Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 48

June 2021

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 48

Update 48, June 2021

Obligations of the parties has been updated at **[1-200] The prosecutor** to add *Strbak v The Queen* [2020] HCA 10, where the High Court concluded a guilty plea does not relieve the Crown of its obligation to prove its case on sentence without assistance from the offender. **[1-205] Professional Rules and DPP Guidelines** has been updated after the Office of the Director of Public Prosecutions re-issued its Prosecution Guidelines in March 2021. The Guideline on sentence is now Chapter 2.4 and Chapter 13 (referred to at *Duty of disclosure*) addresses prosecutorial disclosure obligations. References to the Legal Profession Uniform Conduct (Barristers) Rules 2015, rr 87, 91 and Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rr 29.5, 29.8 have replaced outdated references. **[1-220] Duty of legal practitioners to correct error by sentencing judge** has been updated to add a reference to *Kandemir v R* [2018] NSWCCA 154, which is another example of a case emphasising the obligations of legal practitioners to correct misstatements by judges during sentence proceedings.

Purposes of sentencing has been reviewed and outdated material removed. **[2-240] To prevent crime by deterring the offender and other persons from committing similar offences: s 3A(b)** includes reference to *Weribone v R* [2018] NSWCCA 172. *Dungay v R* [2020] NSWCCA 209 has been added to the examples where general or specific deterrence may be impacted by other principles such as community protection. *R v Dong* [2021] NSWCCA 82 has been added at **[2-250] To protect the community from the offender: s 3A(c)**. That case considered situations where it may be necessary to expressly and separately consider the need for a sentence to reflect community protection. The *Terrorism (High Risk Offenders) Act* 2017 has been added to the examples of statutory exceptions to the principle prohibiting preventative detention in NSW. Reference to *Minister for Home Affairs v Benbrika* [2021] HCA 4, where the High Court considered the continuing detention order scheme for Commonwealth terrorism offenders in Div 105A *Criminal Code* (Cth) has been added.

Setting terms of imprisonment has been updated at **[7-505] Aggregate sentences** to add *Aryal v R* [2021] NSWCCA 2 which emphasises that aggregate sentences must reflect the totality of the offending behaviour. Discussion of *Aryal v R* and *Noonan v R* [2021] NSWCCA 35 has been added to **[7-507] Settled propositions concerning s 53A** under **Application of *Pearce v The Queen* and the totality principle (propositions 1, 4 and 6)**.

Subjective matters taken into account (cf s 21A(1)). The commentary at **[10-570] Deportation** has been rewritten. Important recent cases added are: *R v Calica* [2021] NTSCFC 2, a five-judge Bench decision of the Northern Territory Supreme Court which considered the diverging State and Territory approaches to deportation as a mitigating factor on sentence; *Kroni v R* [2021] SASCFC 15; *Kristensen v R* [2018] NSWCCA 189; and *Hanna v Environment Protection Authority* [2019] NSWCCA 299.

Victims and victim impact statements has been generally revised. **[12-830] Evidentiary status and use of victim impact statements at sentence** and **[12-832] Victim impact statements and harm caused by sexual assault** have been amended to include *Culbert v R* [2021] NSWCCA 38, which considered the ways a victim impact statement may be used to assess whether substantial harm was caused by an offence. References to ss 30L(1) and 30L(5) *Crimes (Sentencing Procedure) Act* 1999 in **[12-839] Victim impact statements when offenders are forensic patients** have been updated following amendment by the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020. The amount of the victims support levy has been updated in **[12-867] Victims support levies** for the 2020–2021 financial year.

[13-100] Taking further offences into account (Form 1 offences) has been extensively revised and rewritten.

Murder. Commentary on what are described as "mercy killings" has been added to **[30-010] Relative seriousness of the categories of murder**. **[30-105] Conceal corpse** has also been added.

Manslaughter and infanticide. **[40-010] Categories of Manslaughter**, *Substantial impairment* and **[40-070] Infanticide** have been revised to update the references to ss 22A and 23A(8) *Crimes Act* 1900 following their amendment by the *Mental Health and Cognitive Impairment Forensic Provisions Act* which commenced on 27 March 2021.

Domestic violence offences has been revised and parts of the commentary reorganised. Observations by Wilson J in *Yaman v R* [2021] NSWCCA 239 explaining the rationale for the importance of general and specific deterrence in a domestic violence context have been added to **[63-500] Introduction** and **[63-510] Sentencing approach to domestic violence**. **[63-505] Statutory framework** has been revised and updated to include reference to ss 39(1A), 39(2A)–(2C) and 39(2D) *Crimes (Domestic and Personal Violence) Act* 2007 which concern the period of an ADVO for adult offenders sentenced to full time imprisonment and the date an ADVO comes into force.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 48

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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 correct error by sentencing judge

Legal practitioners appearing in sentencing proceedings 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].

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Crimes (Sentencing Procedure) Act 1999

Sentencing procedures generally

[The next page is 2051]

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)

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 of the offender: *R v Mauger* [2012] NSWCCA 51 at [38], citing *R v Wilhelm* [2010] NSWSC 378 at [30]. 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 New South Wales 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 Taken into Account (cf s 21A(1))** 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)

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

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]

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

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 CCA to be contrary to the principles in *Power v The Queen* and *R v Simpson*: *R v Hall* at [90].

[7-505] Aggregate sentences

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 [7-520] **Indicative sentences: fixed term or term of sentence**.

[7-507] Settled propositions concerning s 53A

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].

Nor is there a 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".

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**.

[7-508] Appellate review of an aggregate sentence

RA Hulme J in *JM v R* [2014] NSWCCA 297 at [40] set out "further propositions" in relation to appellate review of aggregate sentencing exercises (numbering continues from [39] (see [7-507]) above, 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 principle 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

Propositions 11, 12 and 13 were affirmed in *Kerr v R* [2016] NSWCCA 218 at [114] and in *Kresovic v R* [2018] NSWCCA 37 at [42].

[7-510] Special circumstances under ss 44(2) or 44(2B)

Sections 44(2) and 44(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 *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%: *Brennan v R* 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

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?

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 "***Limit on restriction in ss 44(2) and 44(2B)***" in [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].

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) [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 offences committed many years earlier** at [17-410].

[7-516] Giving effect to finding of special circumstances

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]; *Rizk v R* [2020] NSWCCA 291; *GP v R* [2017] NSWCCA 200 at [16].

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]. 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]. 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].

The Sentencing calculator on JIRS may assist when considering the requirements of s 44.

[7-518] Empirical study of special circumstances

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

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].

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

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. Subsection (1) does not apply if a court imposes an aggregate sentence of imprisonment in respect of 2 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

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

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

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

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

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

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 [16-050] **Fixing non-parole periods and making recognizance release orders** under "Mixture of Commonwealth and State offences".

[7-580] No power to impose conditions on parole orders

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

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

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 (Forensic Provisions) Act* 1990: s 54 *Crimes (Sentencing Procedure) Act*.

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Sentencing procedures generally

Guilty plea to be taken into account

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)

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Correction and adjustment of sentences

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Subjective matters taken into account (cf s 21A(1))

[10-400] Prior record

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) 114 A Crim R 8, 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.

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) 120 A Crim R 255 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) 167 A Crim R 159 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.

Subsection (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

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

There is a statutory exception to this rule introduced by the *Crimes Amendment (Sexual Offences) Act* 2008. 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). Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). "Child sexual offence" is defined in s 21A(6). The exception applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments on 1 January 2009, 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 *Crimes (Sentencing Procedure) Act*.

In order for s 21A(5A) to apply the court should make an express statement that it is satisfied that an offender's good character or lack of previous convictions had been of assistance to the offender in the commission of the offence: *NLR v R* [2011] NSWCCA 246 at [31]. In *O'Brien v R* [2013] NSWCCA 197, the court held that the sentencing judge erred by taking into account the applicant's good character and lack of previous convictions as a mitigating factor in sentencing. Section 21A(5A) arguably precluded it being taken into account in that way since the applicant's good character and position as a responsible member of the community appears to have been of assistance to him in befriending the victim's family and facilitating the commission of the offences: *O'Brien v R* at [40]. Similarly, in *R v Stoupe* [2015] NSWCCA 175, the court held the

respondent's good character assisted him to hold the position of a childcare worker which he abused by committing the offences against the victim. The case fell squarely within the terms of s 21A(5A): *R v Stoupe* at [86].

On the other hand, in *AH v R* [2015] NSWCCA 51, the court held that the judge should not have applied s 21A(5A). Although the offender's relationship with the victim's mother and the trust which that engendered created an environment in which the offences could be committed, his good character could not be said to have assisted him in the commission of the offences: *AH v R* at [25].

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) 162 A Crim R 29 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) 187 A Crim R 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) 112 A Crim R 466, considered in *R v Weininger* (2000) 119 A Crim R 151 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

In *Alvares v R* (2011) 209 A Crim R 297 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) 123 A Crim R 213 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 Commonwealth offenders at [16-010].

[10-430] Age

See also **Youth** at [10-440].

Advanced age

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 age 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) 121 A Crim R 484 at [44]; *R v Knight* [2004] NSWCCA 145 at [33]; *Des Rosiers v R* (2006) 159 A Crim R 549 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].

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. A court cannot overlook that each year of a sentence of imprisonment may represent a substantial proportion of the life left of an offender: *R v Hunter* (1984) 36 SASR 101 at 104. On the other hand, a life sentence may be the appropriate sentence where a person of advanced age commits very serious crimes: *R v Walsh* [2009] NSWSC 764 at [43].

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). In *R v McLean*, Wood CL at CL stated at [44]:

> Moreover, while the age of a person standing for sentence needs to be taken into account, as do any other circumstances such as the classification of the offender, or illness, that may make imprisonment more onerous, lest a punishment be imposed that is out of proportion to the objective and subjective criminality involved, this cannot give rise to an expectation that the elderly can offend with relative impunity.

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.

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]. 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.

However, 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. The Court of Appeal of Victoria later observed that "it does not follow that every sentence which justifiably deserves that

epithet ['crushing'] must on that account and on that account alone be held to be manifestly excessive": *R v Crowley* (1991) 55 A Crim R 201 at 206; *R v Bazley* (1993) 65 A Crim R 154 at 158.

[10-440] Youth

See discussion of s 6 *Children (Criminal Proceedings) Act* 1987 in **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]; **Principles relating to the exercise of criminal jurisdiction** at [15-010]; **Relevance of youth at sentence** at [15-015]; and **Sentencing principles applicable to children dealt with at law** at [15-090].

[10-450] Health

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) 62 ALJR 319. 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) 216 A Crim R 152 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) 128 A Crim R 362. 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) 133 A Crim R 385, 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) 114 A Crim R 207 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.

Foetal alcohol spectrum disorder (FASD)

In *LCM v State of Western Australia* [2016] WASCA 164, the West Australian Court of Appeal considered the medical condition of foetal alcohol spectrum disorder (FASD) and how it could be relevant 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.

The Australian Medical Association (AMA) acknowledges that FASD occurs in Australia and recommends in the AMA 2016 position statement on FASD:

> 7. Implementation of strategies that identify and support people with FASD who come into contact with the education, criminal justice and child protection systems.

[10-460] The relevance of an offender's mental condition

The fact that an offender was, or is, suffering from a mental disorder or disability either at the time of the commission of the offence or at the time of sentencing may be taken into account at sentencing: *R v Anderson* [1981] VR 155; (1980) 2 A Crim R 379. In summary proceedings, it may be relevant to a s 32 application under the *Mental Health (Forensic Provisions) Act* 1990 (see [90-050]).

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* (2010) 79 NSWLR 1 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.

Some of the types of mental conditions that offenders can have are described in Intellectual Disability and Rights Service, "Step by Step Guide to Making a Section 32 Application for a Person with an Intellectual Disability", October 2011, accessed 11 April 2012. The broad term "developmental disability" is used in the publication to cover "disability categories such as: intellectual disability, cerebral palsy, epilepsy, autism (including Asperger disorder) and some neurological conditions (at p 8, referencing Errol Cocks, *An Introduction to Intellectual Disability in Australia*, 3rd edn, Australian Institute on Intellectual Disability, 1998). Mental condition also includes a disability of mind resulting from acquired brain injury (at p 11).

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 no 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, 2013 is now available.

Standard non-parole period provisions

The High Court said in *Muldrock* at [27] that: "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." The snpp statutory scheme was amended following *Muldrock* see discussion at **What is the standard non-parole period?** at [7-910] and **Consideration of the standard non-parole period in sentencing** at [7-920].

Section 21A(3)(j) also refers to an offender not being aware of the consequences of his or her 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].

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.

Offender acts with knowledge of what she or he is doing

In *R v Wright* (1997) 93 A Crim R 48 at 51 the court held that it is an accepted principle of sentencing that 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. However, if the offender acts with knowledge of what he or she is doing and with knowledge of the gravity of the actions, the moderation need not be great. In *R v Wright* 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 Hilder* (1997) 97 A Crim R 70 at 84; *R v Mitchell* (1999) 108 A Crim R 85 at [42]–[45]; *Benitez v R* (2006) 160 A Crim R 166 at [41]–[42]; *Taylor v R* [2006] NSWCCA 7 at [30]; *Cole v R* [2010] NSWCCA 227 at [71]–[73]; *R v Burnett* [2011] NSWCCA 276. The Crown in *Adzioski v R* [2013] NSWCCA 69 submitted without success that the judge had failed to apply *R v Wright*.

In *Skelton v R* [2015] NSWCCA 320 at [138]–[139], the jury rejected the defence of mental illness, ie that the accused did not know his actions were wrong. The sentencing judge was found to err in concluding that 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". The court held that, had the offender fully appreciated his actions were wrong, the defence of mental illness would have been established. The jury's verdict left open the possibility that the offender was impaired to some degree. The judge's conclusion that the impairment was "not great at all, or even significant" was contrary to the expert evidence on the subject: *Skelton v R* at [138]ff.

Intermediate appellate court checklists

Intermediate appellate courts in NSW and Victoria have, from time to time, summarised sentencing principles where the offender suffers from a mental condition. See the list in *R v Verdins* [2007] VSCA 102 at [32] quoted with approval in *Courtney v R* (2007) 172 A Crim R 371 at [14]. In *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, McClellan CJ at CL at [177], listed the following propositions (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. Consequently the need to denounce the crime 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 ...

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* at [32]; *Courtney v R* at [14]–[15].

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: *Alkanaan v R* [2017] NSWCCA 56 at [108]. 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* [2014] NSWCCA 114 at [34]; *Jeffree v R* [2017] NSWCCA 72 at [31]. The principles set out in *DPP (Cth) v De La Rosa* have been applied in *Biddle v R* [2017] NSWCCA 128 at [89]–[90]; *Laspina v R* [2016] NSWCCA 181 at [39]; *Aslan v R* at [33] and *Jeffree v R* at [30].

As to the relevance of mental condition when sentencing for a standard non-parole period offence, see "Standard non-parole period provisions" above.

As a factor relevant 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) 160 A Crim R 166 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 *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [20]:

> As *Veen [No 2]* held, it is well settled that common law sentencing principles have long accepted protection of the community as a relevant sentencing consideration.

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 of Criminal Appeal 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; R v Blessington* (2007) 234 CLR 38 at [1]. See further at [30-025].

For a discussion of limiting terms see **Limiting terms** at [90-040].

[10-470] Race and ethnicity

See Special Bulletin 4 — *Relevance of deprived background of an Aboriginal offender* — October 2013.

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*) has been altered by 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. It abolishes intoxication as a mitigating factor at the time of the offence (see further below at [10-480]).

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].

[10-475] Deprived background of an offender

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: *Bugmy v The Queen* (2013) 249 CLR 571 at [40]. 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 *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the court held that in using the word "may", the plurality in *Bugmy v The Queen* at [40] were not saying that a 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, however, confined to that of violence and alcohol abuse in an immediate family context. The principle has been applied 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] (see further below).

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]. 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].

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].

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].

[10-480] Intoxication

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*.

Section 21A(5AA) applies to the determination of a sentence for an offence whenever committed unless, before the commencement date (ie 31 January 2014), the court has convicted the person being sentenced of the offence, or a court has accepted a plea of guilty and the plea has not been withdrawn.

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: *Bourke v R* (2010) 199 A Crim R 38 at [26]. The NSWCCA endorsed (in *GWM v R* [2012] NSWCCA 240 at [82] and *ZZ v R* [2013] NSWCCA 83 at [110]) the statement in *Hasan v The Queen* [2010] VSCA 352 at [21] that:

> courts around Australia have consistently rejected the proposition that intoxication can mitigate the seriousness of an offence or reduce the offender's culpability. An "out of character" exception is acknowledged to exist, but it has almost never been applied.

Section 21A(5AA) abolishes the out of character exception.

Section 21A(5AA) also abolishes the common law approach to intoxication in *R v Fernando* (1992) 76 A Crim R 58 approved in *Bugmy v The Queen* (2013) 249 CLR 571 at [38] where French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ 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.]

Section 21A(5AA) prohibits a court from taking into account an offender's intoxication at the time of the offence as a mitigating factor even if it is a "reflection of the environment in which he or she was raised". It does not impact upon the relevance of an offender's deprived background.

As an equivocal or aggravating factor

Section 21A(5AA) does not alter common law authority which holds that an offender's intoxication at the time of the offence can be a relevant factor in determining the "degree of deliberation involved in the offender's breach of the law": *R v Coleman* (1990) 47 A Crim R 306 per Hunt J at 327. An offender's intoxication can aggravate the crime because of the recklessness with which the offender became intoxicated and proceeded to commit the crime: *R v Coleman* at 327.

Intoxication may also be treated as an equivocal factor, that is, one that neither aggravates nor mitigates but rather explains the context of the crime: *R v Fletcher-Jones* (1994) 75 A Crim R 381 at 387–388; *SK v R* [2009] NSWCCA 21 at [7]; *BP v R* [2010] NSWCCA 159 at [79], see also [55]; *ZZ v R* at [113].

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) 221 A Crim R 161 at [73]–[75], [83]. In *R v Mitchell* (2007) 177 A Crim R 94 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* 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 [7-910].

[10-485] Drug addiction

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).

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].

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

The general principle is that hardship to family and dependants is an unavoidable consequence of a custodial sentence and is not a mitigating consideration, unless such hardship is "wholly", "highly" or "truly" exceptional. 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*. 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].

The court must identify a ground upon which the hardship to a family member or third party caused by the imprisonment of the offender can properly and relevantly be regarded as exceptional before it is taken into account in the sentencing of the offender.

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) 116 A Crim R 150; *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

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) 202 A Crim R 209 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) 143 A Crim R 118 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) 143 A Crim R 118 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) 113 A Crim R 386 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

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

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) 184 A Crim R 593 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) 139 A Crim R 398 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) 231 A Crim R 537 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) 200 A Crim R 1, 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) 171 A Crim R 544 at [86].

In *R v Zerafa* (2013) 235 A Crim R 265, 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

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) 185 A Crim R 164. 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) 198 A Crim R 135 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) 106 A Crim R 303 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) 151 A Crim R 166 at [242]. See also *R v Khamas* (1999) 108 A Crim R 499 and *R v Jajou* (2009) 196 A Crim R 370 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) 117 A Crim R 497 per Howie J at [81].

Sentencing practice after long delay

Where there has been long delay between the time of commission of an offence and the time of sentencing, should a court sentence by reference to sentencing patterns as they existed when the offence was committed or by reference to current sentencing patterns? This question was considered by a five-member bench of the Court of Criminal Appeal in *R v MJR* (2002) 54 NSWLR 368 (Spigelman CJ, Grove J, Sully J and Newman AJ; Mason P dissenting). It held that where, by reason of delay, 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. 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) 117 A Crim R 497 at 511, 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.

Where considerable delay has occurred before sentencing, the sentencing judge must have regard to the maximum sentence and the level of sentences in fact imposed at the date of the offence.

For a discussion of sentencing practices following delay in the context of sexual offences against children see **Sentencing for offences committed many years earlier** at [17-410].

[10-540] Restitution

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) 156 A Crim R 478 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

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 [7-910] **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) 150 A Crim R 299 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) 155 A Crim R 202 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

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) 186 A Crim R 279 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

Under the *Migration Act* 1958 (Cth) an offender who is not an Australian citizen (non-citizen offender), may be deported as a consequence of committing an offence. 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: ss 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, actual or potential deportation is "irrelevant as a sentencing consideration" and it is an error to use it to determine any aspect of the sentence: *R v Pham* [2005] NSWCCA 94 at [13]–[14]; *He v R* [2016] NSWCCA 220 at [23]; *AC v R* [2016] NSWCCA 107 at [79]; *Hanna v EPA* [2019] NSWCCA 299 at [83]. One reason is that deportation is a matter exclusively for the Executive Government: *R v Pham* at [13]; *Kristensen v R* [2018] NSWCCA 189 at [34]; *Hanna v EPA* at [97]. Another is that it may be difficult to quantify the prospects of deportation at the time of sentence as the migration status of a non-citizen offender who has been residing in Australia is often unresolved until well after imposing the sentence: *Kristensen v R* at [35]; *R v Leka* [2017] SASCFC 77 at [32]; *Hanna v EPA* at [97].

Deportation as a matter in mitigation

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 it is an error to do so: *R v Pham* [2005] NSWCCA 94 at [13]–[14]; *Khanchitanon v R* [2014] NSWCCA 204 at [28]; *Kristensen v R* at [35]. 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.
>
> … [Also] this is a case where the evidence about the applicant's likely deportation does not rise beyond mere speculation.

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]; *Nguyen v R* [2016] VSCA 198 at [35]–[36]; *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] SASCFC 15 at [227]–[229]; *R v Calica* [2021] NTSCFC 2 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, February 2021, at [371]ff. See as examples: *R v Mirzaee* [2004] NSWCCA 315 at [21]; *He v R* at [23], [25]–[26]. However, *R v Calica,* as a five-judge Bench decision, will affect consideration of this issue in Commonwealth cases.

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* [2016] NSWCCA 220 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].

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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.

The scheme also applies to offences dealt with by the Industrial Relations Commission under Pt 2, Div 5 *Work Health and Safety Act* 2011 or Pt 3, Div 3, Subdiv 3 Rail Safety National Law (NSW) resulting in the death of, or actual physical bodily harm to, any person: s 27(3) (former s 27(2A)).

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):

> (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 in NSW** 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 16AAA(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 16AAA(1)(a). The statement must describe the impact of the offence on the victim, including harm suffered as a result of the offence: s 16AAA(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 16AAA(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). 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). On doing so, 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".

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Particular offences

Dangerous driving and navigation

Detain for advantage/kidnapping

Drug Misuse and Trafficking Act 1985 (NSW) offences

Fraud offences in NSW

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

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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."

[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.

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]. In *R v Warwick (No 94)* [2020] NSWSC 1168, the sentencing judge concluded that s 61(1) was satisfied in relation to three offences of murder committed as part of a campaign of extreme violence waged as retaliation against those the offender thought acted against his interests in Family Court proceedings between 1980 and 1985. His moral culpability was extreme and the offences involved sophisticated planning and preparation and were part of a sustained course of conduct: [18], [94]–[95].

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. It has been held that a two-stage process is therefore required in determining whether a life sentence is mandated: *R v Valera* [2002] NSWCCA 50 at [8]; *R v Miles* [2002] NSWCCA 276 at [204]:

> The Court must first determine whether on the objective facts the level of culpability is so extreme that it warrants the maximum penalty. The Court must then determine whether the subjective factors are capable of displacing the prima facie need for the maximum penalty.

In *R v Harris* (2000) 50 NSWLR 409 at [87]–[88], [90] the court held that s 61(1) effectively restates the common law concerning the imposition of life sentences for murder. Similarly, in *Adanguidi v R* at [23], it was noted that "two avenues for a life sentence continued to exist after the enactment of s 61 of the Act, one arising at common law and the other arising under s 61".

It is not necessary for the sentencing judge to use the precise terms set out in s 61(1): *R v Lo* [2003] NSWCCA 313 at [27].

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]; *R v Villa* [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

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: *R v Villa* [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].

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.

[30-048] Delay between murder offence and sentence

Where there has been a long delay between the commission of the murder and the time of sentencing, a court should sentence by reference to the sentencing patterns that existed when the offence was committed: *R v MJR* (2002) 54 NSWLR 368 at [107]; *R v Moon* [2000] NSWCCA 534 497 at [69]; see further *Sentencing practice after long delay* in **Delay** at [10-530].

[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. 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.

[30-100] 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: *R v Villa* [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. 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.

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 Alexande*r (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.

The authors of the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* 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].

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]. The authors of the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* identified 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].

[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 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.

[The next page is 25001]

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

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

(c) an offence (other than a personal violence offence) the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both).

"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, on convicting an offender of 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

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.

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].

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) 125 A Crim R 551 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) 144 A Crim R 180 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) 134 A Crim R 174 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 A Crim R 1 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) 181 A Crim R 185 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 A Crim R 500 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**.

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