R* of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: at [65], [118], [128], [140].

Is a lesser sentence warranted

The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: *Kentwell v The Queen* at [43]. If the court concludes either that the same, or a greater, sentence should be imposed, it is not required to re-sentence: *Kentwell v The Queen* at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: *Kentwell v The Queen* at [43] citing *Neal v The Queen* (1982) 149 CLR 305 at 308.

The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease as it lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: *Thammavongsa v R* at [3], [16].

Reception of evidence following finding of error

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: *Betts v The Queen* (2016) 258 CLR 420 at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: *Kentwell v The Queen*

at [43] citing *Douar v R* [2005] NSWCCA 455 at [124] and *Baxter v R* at [19] with approval. In *Douar v R* at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: *R v Deng* [2007] NSWCCA 216 at [43]; *R v Fordham* (unrep, 2/12/97, NSWCCA).

The appellant cannot run a "new and different case": *Betts v The Queen* at [2]. It is not the case that once error is demonstrated, the appellate court may receive *any* evidence capable of bearing on its determination of the appropriate sentence: *Betts v The Queen* at [8], [12]–[13] approving *R v Deng* [2007] NSWCCA 216 at [28]. The conduct of an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by *House v The King* (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: *Betts v The Queen* at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: *Betts v The Queen* at [14].

In *Betts v The Queen*, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: at [57]–[59].

The power to remit under ss 12(2) and 6(3)

Section 12(2) *Criminal Appeal Act 1912* provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made".

The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: *Betts v The Queen* at [17]. The issue was unnecessary to determine in *Betts v The Queen* at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): *Betts v The Queen* at [17].

The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in *O'Neil-Shaw v R* [2010] NSWCCA 42: *Betts v The Queen* at [19].

It was held in *O'Neil-Shaw v R* at [56] that s 6(3) should not be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: *O'Neil-Shaw v R* at [32]. Remittal under s 12(2) *Criminal Appeal Act* is the more appropriate course since this permits a judge to determine the question of sentence upon the evidence adduced in the second hearing: *O'Neil-Shaw v R* at [57].

The meaning of "sentence" in s 6(3)

An aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act 1999* is a "sentence" within s 6(3): *JM v R* [2014] NSWCCA 297 at [40]; see also **[70-035] Appellate review of an aggregate sentence**.

In the past there was an issue about whether the word "sentence" in s 6(3) refers only to a specific sentence for a particular offence and did not include a reference to an overall effective sentence: see *R v Bottin* [2005] NSWCCA 254 (as to the latter) and *Arnaout v R* [2008] NSWCCA 278 at [21] (as to the former).

[70-060] Additional, fresh and new evidence received to avoid miscarriage of justice

The Court of Criminal Appeal has flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice: *Betts v The Queen* (2016) 258 CLR 420 at [2], [10]. More than one approach has been adopted (as explained below). *Barnes v R* [2022] NSWCCA 140 contains a summary of the relevant principles at [24]–[34].

The conventional approach is for the court to ask whether the additional evidence is "fresh", that is, evidence which the applicant was unaware of and could not have obtained with reasonable diligence: *R v Goodwin* (unrep, 3/12/90, NSWCCA); *R v Abou-Chabake* [2004] NSWCCA 356 at [63]. Fresh evidence is to be contrasted with new evidence which is not received. It is evidence that was available at the time, but not used and could have been obtained with reasonable diligence: *Khoury v R* [2011] NSWCCA 118 at [107]; *R v Many* (unrep, 11/12/90, NSWCCA); *Barnes v R* at [28]. Even if evidence is fresh, it will not be received by the court unless it affects the outcome of the case: *R v Fordham* (unrep, 2/12/97, NSWCCA) at 378. For example, the evidence in *Bajouri v R* [2016] NSWCCA 20 of images on Facebook showing the victim doing activities such as jet skiing 10 months after the assault offence and 18 months before his victim impact statement could not qualify as fresh evidence. It did not contradict or cast doubt on the contents of the victim impact statement: at [44], [46], [51]. "New" evidence is evidence that was available but not used, or was discoverable with the exercise of reasonable diligence at the time of sentence: *Khoury v R* at [107]; *Barnes v R* at [28].

Evidence of factual circumstances which existed at sentence

The Court of Criminal Appeal has received additional evidence of facts or circumstances which existed at the time of sentencing, even if not known, or imperfectly understood, at that time: *Khoury v R* [2011] NSWCCA 118 at [113]. That is, circumstances existed which were known at sentence but their significance was not appreciated: *Khoury v R* at [114]–[115]. See the examples referred to in *Springer v R* [2007] NSWCCA 289 at [3]. The rationale for the receipt of the additional evidence is that the sentencing court proceeded on an erroneous view of the facts before it: *Khoury v R* at [113].

The decision to admit additional evidence is discretionary and caution must be exercised: *Khoury v R* at [117]; *Wright v R* [2016] NSWCCA 122 at [19], [71]. The applicant must establish a proper basis for the admission of the evidence: *Khoury v R* at [117]. Relevant factors to be taken into account according to Simpson J in *Khoury v R* at [121] include:

> … the circumstances of, and any explanation for, the non-production of the evidence — a deliberate decision on the part either of the applicant, or his or her legal representatives, ignorance in the applicant of the significance of the evidence,

> resulting in its not being communicated to the legal representatives, incompetent legal representation [and] … the potential significance of the evidence to have affected the outcome at first instance …

Two categories of case have emerged:

- medical evidence cases: *Khoury v R* at [115]
- assistance to authorities cases: *R v Many* (unrep, 11/12/90, NSWCCA); *ZZ v R* [2019] NSWCCA 286.

Medical evidence cases

The general principle that parties will not normally be able to produce fresh or new evidence on appeal reflects the importance of finality: *Cornwell v R* [2015] NSWCCA 269 at [39]. However, evidence as to a medical condition may form the basis for an exception to this principle where it is in the interests of justice: *Cornwell v R* at [39], [57], [59]; *Turkmani v R* [2014] NSWCCA 186; *Khoury v R* [2011] NSWCCA 118 at [115]; *Dudgeon v R* [2014] NSWCCA 301.

In *Turkmani v R*, the court at [66] identified three categories of case where fresh evidence is sought to be adduced in relation to the health of an offender. First, where the offender was only diagnosed as suffering from a condition after sentence but was affected at the time of sentence; secondly where, although the symptoms of a condition may have been present, their significance was not appreciated and; thirdly where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but did not. See the discussion of *Turkmani v R* in *Wright v R* [2014] NSWCCA 186 at [73].

The discretion to admit fresh evidence of an offender's medical condition was permitted in *Cornwell v R* on the basis that he was clearly suffering Huntington's disease at the time of sentencing which was likely to make custody more burdensome for him: at [59], [64]. The evidence established that the pre-sentence instructions given by the applicant to his legal representatives — that he did not wish to undergo testing for the disease — were justified by psychological factors including the fear of a positive diagnosis following his experience of family members with the same disease: at [58].

In *Wright v R*, the applicant was sentenced on the basis he was in poor health and of advanced age. Following sentence, he was diagnosed with Alzheimer's disease. Although the evidence qualified as fresh evidence, the court exercised its discretion not to admit it because the evidence would not have made a significant difference to the sentence imposed by the judge: at [1], [20], [84], [98], [100]. The sentence already represented a lenient outcome: at [86].

Evidence the applicant had developed terminal liver cancer was admitted as fresh evidence in *Lissock v R* [2019] NSWCCA 282. The Crown accepted the condition was present to some degree at sentence and its significance not fully appreciated until much later. The applicant was re-sentenced on the basis his time in custody would be more difficult physically and psychologically than if he were completely well: at [92]–[94], [113]–[114].

As to psychological conditions, there is an unresolved issue as to whether the additional evidence is the psychological condition existing at the time or the later diagnosis by the expert in a report prepared after sentence proceedings: *Khoury v R*

at [118], quoting Basten JA in *Einfeld v R* [2010] NSWCCA 87 at [45], [50]. A psychological report prepared after sentence is not necessarily fresh or new evidence because it was prepared after sentence: *Khoury v R* at [120], but see *R v Fordham* at 377–378.

Assistance to authorities

In the particular circumstances of *ZZ v R* [2019] NSWCCA 286, the court concluded that information provided by the applicant in an interview with police upon her arrest which, after the sentence proceedings, resulted in arrests overseas, qualified as fresh evidence and resulted in a reduction of her sentence on appeal: at [29]–[30], [33]–[34]. See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]–[42].

Evidence of facts that have arisen entirely after sentence

The past tense used in s 6(3) "some other sentence, whether more or less severe is warranted in law and should have been passed" has the effect according to Simpson J in *Khoury v R* [2011] NSWCCA 118 at [110] that:

> … evidence of events or circumstances or facts that have arisen *entirely* since sentencing cannot be taken into account, no matter how compelling they may be. If the facts did not exist at the time of sentencing, it cannot have been an error for the sentencing judge not to have taken them into account [emphasis added].

See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]. While there is some flexibility with respect to the application of this principle (see *Agnew v R* at [39]–[40] and the discussion below) the view, for example, that a post-sentence reduction in a custodial sentence for assistance to authorities can be achieved by means of an appeal where no error or miscarriage has been found should not be encouraged: *Agnew v R* at [40]–[42].

Evidence that an applicant assisted authorities post sentence: *JM v R* [2008] NSWCCA 254, or had a medical condition that did not exist at sentence, has not been received by the court: *Khoury v R* at [111]–[112].

[70-065] Miscarriage of justice arising from legal representation

The general rule as set out in *R v Birks* (1990) 19 NSWLR 677 at 683 and 685 that "a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted" applies to sentencing proceedings: *Khoury v R* [2011] NSWCCA 118 at [104]; *Tran v R* [2014] NSWCCA 32 at [12]; *CL v R* [2014] NSWCCA 196. However, fresh evidence has been admitted by the Court of Criminal Appeal without error being established where a miscarriage of justice occurred because the applicant was incompetently or carelessly represented at sentence: *R v Fordham* at 377–378, citing *R v Abbott* (unrep, 12/12/85, NSWCCA); *Munro v R* [2006] NSWCCA 350 at [23]–[24].

Where evidence was available to the defence at the time of sentencing, a miscarriage of justice will rarely result simply from the fact that the evidence was not put before the sentencing judge, even if the evidence may have had an impact upon the sentence passed: *R v Fordham* at 377.

Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused

to such decisions, even though it is conceivable that other decisions or something else may have worked better: *Ratten v The Queen* (1974) 131 CLR 510 at 517; *R v Diab* [2005] NSWCCA 64 at [19].

In *Khoury v R*, counsel said it did not occur to him to call psychiatric evidence concerning the applicant's low intellectual functioning. Evidence was received on appeal because of its significance in the case: see the explanation of *Khoury v R* in *Grant v R* [2014] NSWCCA 67 at [57]. Conversely, in *Grant v R*, the court refused to admit two psychological reports prepared many years after sentence proceedings: *Grant v R* at [58].

A miscarriage of justice was found in *Grant v R* where the applicant pleaded guilty to manslaughter on the basis of excessive self-defence because the legal representative: failed to explain to the client the various states of mind within the offence of manslaughter; failed to obtain clear instructions from the client on that issue; and, informed the court what he thought was his client's intention without having obtained clear instructions on the issue: at [71], [77].

[70-070] Crown appeals for matters dealt with on indictment

Section 5D(1) *Criminal Appeal Act 1912* provides:

> The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

Although the Attorney General (NSW) has a statutory right to appeal against sentence, it has only been exercised once since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the *Director of Public Prosecutions Act 1986* (NSW). See *CMB v Attorney General for NSW* (2015) 256 CLR 346. The decision to institute a Crown appeal is made by the DPP, although the Executive government sometimes requests that the DPP consider an appeal on behalf of the Crown to correct a sentence perceived to be inadequate.

Time limits to appeal and specifying grounds

Section 10(1) *Criminal Appeal Act* (which provides that a notice of intention to appeal must be filed 28 days from the date of sentence), does not apply to Crown appeals: *R v Ohar* (2004) 59 NSWLR 596. However, under the rules, the period for filing a Crown appeal against sentence under s 5D *Criminal Appeal Act* is 28 days after the sentence: r 3.5(4), Supreme Court (Criminal Appeal) Rules 2021. If a notice of appeal is filed after this period, the court must grant leave: r 3.5(5). Delay in bringing an appeal is relevant to the court's exercise of its discretion to intervene: *Green v The Queen* (2011) 244 CLR 462 at [43].

A notice of a Crown appeal (as filed) must be served on the respondent, the Legal Aid Commission and the last known Australian legal practitioner representing the respondent (r 3.7(1)) and must be personally served on the respondent if they are not represented (r 3.7(2)).

While not specifically addressed in the rules, it appears clear from the approved Notice of Appeal and accompanying Annexure A (available on the Supreme Court

website) that documents setting out all grounds relied on in the appeal and written submissions addressing each ground are to be attached to the relevant notice of appeal: cf *R v JW* (2010) 77 NSWLR 7 at [33] .

At some stage a formal document identifying the grounds should be brought into existence in a Crown appeal: *R v JW* (2010) 77 NSWLR 7 at [33], [35]. The court acknowledged in *R v JW* at [33] that it is a desirable "rule of practice", within the meaning of r 76, that a Crown appeal should identify grounds of appeal in the notice of appeal, but that practice does not require grounds to be identified when the notice is first filed and failure to do so does not render the appeal incompetent: *R v JW* at [33]. The High Court decision of *Carroll v The Queen* (2009) 83 ALJR 579 does not imply a contrary position: *R v JW* at [35].

[70-080] Matters influencing decision of the DPP to appeal

The NSW Prosecution Guideline Chapter 10: DPP appeals, at [10.2], states in part that the DPP will only lodge an appeal if satisfied that:

1. all applicable statutory criteria are established
2. there is a reasonable prospect that the appeal will succeed
3. it is in the public interest.

The Guideline states, at [10.4] Appeals against sentence, that the primary purpose of DPP sentence appeals to the Court of Criminal Appeal is to allow the court to provide governance and guidance to sentencing courts. The Guideline recognises that such appeals are, and ought to be, rare. The Guideline states they should be brought in appropriate cases:

1. to enable the courts to establish and maintain adequate standards of punishment for crime
2. to enable idiosyncratic approaches to be corrected
3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

The *Prosecution policy of the Commonwealth: guidelines for the making of decisions in the prosecution process* (issued by the CDPP in July 2021) sets out the Director's policy in relation to Commonwealth prosecution appeals against sentence. It can be accessed from "Prosecution Process" on the CDPP website.

Guideline 6.35 of the Commonwealth prosecution policy states that the prosecution right to appeal against sentence "should be exercised with appropriate restraint" and "consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful". Guideline 6.36 further states that an appeal against sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation.

[70-090] Purpose and limitations of Crown appeals

Last reviewed: November 2023

The primary purpose of a Crown appeal is to lay down principles for the governance and guidance of courts with the duty of sentencing convicted persons: *Green v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [1], [36], quoting

Barwick CJ in *Griffith v The Queen* (1977) 137 CLR 293 at 310. See also *R v DH* [2014] NSWCCA 326 at [19]; *R v Tuala* [2015] NSWCCA 8 at [98]. Their Honours in *Green v The Queen* continued at [36]:

> That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

The High Court affirmed the above passage in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [55].

The purpose of Crown appeals extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing: *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]–[62].

The two hurdles in Crown appeals

In a Crown appeal against sentence, the Crown is required to surmount two hurdles: firstly, it must identify a *House v The King* [(1936) 55 CLR 499 at 505] error in the sentencing judge's discretionary decision; and secondly, it must negate any reason why the residual discretion of the CCA not to interfere should be exercised: *CMB v Attorney General for NSW* at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 per Heydon JA at [12] with approval. The discretion is residual only in that its exercise does not fall to be considered unless *House v The King* error is established: *CMB v Attorney General for NSW* at [33], [54]. Once the discretion is enlivened, it remains incumbent on the Crown as the appellant under s 5D to demonstrate that the discretion should be exercised: *CMB v Attorney General for NSW* at [33], [54].

Error and manifest inadequacy

The court may only interfere where error, either latent or patent, is established: *Dinsdale v The Queen* at [61]; *Wong and Leung v The Queen* (2001) 207 CLR 584 at [58], [109]. The bases of intervention in *House v The King* (1936) 55 CLR 499 at 505 are not engaged by grounds of appeal which assert that the judge erred by (a) failing to properly determine the objective seriousness of the offence, or (b) failing to properly acknowledge the victim was in the lawful performance of his duties, or (c) by giving excessive weight to an offender's subjective case to reduce the sentence: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *R v Tuala* [2015] NSWCCA 8 at [44]. These are just "particulars of the ground that the sentence was manifestly inadequate": *Bugmy v The Queen* at [22], [53].

Manifest inadequacy of a sentence is shown by a consideration of all matters relevant to fixing a sentence and, by its nature, does not allow lengthy exposition. Reference to the circumstances of the offending and the personal circumstances of an offender, may sufficiently reveal the bases for concluding that a sentence is manifestly inadequate: *Hili v The Queen* (2010) 242 CLR 520 at [59]–[61].

As to the application of the parity principle in Crown appeals see **[10-850]**.

Assessment of objective seriousness

It is open to an appeal court in a Crown appeal to form a different view from the sentencing judge as to the objective seriousness of an offence where the (only) *House v The King* error asserted is that the sentence is "plainly unjust": *Carroll v The*

Queen [2009] HCA 13 at [24]. However, in reaching its conclusion, the appeal court cannot discard the sentencing judge's factual findings where the findings are not challenged: *Carroll v The Queen* at [24]. In relation to a finding of objective seriousness, Spigelman CJ had said in *Mulato v R*:

> Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself …

See earlier discussion under **Errors of fact and fact finding on appeal** in **[70-030]**.

Specific error alone is not enough to justify interference in a Crown appeal; the Crown must also demonstrate that the sentence is manifestly inadequate: *R v Janceski* [2005] NSWCCA 288 at [25]. The court must make an express finding that the sentence imposed at first instance is manifestly inadequate and the power to substitute the sentence is not enlivened by a finding that the court would have attributed less weight to some factors and more to others: *Bugmy v The Queen* at [24]; *R v Tuala* at [44]. The court must be satisfied that the discretion miscarried, resulting in the judge imposing a sentence which was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards": *Bugmy v The Queen* at [24], [55]. If that is the case, the court has to then consider whether the Crown appeal "should nonetheless be dismissed in the exercise of the residual discretion": at [24].

As to the residual discretion see further below at **[70-100]**.

Aggregate sentences

Section 5D *Criminal Appeal Act* permits the Crown to appeal "against any sentence pronounced". The Crown cannot appeal an indicative sentence (the sentence that would have been imposed for an individual offence under s 53A(2)(b) *Crimes (Sentencing Procedure) Act*) because it is neither pronounced nor imposed: *R v Rae* [2013] NSWCCA 9 at [32]. Where an aggregate sentence is imposed only one sentence is pronounced, but the appellate court can consider submissions as to the inadequacy or otherwise of an indicative sentence in determining whether an aggregate sentence is inadequate: *R v Rae* at [32]–[33].

With appropriate modification the principles with respect to appeals of aggregate sentences on the grounds of manifest excess "equally apply" to a complaint of manifest inadequacy: *DPP (NSW) v TH* [2023] NSWCCA 81 at [53]–[54]; see also discussion in **[70-035] Appellate review of an aggregate sentence**. In *DPP (NSW) v TH*, while the "ultimate issue" was whether the aggregate sentence was manifestly inadequate, the fact that three of the four indicative sentences were "below any conception of the proper range of sentences for such offending" meant it almost inevitably followed that the aggregate sentence was also manifestly inadequate: at [56]–[58].

Double jeopardy principle

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009* abolished the principle of double jeopardy in Crown appeals on sentence. A new s 68A entitled "Double jeopardy not to be taken into account in prosecution" was inserted into the *Crimes (Appeal and Review) Act 2001*. It provides:

> (1) An appeal court must not:
>
> (a) dismiss a prosecution appeal against sentence, or

(b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,

because of any element of double jeopardy involved in the respondent being sentenced again.

(2) This section extends to an appeal under the *Criminal Appeal Act 1912* and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

The terms of s 68A(1), "[an] appeal court", and s 68A(2), "extends to an appeal under the *Criminal Appeal Act 1912*", on their face appear also to apply to Crown appeals from the Local Court to the District Court.

The expression "double jeopardy" in s 68A is limited to "the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence": *R v JW* (2010) 77 NSWLR 7 at [54]. Chief Justice Spigelman said at [141] (with support of other members of the Bench at [205] and [209]):

(i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.

(ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.

(iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.

(iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.

(v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

Application of s 68A to Commonwealth Crown appeals

The High Court held in *Bui v DPP (Cth)* (2012) 244 CLR 638 that ss 289–290 *Criminal Procedure Act 2009* (Vic) (which are materially similar double jeopardy provisions to s 68A) do not apply to Crown appeals against sentence for a Commonwealth offence. The court made explicit reference to the NSW decision of *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 in deciding the issue. See also *DPP (Cth) v Afiouny* [2014] NSWCCA 176 at [75]. Section 80 *Judiciary Act 1903* (Cth), which enables State courts to exercise federal jurisdiction, allows the common law to apply where it has not been modified by State legislation and so far as the laws of the Commonwealth are not applicable or their provisions insufficient: *Bui* at [27]. The High Court held that no question of picking up the Victorian provisions arose because the issue can be resolved by reference to s 16A *Crimes Act 1914* (Cth) itself. In short, there is "no gap" in the Commonwealth laws: *Bui* at [29]. Section 16A does not accommodate the common law principle of "presumed anxiety": *Bui* at [19]. The same reasoning applies to s 68A.

Although presumed anxiety cannot be read into the text of s 16A(1), actual mental distress can be taken into account under s 16A(2)(m) both when the court is determining whether to intervene and in resentencing: *Bui* at [21]–[24], approving *DPP*

(Cth) v De La Rosa. Simpson J's view in that case of s 16A(2)(m) at [279]–[280] — that it is limited to a condition of distress and anxiety which is the subject of proof — is to be preferred to the views expressed by Allsop P and Basten JA: *Bui* at [23]. Section 16A(2)(m) refers to the actual mental condition of a person, not his or her presumed condition. A condition of distress or anxiety must be demonstrated before s 16A(2)(m) applies: *Bui* at [23].

Counsel for the respondent in *R v Nguyen* [2010] NSWCCA 238 at [125]–[127] unsuccessfully relied upon the offender's anxiety and distress suffered as a consequence of the Crown appeal. However, in *R v Primmer* [2020] NSWCCA 50 the respondent's affidavit, setting out his personal anxiety and distress when advised of the appeal and the prospect of his sentence being increased, was one matter taken into account by the court in exercising its discretion to decline to intervene: at [40]–[43].

Rarity

It was long established at common law that appeals by the Crown should be rare: *Malvaso v The Queen* (1989) 168 CLR 227. The application of that factor has been abolished, see *R v JW* at [141] in (v) (see above). In *R v JW* at [124], [129], Spigelman CJ said that insofar as "rarity" was intended to apply as a sentencing principle by way of guidance to courts of criminal appeal, it should be understood as reflecting the double jeopardy principle, now abolished. Other reasons for the frequency or otherwise of such appeals are not matters that are generally of concern to a court of criminal appeal. They are directed to the prosecuting authorities.

[70-100] The residual discretion to intervene

Once error is identified in a Crown appeal, the court is not obliged to embark on the resentencing exercise: *R v JW* (2010) 77 NSWLR 7 at [146]. The court has a discretion to refuse or decline to intervene even if error is established: *R v JW* at [146]; *Green v The Queen* (2011) 244 CLR 462 at [1], [26]; *R v Reeves* [2014] NSWCCA 154 at [12].

It is an error for the court to fail to consider the exercise of its residual discretion to dismiss the Crown appeal despite finding error: *Bugmy v The Queen* (2013) 249 CLR 571 at [24]; *Reeves v The Queen* (2013) 88 ALJR 215 at [60]–[61].

Two questions are relevant to the exercise of the residual discretion: first, whether the court should decline to allow the appeal even though the sentence is erroneously lenient; and second, if the appeal is allowed, to what extent the sentence should be varied: *R v Reeves* at [13]; *Green v The Queen* at [35]. The purpose of Crown appeals is not simply to increase an erroneous sentence. The purpose is a "limiting purpose" to establish sentencing principles and achieve consistency in sentencing: *R v Reeves* at [14]–[15]; *Griffiths v The Queen* (1977) 137 CLR 293 at [53]; *R v Borkowski* [2009] NSWCCA 102 at [70]. Where the guidance provided to sentencing judges is limited, for example, because the proceedings are subject to non-publication orders, it may be appropriate to dismiss the appeal in the exercise of the residual discretion: *HT v The Queen* (2019) 93 ALJR 1307 at [51]; [55]; [90].

In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing: *R v Reeves* at [19]; *R v Deng* [2007] NSWCCA 216 at [28]; *R v Allpass* (unrep, 5/5/93, NSWCCA).

The onus is on the Crown to negate any reason why the residual discretion should be exercised: *R v Hernando* [2002] NSWCCA 489 at [12], cited with approval in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [34], [66].

Section 68A(1) expressly removes double jeopardy as a discretionary consideration for refusing to intervene: *R v JW* at [95] but it "leaves other aspects untouched" and "there remains a residual discretion to reject a Crown appeal" for reasons other than double jeopardy: *R v JW* per Spigelman CJ at [92], [95] (other members of the court agreeing at [141], [205], [209]).

The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand: *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.

Factors that bear upon the residual discretion

The category of factors that bear upon the residual discretion are not closed. Rarity and the frequency of Crown appeals is no longer a relevant consideration: *R v JW* (2010) 77 NSWLR 7 at [129].

Conduct of the Crown

The conduct of the Crown at first instance is an important consideration. A Crown concession before the sentencing judge that a non-custodial sentence is appropriate, bearing in mind the Crown's duty to assist a sentencing court to avoid appellable error, is a consideration weighing strongly against interference: *CMB v Attorney General for NSW* at [38], [64]; see also *R v Allpass* (unrep, 5/5/93, NSWCCA); *R v Chad* (unrep, 13/5/97, NSWCCA); *R v JW* (2010) 77 NSWLR 7 at [92]. The failure of the Crown to indicate that a proposed sentence is manifestly inadequate is a material consideration in the exercise of the CCA's residual discretion: *CMB v Attorney General for NSW* at [64]. When the Crown asks the CCA to set aside a sentence on a ground, conceded in the court below, the CCA in the exercise of its discretion should be slow to interfere: *CMB v Attorney General for NSW* at [38], [64], [68]; citing *R v Jermyn* (1985) 2 NSWLR 194 at 204 with approval.

Other factors

Some of the other factors that may favour the exercise of the discretion are:

- delay by the Crown in lodging the appeal: *R v Hernando* at [30]; *R v JW* at [92]; *R v Bugmy (No 2)* [2014] NSWCCA 322 at [19], [101]
- conducting a case on appeal on a different basis from that pursued at first instance: *R v JW* at [92]
- delay in the resolution of the appeal: *R v Price* [2004] NSWCCA 186 at [60]; *R v Cheung* [2010] NSWCCA 244 at [151]; *R v Hersi* [2010] NSWCCA 57 at [55]
- the fact a non-custodial sentence was imposed on the offender at first instance: *R v Y* [2002] NSWCCA 191 at [34]; *R v Tortell* [2007] NSWCCA 313 at [63]
- the fact the non-parole period imposed at first instance has already expired: *R v Hernando* at [30]; or the fact the respondent's release on parole is imminent: *Green v The Queen* at [43]
- the fact the offender has made substantial progress towards rehabilitation: *CMB v Attorney General for NSW* at [69]

- "the effect of re-sentencing on progress towards the respondent's rehabilitation": *Green v The Queen* at [43]
- where resentencing would create disparity with a co-offender: *R v Bavin* [2001] NSWCCA 167 at [69]; *R v McIvor* [2002] NSWCCA 490 at [11]; *R v Cotter* [2003] NSWCCA 273 at [98]; *R v Borkowski* at [67]; *Green v The Queen* at [37]. See **Crown appeals and parity** at **[10-850]**
- the deteriorating health of the respondent since sentence: *R v Yang* [2002] NSWCCA 464 at [46]; *R v Hansel* [2004] NSWCCA 436 at [44]
- the fact that, were the court to impose a substituted sentence, the increase would be so slight as to constitute 'tinkering': *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]; *R v Woodland* [2007] NSWCCA 29 at [53]
- the guidance provided to sentencing judges will be limited and the decision will result in injustice: *Green v The Queen* at [2]; *CMB v Attorney General for NSW* at [69]
- the case is unlikely to ever arise again: *CMB v Attorney General for NSW* at [69].

[70-110] Resentencing following a successful Crown appeal

If a Crown appeal against sentence is successful and the appellate court resentences the respondent, it does so in the light of all the facts and circumstances as at the time of resentencing: *R v Warfield* (1994) 34 NSWLR 200 at 209, following *R v Allpass* (unrep, 5/5/93, NSWCCA). The court will admit evidence of matters occurring after the date of the original sentencing to be taken into account on this basis: *R v Deng* [2007] NSWCCA 216 at [28]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act 1999* provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: *R v JW* (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in *R v Parkinson* [2010] NSWCCA 89 at [49]–[51].

For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see **Power to reduce penalties for assistance to authorities** at **[12-240]**.

[70-115] Judge may furnish report on appeal

Section 11 *Criminal Appeal Act 1912* provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case.

A s 11 report should only be provided in exceptional circumstances: *R v Sloane* [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way:

Vos v R [2006] NSWCCA 234 at [26]; *R v Sloane* at [9]. The relevant and permissible functions of a report are set out in *R v Sloane* at [10]–[12]; see also *Zhang v R* [2018] NSWCCA 82 at [37]–[39].

[70-120] Severity appeals to the District Court

Last reviewed: November 2023

Any person who has been sentenced by the Local Court may appeal to the District Court against the sentence: s 11(1) *Crimes (Appeal and Review) Act 2001*. The appeal is by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings: s 17.

The nature of an appeal "by way of rehearing" was discussed in *Fox v Percy* (2003) 214 CLR 118 in the context of an appeal under the *Supreme Court Act 1970*. Referring to the "requirements, and limitations, of such an appeal" the plurality said at [23]:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. [Citations omitted.]

Section 20(2) *Crimes (Appeal and Review) Act* empowers the District Court on a sentence appeal to set aside or vary the sentence or dismiss the appeal. "Sentence" is exhaustively defined in s 3. "Varying a sentence" is defined in s 3(3) to include: (a) a reference to varying the severity of the sentence, (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature, and (c) a reference to varying or revoking a condition of, or imposing a new condition on, an intensive correction order, community correction order or conditional release order. The power conferred to vary a sentence includes the power to make an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* and, for that purpose, to set aside a conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: s 3(3A).

The exercise of a power to set aside or vary a sentence under s 20 operates prospectively and extends to cases where the variation includes the imposition of a s 10 order and the setting aside the conviction: *Roads and Maritime Services v Porret* (2014) 86 NSWLR 467 at [33]. The exercise of the power to impose a s 10 order does not render the effect of the sentence up to the time of the appeal a nullity: *Roads and Maritime Services v Porret* at [33].

Where the judge is contemplating an increased sentence, the principles in *Parker v DPP* (1992) 28 NSWLR 282 require the judge to indicate this fact so the appellant can consider whether or not to apply for leave to withdraw the appeal: at 295. See further discussion in **Procedural fairness** at **[1-060]**. The court is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. Any sentence varied or imposed and any order made has the same effect and may be enforced in the same manner as if it were made by the Local Court: s 71(3).

[70-125] Appeals to the Supreme Court from the Local Court

A person who has been sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone: s 52 *Crimes (Appeal and Review) Act*. However, such a person may appeal to the Supreme Court on a ground that involves a question of fact, or a question of mixed law and fact, if the court grants leave: s 53.

A person sentenced by the Local Court with respect to an environmental offence may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court: s 53(2).

A question of law alone does not include a mixed question of fact and law: *R v PL* [2009] NSWCCA 256 at [25]. A question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law; while a question concerning the application of incorrect legal principle to the facts of a particular case can give rise to a question of law alone: *Brough v DPP* [2014] NSWSC 1396 at [49]. In that case, an appeal founded upon a critique of the way in which a sentencing magistrate applied well-established principles of totality to the evidence was not a question of law alone: *Brough v DPP* at [50]–[51].

To identify an error by the Local Court in the exercise of its sentencing discretion in terms that amount to an error of the kind identified in *House v King* (1936) 55 CLR 499 at 504, does not of itself answer the question posed by s 56(1), that is, whether the court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong: *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [46].

If it is apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome: *Bimson* at [48].

A conclusion that the exercise of judicial discretion was unreasonable or plainly unjust may enable the appellate court to infer there was error but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. It will often be a distraction to attempt to label a sentence appealed from as manifestly inadequate or excessive. Instead, the appellant should isolate the question of law or legal principle that the lower court adopted or assumed and then demonstrate that it was wrong and material to the outcome: *Bimson* at [53]. Therefore an assertion that a sentence is manifestly inadequate does not identify a question of law alone as required by s 56(1)(a): *Bimson* at [57]. It is not the court's function under s 56(1)(a) to embark on an inquiry into the adequacy or even manifest inadequacy of a Local Court sentence: *Bimson* at [93].

A ground of appeal alleging that the magistrate had incorrectly characterised the seriousness of the offences did not raise a question of law alone; however a ground alleging that the magistrate had applied an incorrect maximum penalty and jurisdictional limit did raise a question of law alone: *Bimson* at [66], [77].

In determining a severity appeal from the Local Court, the Supreme Court has the power to set aside or vary the sentence, dismiss the appeal, or to set aside the sentence and remit the matter to the Local Court for redetermination: s 55(2).

The Supreme Court does not have jurisdiction to hear an appeal against a sentence imposed in the Local Court if an application for leave to appeal in the District Court has been dismissed and the magistrate's order has been confirmed: *Devitt v Ross* [2018] NSWSC 1675 at [60]–[62].

[70-130] Crown appeals on sentence to the District Court

Section 23 *Crimes (Appeal and Review) Act 2001* provides that the DPP may appeal to the District Court against a sentence imposed on a person by a Local Court in proceedings for:

(a) any indictable offence that has been dealt with summarily: s 23(1)(a)

(b) any prescribed summary offence (within the meaning of the *Director of Public Prosecutions Act 1986*): s 23(1)(b), or

(c) any summary offence that has been prosecuted by or on behalf of the DPP: s 23(1)(c).

An appeal pursuant to s 23 is of a different nature to a Crown appeal to the Court of Criminal Appeal under the *Criminal Appeal Act*. Section 26 *Crimes (Appeal and Review) Act* provides that a s 23 Crown appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings. The court may also grant the DPP leave to lead fresh evidence, but only in exceptional circumstances: s 26(2). For the appeal to be upheld, error must be found: *DK v Director of Public Prosecutions* [2021] NSWCA 134 at [32].

The District Court is empowered on an appeal to dismiss the appeal, set aside or vary the sentence: s 27(1); but is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71.

The court has a residual discretion to decline to intervene, on a similar basis to the Court of Criminal Appeal: *DK v Director of Public Prosecutions* at [43]–[44] (see further **[70-100]**–**[70-110]** above). The discretion may not be exercised on the basis of double jeopardy.

[70-135] Crown appeals to the Supreme Court

The Crown may appeal to the Supreme Court against a sentence imposed by a Local Court in any summary proceedings, but only on a ground that involves a question of law alone: s 56(1)(a) *Crimes (Appeal and Review) Act*. Sentences imposed with respect to environmental offences may be appealed by the Crown but only with the leave of the court and on a question of law alone: s 57(1)(a).

See [70-125], above, for discussion of what constitutes a question of law alone. A Crown appeal alleging manifest inadequacy of sentence does not itself raise an error of law: *Morse (Office of the State Revenue) v Chan* [2010] NSWSC 1290 at [5], [39]; *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [51]. The function of the Supreme Court on appeals under s 56(1) is to identify and correct legal error, not to ensure consistency in sentencing for similar offences by magistrates across New South Wales: *Bimson* at [54].

In determining a Crown appeal on a question of law alone, the Supreme Court has the power to set aside or vary the sentence, or to dismiss the appeal: s 59(1). The court is prevented from imposing or varying a sentence to one which could not have been imposed in the Local Court: s 71.

In addition, the court retains a discretion to decline to intervene where an error of law has been established. In *Bimson*, an appeal under s 56, the court declined to intervene although error was established on the basis that the error was caused solely by a statement made to the court by counsel for the prosecution: see [94].

[70-140] Judicial review

Judicial review is another type of appeal available against a District Court judgment following an appeal from the Local Court. There is no right of appeal from the judgment of the District Court given in its criminal jurisdiction, on an appeal to it from the Local Court: *Hollingsworth v Bushby* [2015] NSWCA 251; *Toth v DPP (NSW)* [2014] NSWCA 133 at [6].

Section 69C *Supreme Court Act 1970* applies to proceedings for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court or sentence imposed by the Local Court. The proceedings are instituted in the supervisory jurisdiction of the Court of Appeal with respect to a judgment of the District Court: *Tay v DPP (NSW)* [2014] NSWCA 53 at [1]. The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced: at s 69C(2); *Tay v DPP (NSW)* at [5].

Part 59 Uniform Civil Procedure Rules 2005 (NSW), dealing with judicial review proceedings, requires that proceedings must be commenced within three months of the date of the decision sought to be reviewed: r 59.10(1); *Toth v DPP (NSW)* at [6]. Section 176 *District Court Act 1973* relevantly provides: "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". Section 176 prevents the Court of Appeal exercising its supervisory jurisdiction for error of law on the face of the record: *Hollingsworth v Bushby* at [5], [84], [92]; *Toth v DPP (NSW)* at [6]. The provision does not preclude relief under s 69 *Supreme Court Act* on the ground of jurisdictional error: *Hollingsworth v Bushby* at [5], [84], [92]; *Garde v Dowd* (2011) 80 NSWLR 620.

[The next page is 50001]

Other Acts

para

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

[The next page is 50051]

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

[90-000] Introduction

Last reviewed: May 2023

The interaction between persons suffering mental health conditions and the criminal justice system is well documented as being difficult and often requiring what former Chief Justice Gleeson described in *R v Engert* (1996) 84 A Crim R 67 as a "sensitive discretionary decision". This chapter discusses the penalty options available to the court when dealing with persons with a mental health or cognitive impairment, as set out in Pts 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act). For a discussion regarding the application of the Act to summary proceedings (Pt 2 of the Act) see the *Local Court Bench Book* at **[30-000]**.

The Act, which commenced on 27 March 2021, replaced the *Mental Health (Forensic Provisions) Act 1990* (the 1990 Act) and relevantly applies to:

- proceedings which had commenced but were not completed before 27 March 2021 if the defendant's unfitness to be tried was raised before then
- an inquiry or special hearing which commenced under the 1990 Act but was not completed before 27 March 2021: Sch 2, Pt 2, cl 7.

The 1990 Act continues to apply to "existing proceedings" which are criminal proceedings in which the court has, before 27 March 2021, nominated a limiting term but not made an order under s 27 of the 1990 Act: Sch 2, Pt 2, cl 7A; see discussion of limiting terms at **[90-040]**. A person who, immediately before 27 March 2021, was a forensic patient under the 1990 Act is taken to be a forensic patient within the meaning of the Act: Sch 2, Pt 2, cl 9.

Unless otherwise specified, references to sections below are references to sections of the *Mental Health and Cognitive Impairment Forensic Provisions Act*.

Cases decided before the Act commenced, addressing those aspects of the 1990 Act which were unchanged, remain useful. The references in those cases to the old provisions have been updated to reflect the current legislation.

For detailed commentary on unfitness and special hearings, see the *Criminal Trial Courts Bench Book*: **Procedures for fitness to be tried (including special hearings)** at **[4-325]**ff.

[90-010] Part 4 — Criminal proceedings in the Supreme and District Courts

Last reviewed: May 2023

Part 4 of the Act applies to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and criminal proceedings in the District Court: s 35.

[90-020] Section 42(4) dismissals

Last reviewed: May 2023

Section 42(4) of the Act provides that where a question of fitness to be tried arises the court may determine not to hold an inquiry, dismiss the charge and order that the defendant be released if it is inappropriate to inflict any punishment because of:

(a) the trivial nature of the charge or offence, or

(b) the nature of the defendant's mental health impairment or cognitive impairment, or

(c) any other matter the court thinks proper to consider.

Punishment includes the recording of a conviction and the orders of the court after a special hearing: *Newman v R* [2007] NSWCCA 103 at [41].

The section is expressly directed to the appropriateness of the infliction of punishment: *Newman v R* at [36]. The court is required to approach s 42(4) assuming there would be a finding of guilt by either of the two courses which can flow from a fitness hearing: a conviction at trial if a person is found to be fit to be tried; or a qualified finding of guilt at a special hearing if a person is found to be unfit. If the court would not impose any punishment, the proceedings should be dismissed without the need for a fitness hearing: *Newman v R* at [46]. The purpose of s 42(4) is to avoid the expense and delays associated with fitness hearings where the court would ultimately not inflict any punishment: *Newman v R* at [40].

Section 42(4) is in similar terms to s 10(3) of the *Crimes (Sentencing Procedure) Act 1999*. In each case, the ultimate power of the court is to dismiss a charge that has been, or may be, proven. An equivalent test of "inexpedient" to inflict any punishment applies under s 10(2) *Crimes (Sentencing Procedure) Act*. The list of matters to which the court may have regard is also similar, including the nature of the person's condition and the trivial nature of the charge: s 42(4); s 10(3) *Crimes (Sentencing Procedure) Act*; *Newman v R* at [46].

Newman v R was applied in *R v Chanthasaeng* [2008] NSWDC 122, a drug supply case, where an application for a s 10(4) (now s 42(4)) order was refused.

[90-030] Special hearings and sentencing options

Last reviewed: May 2023

Special hearings aim to ensure that a defendant who is found unfit to stand trial is acquitted unless it can be proved that they committed the offence charged: s 54. For this reason, the defendant is taken to have pleaded not guilty to the offence charged (s 56(5)) and the special hearing is conducted as "nearly as possible" to a regular criminal trial (s 56(1)).

A verdict that the defendant committed the offence (or an alternative offence) charged (s 59(1)(c), (d)) is a "qualified finding of guilt" made in the absence of a conviction (s 62(a)). If such a qualified finding of guilt is made, and the court would have imposed a sentence of imprisonment if the special hearing had been an ordinary trial, the court must nominate a term it would have imposed on the defendant (a "limiting term"): s 63(2). See **[90-040] Limiting terms**.

If a court indicates that it *would not* have imposed a sentence of imprisonment, it may impose any other penalty or make any other order it might have made on

conviction of the person for the relevant offence in ordinary criminal proceedings: s 63(3). The phrase "any other penalty" includes sentencing options found in the *Crimes (Sentencing Procedure) Act 1999*: *Smith v R* [2007] NSWCCA 39 at [61]; but not imprisonment and its alternative forms: *Warren v R* [2009] NSWCCA 176 at [19]–[20]. Where the court indicates it would not have imposed a sentence of imprisonment, it must notify the Mental Health Review Tribunal (the Tribunal) that a limiting term is not to be nominated in respect of the person: s 63(6).

In determining a limiting term or other penalty, the court:

- must take into account that, because of the defendant's mental health impairment and/or cognitive impairment, they may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount: s 63(5)(a), and
- may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea: s 63(5)(b), and
- must take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence: s 63(5)(c).

Reports about defendant

Following a verdict being reached at a special hearing, the court may request a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant and whether the release of the defendant is likely to seriously endanger the safety of the defendant or any member of the public: s 66(1). The court may consider the report before making orders about the defendant: s 66(2).

[90-040] Limiting terms

Last reviewed: May 2023

Limiting terms are sentences imposed by Supreme and District Courts at the conclusion of special hearings. Section 63(2) defines a limiting term as the best estimate of the sentence the court would have imposed if the special hearing had been an ordinary trial and the person had been fit to be tried for the offence. A person serving a limiting term is a forensic patient: ss 3, 72(1)(b).

Purpose of limiting terms

A limiting term is the period beyond which a person cannot be detained for the offence which was the subject of the special hearing: *R v Mitchell* [1999] NSWCCA 120 at [30]. As the court in *R v Mailes* (2004) 62 NSWLR 181 at [32] said, the purpose of a limiting term:

> … is not to punish the person who has not been convicted of any crime, but to ensure that he or she is not detained in custody longer than the maximum the person could have been detained if so convicted following a proper trial …

A limiting term is a sentence for the purposes of s 5(1)(c) *Criminal Appeal Act 1912* by reason of the definition of "sentence" in s 2 of that Act: *R v AN* [2005] NSWCCA 239 at [2]. In determining the limiting term for a particular offence, courts should adopt

and apply all the statutory and common law principles that apply to the sentencing of a person convicted of that offence: *R v AN* at [13]. This includes the purposes of sentencing under s 3A *Crimes (Sentencing Procedure) Act 1999*, ensuring the offender is adequately punished (s 3A(a)): *R v Mailes* at [32]; *R v AB* [2015] NSWCCA 57 at [41]. It should also be borne in mind that the purposes of general deterrence and denunciation under s 3A may be irrelevant to an offender with a mental illness or disability: *R v AB* at [42], [45]. Where the accused is a child, the principles relating to the exercise of criminal jurisdiction in respect of a child contained in s 6 *Children (Criminal Proceedings) Act 1987* will be relevant: *R v AN* at [21].

Non-parole periods not applicable

Section 63(2) of the Act only requires the nomination of a total term and does not permit the imposition of a non-parole period. Section 64(2)(a) further provides that a "… sentence of imprisonment imposed in an ordinary trial of criminal proceedings may be subject to a non-parole period but a limiting term is not." *R v Mitchell* at [21]; *R v Mailes* at [22] and [29]; *R v AN* at [13] dealing with the similar provisions of the 1990 Act supported this proposition.

Standard non-parole periods

The standard non-parole period statutory scheme does not apply to the sentencing of an offender to detention under the *Mental Health and Cognitive Impairment Forensic Provisions Act*: s 54D(1)(b) *Crimes (Sentencing Procedure) Act*.

Limiting terms not to be reduced because of absence of non-parole period

The absence of a non-parole period does not affect the term of the head sentence that would otherwise have been imposed and in relation to which the limiting term is to be set: *R v Mailes* at [43]. There is no logical reason for reducing it simply because there is no provision for a non-parole period: *R v Mailes* at [43]. To do so ignores and undermines the different features and objectives of regular sentences and limiting terms: *R v Mailes* at [44]; *R v Mitchell* at [32].

Limiting terms not to be reduced because of poor prospects of early release

Evidence of practical issues concerning the difficulties faced by persons serving limiting terms in obtaining early release does not affect the requirement in s 63(2) to set limiting terms by reference to the head sentence that would have been imposed following a guilty verdict in a proper trial: *R v Mailes* at [43]; *R v Mitchell* at [31], [64]. The court should not attempt to make any estimate of the degree of likelihood of an offender being released: *R v AN (No 2)* (2006) 66 NSWLR 523 at [74]; *R v AN* at [65].

Relevance of mental health or cognitive impairment to length of limiting terms

An offender's mental health impairment or cognitive impairment is relevant to the length of the limiting terms in at least three ways:

- the applicant's culpability
- the likelihood of re-offending
- the protection of the community.

Precisely how each affects the length of a limiting term depends on the circumstances of each case: *R v AN* at [3], affirming *R v Engert* (1995) 84 A Crim R 67. In *R v AN*

the uncontradicted evidence about the offender's mental condition and its impact on his offending meant that, when determining the length of the limiting term to be imposed, the offender's mental condition was a "highly significant" consideration: at [38]. The protection of the community is often an important consideration. The level of danger which a mentally ill offender presents to the community is a countervailing consideration to all other relevant sentencing principles: *Courtney v R* [2007] NSWCCA 195 at [26], [59], [83]; *Agha v R* [2008] NSWCCA 153 at [24].

McClellan CJ at CL said of the sentencing exercise in *Bhuiyan v R* [2009] NSWCCA 221 at [30]:

> … although in most cases the serious mental illness will have deprived an offender of their usual capacity for reason and control it must not be allowed to overwhelm appropriate consideration of the circumstances of the offence and the other subjective features of the offender. The particular difficulties faced by an offender which may have contributed to the offence will be addressed by the Mental Health Review Tribunal which in appropriate circumstances may release the offender before the limiting term has expired.

Date of commencement, concurrency and consecutiveness

In determining a limiting term, the court must take into account periods of the defendant's custody before, during and after the special hearing relating to the offence: s 63(5)(c).

A limiting term takes effect from when it is nominated unless the court:

(a) determines it is taken to have effect from an earlier time, after taking into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence, or

(b) directs that the term commence at a later time so as to be served consecutively with (or partly concurrently and partly consecutively with) some other limiting term nominated for the person or sentence of imprisonment imposed on the person: s 64(1).

When making a direction that the term commence at a later time, the court is to take into account that:

- a sentence of imprisonment imposed in an ordinary trial of criminal proceedings may be subject to a non-parole period, a limiting term is not (s 64(2)(a)); and,
- in an ordinary trial of criminal proceedings, consecutive sentences of imprisonment are imposed with regard to non-parole periods (s 64(2)(b)).

Limiting terms and alternative forms of imprisonment

Section 63(2) of the Act requires the nomination of a limiting term and does not contemplate the imposition of alternative forms of imprisonment: *Warren v R* [2009] NSWCCA 176 at [20].

Limiting terms and referral to Tribunal

The court must refer the defendant to the Tribunal if it nominates a limiting term and must notify the Tribunal of the orders it makes: s 65(1). The court may order the defendant be detained in a mental health facility, correctional centre, detention centre or other place pending the review of the defendant by the Tribunal: s 65(2).

Extension and expiration of limiting terms

When a person's limiting term expires (where that term is less than life), they will cease to be a forensic patient: s 101(e). However, the Minister administering the Act may apply to the Supreme Court for an extension order against a forensic patient where they are subject to a limiting term or an existing extension order: ss 123, 124(1). Such an application may not be made more than six months before the end of the forensic patient's limiting term or expiry of the existing extension order: s 124(2). The Supreme Court may order an extension if satisfied to a high degree of probability that the forensic patient poses an unacceptable risk of causing serious harm to others, and that risk cannot adequately be managed by less restrictive means: ss 121, 122.

The requirements for an application for an extension order are set out in s 125, and pre-hearing procedures are set out in s 126. If, following a preliminary hearing, the Supreme Court is satisfied the matters alleged in the supporting documentation would, if proved, justify making an extension order, the court must make orders appointing certain qualified persons to conduct examinations: s 126(5). In determining whether an extension order should be made or the application should be dismissed under s 127(1), the court is to consider a number of factors including the safety of the community, the reports received, and the forensic patient's level of compliance with any obligations they were subject to: s 127(2).

In *Attorney General for NSW v Bragg (Preliminary)* [2021] NSWSC 439, the Attorney General made an application for an extension order under s 123. In ordering a three-month extension, Wright J considered aspects of the relevant provisions and stated the following propositions (citations omitted):

- The "high degree of probability" referred to in s 122 indicates the existence of the risk in question must be proved to a higher degree than the normal civil standard of proof of "more probable than not", but does not have to be proved to the criminal standard of "beyond reasonable doubt": [25].
- The "serious harm" which must be considered is not limited to physical harm and it may include psychological harm. Whether such harm is "serious" within the meaning of s 122(1) will depend on whether it is such harm as should attract consideration given the objects, scope and terms of Pts 5 and 6 of the Act: [26].
- Whether the risk of causing serious harm to others is "unacceptable" is to be judged according to its ordinary or everyday meaning and the right of a person to their personal liberty at the expiry of a limiting term is not a relevant consideration in the determination of whether the person poses an "unacceptable risk": [27].
- The nature of the risk posed has to be assessed by reference to past conduct, the seriousness of the possible future conduct and the period over which the risk may come to fruition, based on an absence of protective measures: [28].
- In order to determine that the person poses an unacceptable risk of causing serious harm to others, the court need not be satisfied that the risk is more likely than not: [30]; s 122(2) of the Act.

Wright J also observes in *Attorney General of NSW v Bragg (Preliminary)* at [18] that the provisions concerning preliminary hearings in the Act do not differ in material respects from the corresponding provisions in the *Crimes (High Risk Offenders)*

Act 2006 and, accordingly, authorities concerning that other legislation can be of considerable assistance in applying the Act's provisions, having regard to the different circumstances and context in which the latter Act operates.

An extension order commences when it is made, or when the limiting term expires, whichever is the later: s 128(1)(a). It cannot exceed 5 years, but a second or subsequent application for extension can be made: s 128(1)(b), 128(2).

When a person's limiting term expires and no extension application is made, they must be discharged unless classified as an involuntary patient under Ch 3 of the *Mental Health Act 2007*: ss 107(1), 108, (also see Note in s 122). Under the review process established in Pt 5, Div 3, a person may be released by the Tribunal prior to the expiration of their limiting term: ss 81–85.

[90-050] Part 2 — Summary proceedings

Last reviewed: May 2023

See **[30-000] Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020** in the *Local Court Bench Book* for detailed commentary of such proceedings.

Index

[References are to paragraph numbers]

B

E

J

K

L

M

R

S

T

W

Y

[The next page is [51]]

Table of Statutes

[References are to paragraph numbers]

[Up to date to Update 56]

Commonwealth

New South Wales

[The next page is Filing Instructions]

Table of cases

[References are to paragraph numbers]

[Up to date to Update 59]

B

C

E

H

L

M

N

Q

R

S

T

[The next page is Filing Instructions]