Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 50

March 2022

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 50

Update 50, March 2022

Community-based orders generally has been revised at [3-510] **Requirements for assessment reports** to include *RC v R* [2020] NSWCCA 76 where the court concluded that although an assessment report is not required before imposing, for example, a community correction order (CCO), it is important to obtain one because it informs consideration of not only the appropriate sentence options but the availability of particular conditions.

Community correction orders (CCOs) has been updated at [4-410] **The legislative requirements** to add *R v AR* [2022] NSWCCA 5 which confirms that a conviction must be recorded before a CCO can be made, including when a child is being dealt with for a "serious children's indictable offence". [4-420] **Procedures for making a CCO** now includes *RC v R* [2020] NSWCCA 76. This reiterates the importance of obtaining an assessment report before imposing a CCO, and confirms that one is required if community service work is being considered as a condition.

Objective factors (cf s 21A(1)) has been revised at [10-000] **Maximum penalty** under the subheading **Maximum penalties and the jurisdiction of the Local Court** to add *Park v The Queen* [2021] HCA 37. This restates the rule in *R v Doan* (2000) 50 NSWLR 115 and confirms that when sentencing an offender for an indictable offence which is being dealt with summarily, the maximum penalty, not the lower jurisdictional limit, is the starting point for determining the appropriate sentence. The jurisdictional limit is applied after that.

Guilty plea [11-515] **Guilty plea discounts for offences dealt with on indictment** under the subheading **Discounts when plea offer to different offences refused when made** has been revised to include *Black v R* [2022] NSWCCA 17 where the meaning of the phrase "the offence the subject of the proceedings" in ss 25E(1)(b) and 25E(2)(b) *Crimes (Sentencing Procedure) Act* 1999 was considered. In context, that phrase refers to the principal offence the subject of the proceedings, not multiple offences that might be the subject of the proceedings. Any other construction produces unfairness to the offender.

Taking further offences into account (Form 1 offences) has been updated at [13-200] **The statutory requirements**. *R v JH* [2021] NSWCCA 299 has been added as an example of a case where error was established because an offence with a maximum penalty of life imprisonment was placed on a Form 1. *Dale v R* [2021] NSWCCA 320 and *Pham v R* [2021] NSWCCA 234 have also been added under the subheading **The procedure the court must follow — s 33** to illustrate the potential issues if the requirement to ask the offender if they want further offences to be taken into account is not complied with.

Dangerous driving, and navigation. The commentary at [18-300] **Statutory history** has been revised. [18-310] **The statutory scheme for dangerous driving offences** has been rewritten and now provides a table of the offences, includes the offence of failing to stop and assist after a vehicle impact in s 52AB *Crimes Act* 1900, and commentary about the offences enacted by the *Crimes Legislation Amendment (Loss of Foetus) Act* 2021 when the relevant dangerous driving offence causes the loss of a foetus of a pregnant woman. These offences apply to offences committed on, or after, 29 March 2022. At [18-320] **Guideline judgment**, commentary under the new subheading **Impact of changes in sentencing practice since guideline** has been added**,** including reference to *Stanton v R* [2021] NSWCCA 123. Changes in sentencing practice since the guideline judgment *R v Whyte* (2002) 55 NSWLR 252 was decided should be taken into account when applying the guideline. [18-332] **Momentary inattention or misjudgment** has been revised to include *R v Balla* [2021] NSWCCA 325, an example of a non-custodial sentence for an offence against s 52A involving momentary inattention, and *Elphick v R* [2021] NSWCCA 167 an example of a case where the relevant conduct did not constitute "momentary inattention. *Elphick v R* has also been added to [18-340] **General deterrence**. The text at [18-350] **Motor vehicle manslaughter** has been rewritten. *Crowley v R* [2021] NSWCCA 45 has been added. In some of these cases, the requirements of both gross criminal negligence and unlawful and dangerous

act manslaughter will be satisfied: *Crowley v R* at [18]. *Director of Public Prosecutions v Abdulrahman* [2021] NSWCCA 114; *Smith v R* [2020] NSWCCA 181, *Day v R* [2014] NSWCCA 333, *Spark v R* [2012] NSWCCA 140 and *Bombardieri v R* [2010] NSWCCA 161 have been added as examples of sentencing in motor vehicle manslaughter cases. [18-380] **Mitigating factors** under the subheading **Youth** has been rewritten. *Byrne v R* [2021] NSWCCA 185, which reiterates the significance of general deterrence when offences of this kind are committed by young people has been added. In *Byrne v R* both drivers, youths engaging in a street race, were on provisional licences which was found to exacerbate their culpability and made deterrence particularly important. *Hoskins v R* [2020] NSWCCA 18 has been added at [18-410] **Licence disqualification**. The extension of the disqualification period is subject to any order of the court sentencing an offender: Hoskins v R at [23]; s 206A(5) *Road Transport Act* 2013. A new section at [18-415] **Failure to stop and assist** has been added and includes *Hoskins v R* and *Geagea v R* [2020] NSWCCA 350 which outline the approach to sentencing for these offences. Consequential changes, as a result of the *Crimes Legislation Amendment (Loss of Foetus) Act* 2021, have been made at [18-420] **Dangerous navigation**.

Murder [30-030] **Life sentences** under the subheading **Life sentences under s 61, Crimes (Sentencing Procedure) Act 1999** the commentary has been rewritten. Outdated cases have been removed. *Rogerson v R* [2021] NSWCCA 160 and *CC v R* [2021] NSWCCA 71 have been added. These cases outline the approach to take when considering the requirements of ss 61(1) and 21(1) *Crimes (Sentencing Procedure) Act* 1999 and whether or not a life sentence should be imposed. Commentary has been revised at [30-040] **Aggravating factors and cases that attract the maximum** to include, from *Rogerson v R*, that the categories of murder warranting a life sentence are not closed and the conclusion a life sentence should be imposed is a severe one. Under the subheading **Other factors** *Rogerson v R* has been added to the list of cases which identify factors in murder cases which might aggravate the offence and indicate it attracts the maximum penalty.

Commonwealth drug offences. At [65-100] **Criminal Code offences** the commentary has been revised to summarise the current statutory framework. The text under the subheading **Different offences and Di Simoni** in [65-130] **Objective factors relevant to all Commonwealth drug offences** has been rewritten and *El Jamal v R* [2021] NSWCCA 105 has been added. That case discusses the extent to which a sentencing judge can take into account facts relating to an importation when an offender is charged with possession. In *El Jamal v R*, the CCA found the sentencing judge erred by frequently referring to "the importation offence" and placing importance on findings of the offender's role in the uncharged importation when sentencing for the possession offence. *ZZ v R* [2019] NSWCCA 286 has been added at [65-140] **Subjective factors** as a recent example of a case where the applicant's assistance to the authorities was found to be of much greater value than was thought at the time of sentence.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 50

Please file the Summary and Filing Instructions behind the "Filing Instructions" tab card at the back of the Bench Book.

Please discard previous Summary and Filing Instructions sheets.

Previous Summaries can be accessed on the Currency page of the Bench Book in JIRS.

Tab Card	*Discard Old Pages*	*Insert New Pages*
Preliminaries	vii–ix	vii–ix
Crimes (SP) Act 1999		
— Penalties	2801–2808	2801–2807
	3401–3405	3401–3405
— Sentencing Procedures	5501–5521	5501–5522
	5791–5801	5791–5801
	6081–6089	6081–6089
Particular offences	9241–9256	9241–9258
	15001–15018	15001–15019
	32201–32210	32201–32211

Contents

[The next page is 1001]

Community-based orders generally

[3-500] Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[3-510] Requirements for assessment reports

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

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

An assessment report:

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

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

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

Times when the report may be requested

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

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

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

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

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

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

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

Matters the report must address

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

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

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

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

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

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

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

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

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

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

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

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

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

[3-520] Multiple orders

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

Hierarchy where multiple orders

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

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

Community service work conditions

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

Curfew conditions

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

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

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

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

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

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

[The next page is 3001]

Community correction orders (CCOs)

[4-400] Introduction

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

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

Summary of CCO essentials

A CCO:

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

[4-410] The legislative requirements

The statutory scheme for CCOs is found in the following:

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

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

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

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

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

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

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

[4-420] Procedures for making a CCO

Assessment reports

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

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

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

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

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

Duration and commencement

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

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

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

Fixing appropriate conditions

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

(a) the standard conditions in s 88

(b) any additional conditions imposed under s 89

(c) any further conditions imposed under s 90.

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

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

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

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

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

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

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

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

(g) a supervision condition.

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

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

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

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

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

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

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

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

Explaining the order

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

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

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

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

[4-430] Variation and revocation of CCO conditions

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

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

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

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

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

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

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

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

[The next page is 3461]

Objective factors (cf s 21A(1))

[10-000] Maximum penalty

The maximum penalty represents the legislature's assessment of the seriousness of the offence: and for this reason provides a sentencing yardstick: *Elias v The Queen* (2013) 248 CLR 483 at [27]; *Gilson v The Queen* (1991) 172 CLR 353 at 364. In *Markarian v The Queen* (2005) 228 CLR 357 at [31], Gleeson CJ, Gummow, Hayne and Callinan JJ set out three reasons why sentencers should have particular regard to the maximum penalties prescribed by statute. Their Honours said:

> careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.

Giving careful attention to the maximum penalty does not mean that it "will necessarily play a decisive role in the final determination": *Elias v The Queen* at [27]. Where a maximum sentence was fixed at a very high level in the 19th century it may be of little relevance: *Elias v The Queen* at [27] with reference to *Markarian v The Queen* at [30].

A maximum penalty should not constrain a court's discretion with the result that it imposes an inappropriately severe sentence on an offender: *Elias v The Queen* at [27]. The court must arrive at a sentence that is just in all of the circumstances: *Elias v The Queen* at [27]. The administration of the criminal law involves individualised justice, the attainment of which is acknowledged to involve the exercise of a wide sentencing discretion: *Elias v The Queen* at [27].

In *Markarian*, the High Court found error in the resentencing process because the Court of Criminal Appeal did not start with the maximum penalty for an offence involving the quantity of drug in question, but used another maximum penalty as its starting point: the maximum for an offence in the category of seriousness immediately below that of the principal offence. As indicated above, a maximum penalty serves as a yardstick or as a basis of comparison between the case before the court and the worst possible case. Their Honours also said at [31]:

> [I]t will rarely be, and was not appropriate for Hulme J here to look first to a [lower] maximum penalty, and to proceed by making a proportional deduction from it. [Citations omitted.]

A failure by a sentencing judge to consider the correct maximum penalty for an offence is an error: *R v Mason* [2000] NSWCCA 82. It is not always the case that a sentence imposed by reference to a wrong maximum necessarily requires the court to resentence: *Des Rosier v R* [2006] NSWCCA 16 at [20], citing *R v O'Neill* [2005] NSWCCA 353 and *R v Tadrosse* (2005) 65 NSWLR 740. An erroneous statement as to the maximum penalty does not, of itself, warrant another sentence in law: *Smith v R* [2007] NSWCCA 138 at [34]; *R v Couch-Clarke* [2010] NSWCCA 288 at [39].

Increase in statutory maximum

An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased: *Muldrock v The Queen* (2011) 244 CLR 120 at [31].

For example, where the Legislature almost triples the maximum sentence for a particular type of offence it must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the Legislature that the existing sentencing patterns are to move in a sharply upward manner: *R v Slattery* (unrep, 19/12/96, NSWCCA).

Decrease in the maximum penalty

It is permissible to take into account the subsequent reduction in the maximum penalty as a reflection of the Legislature's policy in relation to fraud offences, and to reduce the impact of the maximum penalty for the repealed offence: *R v Ronen* [2006] NSWCCA 123 at [73]–[74].

Maximum penalties and the jurisdiction of the Local Court

For magistrates exercising summary jurisdiction, the maximum penalty for the offence, *not* the lower jurisdictional limit, is the starting point for determining the appropriate sentence: *Park v The Queen* [2021] HCA 37 at [23]. The Local Court jurisdictional limit cannot regarded as some form of maximum penalty or a penalty reserved for the worst case: *R v El Masri* [2005] NSWCCA 167 at [30]. In *R v Doan* (2000) 50 NSWLR 115 at [35], Grove J (Spigelman CJ and Kirby J agreeing) stated that a jurisdictional maximum is:

> not a maximum penalty for any offence triable within that jurisdiction. In other words, where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit. The implication of the argument of the appellant that, in lieu of prescribed maximum penalties exceeding two years imprisonment, a maximum of two years imprisonment for all offences triable summarily in the Local Court has been substituted, must be rejected. As must also be rejected, the corollary that a sentence of two years imprisonment should be reserved for a "worst case".

In practical terms this means that a magistrate sentencing an offender for an indictable offence being dealt with summarily must identify and synthesise all the relevant factors to be weighed in determining the appropriate sentence, without regard to any jurisdictional limit: *Park v The Queen* at [2], [19]. This includes considering the appropriate discount to be applied for any plea of guilty (required by s 22 *Crimes (Sentencing Procedure) Act* 1999): *Park v The Queen* at [19]–[22]. The relevant jurisdictional limit is applied *after* the appropriate sentence for the offence has been determined: *Park v The Queen* at [2]; see also *Park v R* [2020] NSWCCA 90 at [22]–[35]; [182].

[10-005] Cases that attract the maximum

The maximum penalty for an offence is reserved for worst cases. Past High Court authorities, such as *Ibbs v The Queen* (1987) 163 CLR 447 at 451–452 and *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478, described cases that attract the maximum penalty as cases as falling into the "worst category". Courts should avoid using the

expression "worst category": *The Queen v Kilic* (2016) 259 CLR 256 at [19]–[20]. The expression may not be understood by lay people where a court finds that an offence is serious but does not fall into the "worst category".

The better approach is for the court to clearly record whether the offence is, or is not, so grave as to warrant the imposition of the maximum penalty: *The Queen v Kilic* at [20]. Both the nature of the crime and the circumstances of the criminal are considered in determining that issue: *The Queen v Kilic* at [18]. It is irrelevant whether it is possible to envisage, or conceive of, a worse instance of the offence: *The Queen v Kilic* at [18]. It is not the case that "a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness": *Veen v The Queen (No 2)* at 478.

Where the offence is not so grave as to warrant the imposition of the maximum penalty, a court is bound to consider where the facts of the particular offence and offender lie on the "spectrum" that extends from the least serious instance to the worst: *The Queen v Kilic* at [19]; *Elias v The Queen* (2013) 248 CLR 483 at [27].

As to s 61(1) *Crimes (Sentencing Procedure) Act* 1999, relating to the circumstances in which mandatory life imprisonment may be imposed (previously, s 413B *Crimes Act* 1900 (NSW)), see **Mandatory life sentences under s 61** at [8-600].

[10-010] Proportionality

Common law

The common law has long recognised that the punishment must fit the crime. In *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 472, Mason CJ, Brennan, Dawson and Toohey JJ said:

> The principle of proportionality is now firmly established in this country. It was the unanimous view of the Court in *Veen* [No.1] that a sentence should not be increased beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender

The principle of proportionality "finds statutory expression" in s 3A *Crimes (Sentencing Procedure) Act* through one of the purposes of punishment — "to ensure that an offender is adequately punished": *R v Scott* [2005] NSWCCA 152 per Howie J at [15]; *R v Rayment* [2010] NSWCCA 85 at [112], [156].

The proportionality principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *Veen v The Queen (No 2)* at 472, 485–486, 490–491, 496; *Hoare v The Queen* (1989) 167 CLR 348 at 354; *R v Dodd* (unrep, 4/3/91, NSWCCA) and *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158].

At common law, the term "objective circumstances" was used to describe the circumstances of the crime: see for example, *R v McNaughton* (2006) 66 NSWLR 566 at [15] (quoted below). The gravity of the offence was assessed by reference to its objective seriousness. In *R v Dodd*, the court (Gleeson CJ, Lee CJ at CL and Hunt J) referred to *R v Geddes* (1936) 36 SR (NSW) 554 at 556, where Jordan CJ spoke of the need for a reasonable proportionality between a sentence and the circumstances of the crime. This is achieved by having regard to the "gravity of the offence viewed

objectively" because "without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place". Elaborating on this, the court in *R v Dodd* said at 354:

> Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472 … stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary: see, for example, the passage from the judgment of Street CJ in *Todd* [1982] 2 NSWLR 517 quoted in *Mill* (1988) 166 CLR 59 at 64 …

Following *The Queen v Kilic* (2016) 259 CLR 256, the quote above should be qualified to the extent that the description "most grave category" is now to be avoided (see the discussion at [10-005]). In a five-judge bench decision of *R v McNaughton* at [15], Spigelman CJ described the proportionality principle in the following terms:

> It is authoritatively established that the common law principle of proportionality, propounded in *Veen v The Queen (No 2)*, requires that a sentence should not exceed what is proportionate to the gravity of the crime, having regard to the objective circumstances. (*Hoare v The Queen* (1989) 167 CLR 348 at 354.) In a line of cases, commencing with *R v Dodd* (1991) 57 A Crim R 349 at 354, referred to and affirmed by a five judge bench in *R v Whyte* (2002) 55 NSWLR 252 at [156]–[158], the proportionality principle is also held to apply so that a sentence should not be less than the objective gravity of the offence requires.

Chief Justice Spigelman (the other justices agreeing) held at [24] that "the objective circumstances of the offence … do not encompass [the offender's] prior convictions".

The task requires the court to consider where in the range of conduct covered by the offence the conduct of the offender falls: *Baumer v The Queen* (1988) 166 CLR 51 at 57; *R v Moon* [2000] NSWCCA 534; *R v Way* (2004) 60 NSWLR 168 at [77]; *Hello v R* [2010] NSWCCA 311 at [25]. In *BW v R* (2011) 218 A Crim R 10 at [70], Whealy JA said that this assessment will:

> … generally indicate the appropriate range of sentences available which will reflect the objective seriousness of the offence committed, and set the limits within which a sentence proportional to the criminality of the offender will lie.

In very serious cases, the court will consider whether the maximum penalty should be imposed.

Taking into account the absence of a circumstance which, if present, would render the subject offence a different offence is irrelevant to, and likely to distort, the assessment of objective gravity: *Nguyen v The Queen* (2016) 90 ALJR 595 at [30], [43], [60]. Similarly, a comparison of the gravity of the subject offence with a hypothesised offence is erroneous: *Nguyen v The Queen* at [59].

See **Maximum penalty** above at [10-000] and **Mandatory life sentences under s 61** at [8-600].

Objective seriousness findings

The High Court held in *Muldrock v The Queen* (2011) 244 CLR 120 at [27] that "objective seriousness" of a standard non-parole period offence as referred to in s 54A(2) *Crimes (Sentencing Procedure) Act* is to be determined wholly by reference to

the offending without reference to matters personal to the offender or class of offenders. But a court is *not* required to assess whether a standard non-parole offence falls in the middle range of objective seriousness: at [25]. There is no "need to classify the objective seriousness of the offending": at [29].

See Special Bulletin 5 as to the position following the enactment of the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act* 2013. In essence, the amending Act affirmed *Muldrock v The Queen*. The Court of Criminal Appeal had held, before the decision of *Muldrock v The Queen* (when a middle of the range finding was required), that for offences which are *not* subject to a standard non-parole period the court should generally not make findings of where the offence lies in relation to a mid-range of objective seriousness: *Sivell v R* [2009] NSWCCA 286 at [5] and [32]; *R v Field* [2011] NSWCCA 13 at [49]; *Georgopolous v R* [2010] NSWCCA 246 Allsop P at [3]; per Howie AJ at [30].

Requirement to assess objective seriousness remains post-Muldrock

Although the court is not required to assess the objective gravity of a standard non-parole period offence by reference to notional offences in the mid-range of objective seriousness (see s 54A(6)), proper attention should still be paid to the objective seriousness of the particular offence under consideration: *R v Campbell* [2014] NSWCCA 102 at [27]. An assessment of the objective seriousness of an offence is a critical component of the sentencing process and a mere recitation of the facts of an offence will not satisfy the requirements of that process: *R v Van Ryn* [2016] NSWCCA 1 at [133], [134]; *R v Cage* [2006] NSWCCA 304 at [17].

See **Standard non-parole period offences — Pt 4 Div 1A** at [7-890] and **Sentencing guidelines** at [13-630].

[10-015] Objective seriousness and post-offence conduct

Post offence events can be taken into account in assessing the objective seriousness of a crime but it must be done with particular care: *R v Wilkinson (No 5)* [2009] NSWSC 432 per Johnson J, at [61]. Events which precede and follow the technical limits of a crime may be considered in assessing its objective seriousness: *R v Wilkinson (No 5)* at [61] citing *DPP v England* [1999] 2 VR 258 at 263 at [18]; *R v Garforth* (unreported, 23/5/94, NSWCCA). A sentencing judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime, and are properly to be regarded as circumstances of aggravation or mitigation: *R v Austin* (1985) 121 LSJS 181 at 183; *R v Wilkinson (No 5)* at [61].

Poor treatment of a deceased person's body can be taken into account in homicide cases for the purpose of assessing the seriousness of the offence: *R v Yeo* [2003] NSWSC 315 at [36]; *Knight v R* [2006] NSWCCA 292 at [28]. Examples of aggravating post-offence conduct in murder and manslaughter cases include: infliction of further injury knowing the victim is already dead (*R v Hull* (1969) 90 WN (Pt 1)(NSW) 488 at 492); callous and disrespectful treatment of the body (*Colledge v State of Western Australia* [2007] WASCA 211 at [10] and [15], where the body was left for weeks before being buried with lime to hasten its decomposition); concealing the body (*R v Lowe* [1997] 2 VR 465 at 490, where a deceased child was hidden in

a storm-water drain); dumping the body in a remote spot (*R v Von Einem* (1985) 38 SASR 207 at 218); disposing of the deceased's possessions in different locations "to blur the trail" (*Bell v R* [2003] WASCA 216 at [16] and [25]); and incinerating the body (*R v Schultz* (1997) 68 SASR 377 at 384). In *DPP v England*, the sentencing judge erred by reasoning that acts after death could not amount to aggravating circumstances as the crime of murder was complete upon death: *DPP v England* at [14], [35]. It is not "double-counting" to have regard to post-offence conduct as adding an aggravating dimension to the crime, as well as indicating a lack of remorse: *DPP v England* at [37]; *Bell v R* at [25].

An offender's false statements to police and others concerning the whereabouts of the body, and his failure to reveal its true whereabouts, could not be taken into account in an assessment of the objective seriousness of the murder itself: *R v Wilkinson (No 5)* at [62]. To do so would be tantamount to treating the accused's conduct of his or her defence as an aggravating factor: *R v Cavkic (No 2)* [2009] VSCA 43 at [134].

As to post-crime ameliorative conduct of the offender as a matter in mitigation of sentence see **Ameliorative conduct or voluntary rectification** at [10-560].

[10-020] Consistency

The High Court in *Hili v The Queen* (2010) 242 CLR 520 at [18], [49] examined what is meant by "consistency" and considered "the means by which consistency is achieved". The plurality said, at [18]: "... the consistency that is sought is consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence". The principle was applied in *Barbaro v The Queen* (2014) 253 CLR 58 at [40]. The plurality in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [54] also quoted the passage with approval and added: "Consistency in that sense is maintained by the decisions of intermediate courts of appeal."

It is imperative for a court to have regard to previous cases and "[n]ot just to what has been done in other cases but *why* it was done": *Hili v The Queen* at [18] (emphasis in the original judgment). Like cases should be decided alike and different cases should be dealt with differently: *Hili v The Queen* at [49].

In considering patterns of sentencing it is well to also keep in mind that sentencing is a task involving the exercise of a discretion and that there is no single correct sentence: *Markarian v The Queen* (2005) 228 CLR 357 at [27]. As to sentencing consistency for federal offences see [16-002].

In striving to achieve consistency, courts have utilised previous cases on the one hand and statistics on the other. Many of the authorities cited below discuss both issues, however, for the purpose of this chapter, they have been dealt with separately. To some extent the utility of comparable cases and sentencing statistics depends on the offence. For example, courts have said sentencing statistics should be avoided when sentencing for manslaughter cases (discussed further in introduction to the **Manslaughter and infanticide** chapter at [40-000] under *Use of statistical data*). However, sentencing statistics are commonly utilised by the courts when sentencing for Commonwealth drug offences (see **Achieving consistency** at [65-150]). The issue of consistency and the use of statistics is discussed further within the chapters dealing with particular offences at [17-000]ff.

[10-022] Use of information about sentences in other cases

In seeking consistency, while care must be taken, courts (including first instance judges) must have regard to what has been done in other cases: *Hili v The Queen* (2010) 242 CLR 520 at [53]; *Barbaro v The Queen* (2014) 253 CLR 58 at [40]–[41]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *R v Nguyen* [2010] NSWCCA 238 at [106]. In *Barbaro v The Queen*, the majority of the High Court said at [41]:

> other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect … the synthesis of the "raw material" which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel.

Although *Hili v The Queen* and *DPP (Cth) v De La Rosa* concern sentences imposed for Commonwealth offences, the principles enunciated therein, subject to what was said by the High Court in *The Queen v Pham* (2015) 256 CLR 550 set out below, remain applicable to NSW offences (see the approach taken by the court to manslaughter in *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [54]).

In *The Queen v Pham*, the High Court examined the issue of using other cases during the sentencing process. The plurality (French CJ, Keane and Nettle JJ) set out at [28] the following non-exhaustive list of propositions concerning the way in which the assessment of sentences in other cases is to be approached [footnotes excluded]:

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.

(2) The consistency that is sought is consistency in the application of the relevant legal principles.

(3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.

(6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.

(7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

It is to be noted that no reference was made by the plurality to the statement in *Barbaro v The Queen* at [41] (quoted above) that a court can synthesise raw material like statistics.

The plurality observed that intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as "yardsticks" that may serve to illustrate (although not define) the possible range available: *The Queen v Pham* at [29]. Further, a court must have regard to such a decision unless the objective or subjective circumstances of the case make it distinguishable, or if the court thinks the outcome is manifestly inadequate or excessive: *The Queen v Pham* at [29].

Cases decided in the past do not define the permissible range for a court: *DPP (Cth) v De La Rosa* at [304]. The concept of an "available range", commonly referred to in sentencing appeals, emanates from a conclusion that a sentence is manifestly inadequate or manifestly excessive, and, therefore, falling outside the available range. Such a conclusion is derived from the last limb of *House v The King* (1936) 55 CLR 499 at 505 — that the result is "plainly unjust". However, it is wrong to suggest that a conclusion that a sentence is manifestly inadequate or manifestly excessive requires or permits setting the bounds of the range of available sentences: *Barbaro v The Queen* at [28]; see also *Robertson v R* [2015] NSWCCA 251 at [23]. Ordinarily, it should be assumed after *Barbaro v The Queen* that a court will only accept or reject a submission as to range after considering all the relevant facts and law which bear upon its merit: *Matthews v R* (2014) VR 280 at [17].

In *Munda v Western Australia* (2013) 249 CLR 600, Bell J held at [119] that the fact that the primary judge's sentence was consistent with sentences imposed in comparable cases, and that his Honour's reasons did not disclose patent error, invited careful consideration of the basis on which a conclusion of manifest inadequacy by the Court of Criminal Appeal was reached.

The Queen v Kilic (2016) 259 CLR 256 illustrates the perils of using comparative cases. The Court of Appeal of Victoria erred by attributing too much significance to the sentences imposed in other cases and by concluding that despite the "latitude" to be extended to a sentencing judge the disparity between the respondent's sentence and current sentencing practice meant there was a breach of the principle of equal justice: *The Queen v Kilic* at [23]. The Court of Appeal impermissibly treated the sentences imposed in the few cases mentioned as defining the sentencing range: *The Queen v Kilic* at [24]. The cases mentioned by the parties could not properly be regarded as providing a sentencing pattern: *The Queen v Kilic* at [25]. There were too few cases, one dealt with a different offence, another was more than 12 years old and the circumstances of the offending in each case were too disparate, including the fact that some were not committed in the context of domestic violence against a woman in abuse of a relationship of trust: *The Queen v Kilic* at [25], [27]–[31]. At best they were representative of particular aspects of the spectrum of seriousness: *The Queen v Kilic* at [25].

Strict limits apply as to the use that can be made of sentences imposed in other cases. The court must make its own independent assessment of the particular case: *R v F* [2002] NSWCCA 125 at [38]. The court must identify the limits of the discretion by reference to the facts of the case before it: *Robertson v R* at [23]. Ultimately, the sentencing discretion is individual and must be exercised by the judge in respect of the individual offender and the particular offending: *Gavin v R* at [41]; *DPP (Cth) v De La Rosa* at [304], [305]; *Hili v The Queen* at [54].

Nevertheless, viewing comparable cases in an overall and broad way can provide some measure of the types of sentences passed in similar (although not identical) circumstances: *R v Smith* [2016] NSWCCA 75 at [73]. In *R v Smith*, the CCA referred to a first instance District Court decision and a decision of an intermediate appellate court as illustrations of how courts had approached the sentencing task in serious cases of dangerous driving causing death in the past: *R v Smith* at [70]–[71]. In *Hili v The Queen* at [64]–[65], the High Court also made reference to "one or two closely comparable cases" including the first instance decision of *R v Wheatley* (2007) 67 ATR 531.

It is not always helpful to trawl for comparisons with other decided cases and it would be futile to attempt to gauge the element of manifest seriousness from a single decision that forms part of a range of cases with widely differing objective and subjective circumstances: *R v Zhang* [2004] NSWCCA 358 at [26]; see also *R v Salameh* (unrep, 9/6/94, NSWCCA); *R v Trevenna* [2004] NSWCCA 43 at [98]–[100]; *R v Mungomery* [2004] NSWCCA 450 at [5]; *R v Araya* [2005] NSWCCA 283 at [67]–[71]. Thus, in *RCW v R (No 2)* [2014] NSWCCA 190, the court held at [48] that the judge erred in deriving a starting point for the sentence from a single comparable case on the basis of similarity in objective criminality without consideration of the offender's subjective features. However, there have been exceptions to this principle. In *Behman v R* [2014] NSWCCA 239, the court used the sentence imposed in an earlier case involving conduct "very similar" to that for which the offender stood to be sentenced, as a "strong guide as to the appropriate range": at [17]–[18], [22].

Singling out one subjective feature, such as age, in order to compare sentences is also an unproductive exercise: *Atai v R* [2014] NSWCCA 210 at [147], [161]. In *Atai v R*, a murder case, the Court of Criminal Appeal held that the range of criminality in the chosen cases, the bases upon which the offender was culpable and the subjective features were widely divergent. Similarly, in *Briouzguine v R* [2014] NSWCCA 264, a case involving the supply of significant quantities of drugs, the court held at [78] that reliance by the applicant on a number of other cases concerning drug supply offences involving large commercial quantities, wrongly assumed that the wide variety of facts and degree in which the offending can occur readily yielded a range.

At best, other cases do no more than become part of a range for sentencing, and in the case of manslaughter, this range is wider than for any other offence: *R v George* [2004] NSWCCA 247 at [48]; *Robertson v R* at [18], [20]. Therefore, in manslaughter cases, an examination of the results in other decided cases does not illuminate "in any decisive manner the decision to be reached in a particular case" and is "unhelpful and even dangerous": *BW v R* [2011] NSWCCA 176 at [61]; *R v Vongsouvanh* [2004] NSWCCA 158 at [38]; *CW v R* [2011] NSWCCA 45 at [131]. In *R v Hoerler* [2004] NSWCCA 184 at [41]; *Abbas v R* [2014] NSWCCA 188 at [38]–[42]; *R v Loveridge* (2014) 243 A Crim R 31 at [226]–[227]; and *R v Trevenna* at [98]–[100], it was held that it was not possible to extrapolate a sentencing pattern from past manslaughter cases.

In *Robertson v R*, the applicant was entitled to rely upon comparative manslaughter cases, however, their assistance in the circumstances was limited: *Robertson v R* at [24].

In *King v R* [2015] NSWCCA 99, a murder case, the court held that reliance on four other sentencing judgments as a means of establishing some kind of benchmark against which the reasonableness of the sentence at hand was to be measured, was

not particularly helpful. Murder, like manslaughter, is a protean offence and each case depends upon its own facts. Axiomatically, differences in facts and circumstances will often lead to differences in the resulting sentence: *King v R* at [80].

[10-024] Use of sentencing statistics

It is has long been established that a court should have regard to the general pattern of sentences: *R v Visconti* [1982] 2 NSWLR 104 per Street CJ at 109, 111. In *Barbaro v The Queen* (2014) 253 CLR 58 at [41], the High Court said it is the role of the court to synthesise raw material like statistics.

In *Hili v The Queen* (2010) 253 CLR 58 at [18], the High Court stated that the sentencing consistency sought is "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence". Accordingly, the presentation of sentences which have been passed in "numerical tables, bar charts or graphs" which merely depict outcomes is not useful as it is not possible to ascertain from them why the sentence(s) were imposed. Further, useful statistical analysis is not possible where there is a very small number of offenders sentenced each year, as is the case for federal offenders. The High Court stated at [48]:

> Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results.

The Queen v Pham (2015) 256 CLR 550

Both *Hili v The Queen* and *Barbaro v The Queen* must now be read in light of the High Court decision of *The Queen v Pham* (2015) 256 CLR 550. In *The Queen v Pham*, the court unanimously held that the Victorian Court of Appeal erred in law by adopting an impermissible statistical analysis of comparable cases to determine the objective seriousness of the subject offence: [3], [43]. In this case, Maxwell P attached to his judgment a table of 32 cases of intermediate appellate courts for offences involving a marketable quantity of border controlled drug where the offender was a "courier (or recipient) and no more", had pleaded guilty and had "no (or no relevant) prior convictions". A column in the table expressed the quantity imported as a percentage of the commercial quantity for each of the different drug types. The cases were ranked from the highest percentage to the lowest and a line of best fit was added.

The plurality (French CJ, Keane and Nettle JJ) said the case illustrated the inutility of the presentation of sentences imposed on federal offenders using the numerical tables, bar charts and graphs referred to in *Hili v The Queen* (at [48], see above): *The Queen v Pham* at [32], [33]. Presentations in these forms should be avoided: *The Queen v Pham* at [28]. The statistical analysis was also flawed by treating the weight of drug imported as "the only variable factor affecting offence seriousness" and assuming that "courier" status was of uniform significance: *The Queen v Pham* at [37].

Bell and Gageler JJ did not agree with the plurality on this point and held that even if the Court of Appeal misused the table of 32 cases to determine the objective seriousness

of the offence it does not demonstrate that presentation of this type of material is impermissible: *The Queen v Pham* at [45]. *Hili v The Queen* and *Barbaro v The Queen* are concerned not only with the consistent application of sentencing principles but also with reasonable consistency in sentencing outcomes: *The Queen v Pham* at [42], [46]. In *Hili v The Queen*, the court said it is not useful to use statistical material which only refers to the lengths of sentences passed because it says nothing about why sentences were fixed: *The Queen v Pham* at [46].

The joint justices further held that statistical material showing the pattern of past sentences for an offence may serve as a yardstick by which the sentencer assesses a proposed sentence and the appellate court assesses a challenge of manifest inadequacy or excess: *The Queen v Pham* at [47]. In *Barbaro v The Queen*, the court held that judges must have regard to past cases as they may establish a range. This history stands as a yardstick against which to examine a sentence but it does not define the outer boundary of the permissible discretion. It was accepted that comparable cases and sentencing statistics are aids and part of the material which the sentencer must take into account: *The Queen v Pham* at [48]. The Commonwealth Sentencing Database is a source of potentially relevant information about the pattern of sentencing for federal offences: *The Queen v Pham* at [49]. Bell and Gageler JJ said at [49] [footnote included]:

> Statistics have a role to play in fostering consistency in sentencing, and in appellate review, provided care is taken to understand the basis upon which they have been compiled [see *Knight v R* [2015] NSWCCA 222 at [3]–[13] per RA Hulme J] and provided the limitations explained in … *Barbaro* … are observed. The value of sentencing statistics will vary between offences. It is not meaningful to speak of a pattern of past sentences in the case of offences which are not frequently prosecuted and where a relatively small number of sentences make up the set.

CCA statements concerning the use of statistics

The previous accepted authority in NSW of *R v Bloomfield* (1998) 44 NSWLR 734 at 739, particularly the statements of Spigelman CJ (statistics "may be of assistance in ensuring consistency in sentencing" and "may indicate an appropriate range") must now be read in light of *Wong v The Queen* (2001) 207 CLR 584 at [59], *Barbaro v The Queen* at [41], *Hili v The Queen* at [48] and *The Queen v Pham* (2015) 256 CLR 550 at [49]. The court in *SS v R* [2016] NSWCCA 197 applied those cases. Bathurst CJ said at [63] that statistics in that case:

> … do not provide any real assistance in determining whether the sentence was manifestly excessive in the absence of any detail concerning the circumstances of the particular cases in question.

The limited use that should be made of Judicial Commission statistics has been recognised previously: *Ross v R* [2012] NSWCCA 161 at [19]. Statistics do no more than establish the range of sentences imposed, without establishing that the range is the correct range or that the upper or lower limits are the correct upper or lower limits: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]; *Holohan v R* [2012] NSWCCA 105 at [51]. A failure by a court to consider Judicial Commission statistics does not in itself amount to error in the sentencing process: *Lawson v R* [2012] NSWCCA 56 at [13]. Sentencing statistics are a blunt instrument when seeking to establish manifest excess in a sentencing appeal: *Windle v R* [2011] NSWCCA 277 at [62] and an opaque tool for providing insight into a sentencing range in a sentencing appeal: *R v Nikolovska*

[2010] NSWCCA 169 at [70]. For many offences, culpability varies over so wide a range that the statistics are of limited utility for a particular case and undue weight should not be given to them: *Fogg v R* [2011] NSWCCA 1 at [59].

In *R v Lao* at [2003] NSWCCA 315 at [32]–[33], Spigelman CJ said:

> What is an available "range" is sometimes not accurately stated, when reference is made to Judicial Commission statistics. The statistics of the Judicial Commission do not show a range appropriate for a particular offence.
>
> This court is concerned to determine the appropriate range for the particular offence. The Judicial Commission statistics do not indicate that range. They reflect what was regarded as appropriate in the wide variety of circumstances in the cases reported in those statistics.

The court in *Skocic v R* [2014] NSWCCA 225 at [19]–[20] helpfully summarised the law as it currently stands in relation to the use that can be made of sentencing statistics following the decisions in *Hili v The Queen* and *Barbaro v The Queen*. In *Skocic v R* at [19], Bellew J said:

> In *MLP v R* [2014] NSWCCA 183, with the concurrence of Macfarlan JA and Adamson J, I had occasion to make a number of observations (commencing at [41]) regarding this issue. Those observations included the following:
>
> (i) consistency in sentencing is not demonstrated by, and does not require, numerical equivalence. What is sought is consistency in the application of the relevant legal principles: *Hili v R; Jones v R* [2010] HCA 45; (2010) 242 CLR 520 at [48]–[49][;]
>
> (ii) sentences imposed in other cases do not mark the outer bounds of the permissible sentencing discretion but stand as a yardstick against which to examine a proposed sentence. What is important are the unifying principles which such sentences reveal and reflect: *Barbaro v R; Zirilli v R* [2014] HCA 2; (2014) 305 ALR 323 at [41];
>
> (iii) the presentation of sentences passed in the form of numerical tables and graphs is of limited use: *Hili* (supra) at [48]. This is because reference to the lengths of sentences passed says nothing about why the sentences were fixed as they were;
>
> (iv) this Court has emphasised the need to adopt a careful approach when asked to have regard to statistics: *R v Nikolovska* [2010] NSWCCA 153 at [117] per Kirby J, Beazley JA (as her Honour then was) and Johnson J agreeing. A similarly careful approach is required when the Court is asked to compare a sentence imposed in one case with a sentence imposed in another: *RLS v R* [2012] NSWCCA 236 at [132] per Bellew J, McClellan CJ at CL and Johnson J agreeing. The need to take care in each instance arises, in part, from the fundamental fact that there will inevitably be differences, both in terms of the objective circumstances of offending and the subjective circumstances of the offender, between one case and another;
>
> (v) the fact that a particular sentence is, by reference to statistics, the highest imposed for a single instance of particular offending does not demonstrate that the sentence is unduly harsh. As a matter of common sense, there will always be one sentence which constitutes the longest sentence imposed for particular offending: *Jolly v R* [2013] NSWCCA 76 at [75].

In *Tweedie v R* [2015] NSWCCA 71 at [45], the court held that the Judicial Commission sentencing statistics, which contained only five cases of the same fraud offence sentenced in the District Court, were of no use at all. Further, there was no utility in

comparing the sentences imposed in that case with those imposed in the Local Court where the jurisdictional limit is 20% of the maximum penalty available in the District Court.

Generally, for offences involving the manufacture and supply of drugs, the utility of sentencing statistics are of limited weight because they do not record: the broad range of weight and purity of the drug involved; the role of the offender; and, whether there were aggravating features: *R v Chidiac* at [40]. The aggravating feature of being on conditional liberty at the time of the offending is not recorded in the statistics: *Sparkes v R* at [30].

It has been said that statistics can be used as broad support for a conclusion that a custodial sentence is appropriate: *Mitchell v R* [2013] NSWCCA 318 at [27]–[31]; *Peiris v R* (2014) 240 A Crim R 114 at [96]. However, the comparison of sentencing statistics becomes complicated where Form 1 offences have been taken into account: *R v Lenthall* [2004] NSWCCA 248.

In *Peiris v R*, the court held that it was an error for the sentencing judge to rely on statistics and rates of imprisonment derived from sentences imposed in the Local Court for the purpose of determining an appropriate sentence for a matter dealt with in the District Court, despite the fact that the proceedings could well have been disposed of in the Local Court. If comparison is to be made for the purposes of establishing a yardstick in a case where the offence can be tried summarily and on indictment, then it should be made with all the data including that obtained from the local and higher courts: *Peiris v R* at [90].

As with the use of comparable cases, the myriad circumstances of manslaughter offences means it unhelpful to speak in terms of a range of sentences, or a tariff, for a particular form of manslaughter: *Leung v R* [2014] NSWCCA 336 at [120]; *R v Wood* (2014) 244 A Crim R 501 at [56]. Sentencing statistics for manslaughter cases are of such limited assistance to sentencing judges that they should be avoided: *R v Wood* at [59].

In *Simpson v R* [2014] NSWCCA 23, the court held at [41] that the Judicial Commission's statistics in relation to offences under s 61I were also of little value. The statistics failed to disclose the aggravating factors for each case of which there were many in the case before the court: *Simpson v R* at [31], [35], [37], [39].

Aggregate sentences and JIRS statistics

The applicant in *Knight v R* [2015] NSWCCA 222 was convicted of multiple counts of knowingly taking part in the supply of prohibited drugs contrary to s 25(1) *Drug Misuse and Trafficking Act* 1985. It was an inherent flaw to use the Judicial Commission sentencing statistics based on the principal offence to assert that an aggregate sentence was manifestly excessive: *Knight v R* at [13], [88]; *Tweedie v R* [2015] NSWCCA 71 at [47]. The Judicial Commission sentencing statistics (at the time) did not extend to aggregate sentences or to a number of different sentences that overlap: *R v Chidiac* [2015] NSWCCA 241at [41]; *Knight v R* at [8], [87], [88]; *Sparkes v R* [2015] NSWCCA 203 at [30]. But now see "Explaining the Statistics" in relation to aggregate sentences.

Additionally, in *Knight v R*, the applicant was seeking to compare his aggregate non-parole period (for four offences of supply) with the non-parole periods displayed

in the statistics — which were non-parole periods referable either to a single s 25(1) offence or a s 25(1) offence which was the principal offence in a multiple offence sentencing exercise where all sentences were ordered to be concurrent: *Knight v R* at [11].

Selecting the statistical variable "multiple offences" was of no real utility where an offender is sentenced for multiple counts of the same offence because "multiple offences" does not limit the database to multiple instances of the same offence. It includes instances where there was one or more offences of *any type*: *Knight v R* at [7]. *Knight v R* was referred to by Bell and Gageler JJ in *The Queen v Pham* at [49].

[10-025] Necessity to refer to "Explaining the statistics" document

Where JIRS statistics are used by either party it is essential that reference is also made to the "Explaining the statistics" document (found at the top of the Statistics page on JIRS). This document explains how JIRS statistics are compiled. R A Hulme J in *Why v R* [2017] NSWCCA 101 at [60]–[61], [64] emphasised the need for the parties to refer to the "Explaining the statistics" document on JIRS:

> Quite a deal has been said in judgments of this Court in recent years about the care which needs to attend the use of sentencing statistics provided by the Judicial Commission of New South Wales. Walton J has referred to those which discuss statistics in the context of aggregate sentencing [Cross reference omitted.]
>
> In *Knight v R* [2015] NSWCCA 222 at [13] I wrote … "if [statistics] are to be relied upon, it is necessary that counsel ensure that the limits of their utility are properly understood". Earlier (at [8]) I said:
>
> > Available on the opening page of the statistics section of the Judicial Commission's website is a hyperlink to a document: 'Explaining the Statistics'. It contains an explanation of the counting methods employed and the variables that may be selected to refine the statistics.
>
> …
>
> The sentencing statistics can be a very valuable tool if properly understood and used appropriately. Once again, I can only implore practitioners to read the "Explaining the Statistics" document before relying upon statistics in any court, including this Court.

[10-026] Enhancements to JIRS statistics

JIRS statistics can be utilised to provide comparable cases that may be of assistance to the sentencing court. In response to the decision in *Hili v The Queen* (2010) 253 CLR 58, the higher courts' sentencing statistics on JIRS were enhanced by a new feature allowing users to access further information behind each sentencing graph and isolate offender and offence characteristics relevant to the offender currently being sentenced. The new feature provides sentencing information to explain why the sentence was passed or, as the High Court put it in *Hili v The Queen* at [18], to have "proper regard not just to what has been done in other cases but *why* it was done" [emphasis in original].

The enhancements also facilitate compliance by sentencing courts with proposition (7) in *The Queen v Pham* (2015) 256 CLR 550 at [28] and the principle outlined by the plurality of that case that "intermediate appellate courts must have

regard to sentencing decisions of other intermediate appellate courts in comparable cases as 'yardsticks' that may serve to illustrate (although not define) the possible range of sentences available": *The Queen v Pham* at [29].

The JIRS statistics now provides the following additional information:

- registry file number
- a link to a summary of the CCA judgment, the judgment (whether it is a Crown appeal or severity appeal) and where there is a CCA judgment a link to the first instance remarks if they are available
- offence date
- sentence date (either at first instance or the re-sentencing date on appeal)
- the offender's characteristics listed in summary form including: the number of offences (one/any additional offences); whether a Form 1 was taken into account; the offender's prior record, plea, age and the penalty that was imposed
- the precise overall or effective sentence and the overall non-parole period.

R A Hulme J in *Why v R* [2017] NSWCCA 101 at [62]–[63] made reference to the enhancements:

> The Judicial Commission has provided enhancements to the statistics in recent times, partly in response to what the High Court has said in cases such as *Hili v The Queen; Jones v The Queen* [2010] HCA 45; 244 CLR 520 and *The Queen v Pham* [2015] HCA 39; 256 CLR 550. They include the provision of statistics for "Aggregate/Effective" terms of sentence and non-parole periods. But there are limitations on the utility of these.
>
> Another enhancement is the provision of further information about individual cases which make up the database. Sometimes it is limited but where published judgments are available there is a very helpful hyperlink to them (and sometimes to summaries of them). It is, unfortunately, rarely apparent in this Court that counsel who are relying upon the statistics have made use of this facility.

[10-027] Recent changes to JIRS statistics

The following changes have been made to JIRS sentencing statistics in light of recent Court of Criminal Appeal decisions referred to below. For the NSW higher courts, the menu option variable "Multiple offences" has been removed from the sentencing statistics viewer as the variable included offences of any type and any number and was considered to be too broad by the court in *Knight v R* [2015] NSWCCA 222 at [7]. In other cases the multiple offences variable was misunderstood, see *R v Wright* [2017] NSWCCA 102 at [52] where the parties assumed "multiple" referred only to multiple offences of the specific offence charged.

The "View" menu, which provided the "Median" and the "80% Range" options, has been removed from the sentencing statistics viewer for all NSW courts. Constructive feedback from users suggested that those features lacked utility and could be potentially open to misinterpretation. See also the statements concerning the use of medians in sentencing in *Wong v The Queen* (2001) 207 CLR 584 at [66] and *Harper v R* [2017] NSWCCA 159 at [34]. In the latter case, the applicant's submission

relied upon an underlying premise that the median represents the sentences impose for the middle range offences. In the absence of providing anything about the facts of the cases, the premise was not accepted.

[10-030] Isolated incidents and offences not charged

In sentencing for certain types of charges, such as sexual assault or fraud, the sentencing judge may consider evidence by which the true nature of the offence(s) charged may be judged, including evidence of past and future events not the subject of charges. This does not apply to events significantly later in time or of a type different from those charged. For such evidence to be taken into account there must be an admission to the commission of other offences or an admission that the offences were representative: *R v JCW* [2000] NSWCCA 209 per Spigelman CJ at [55]–[56].

In these circumstances the charges before the court have been described as "representative charges", that is, representative of the total misconduct. Such evidence is admissible not to increase an otherwise proper sentence but only to rebut any suggestion that the charged misconduct was an isolated, spur-of-the-moment lapse, or out of character. Ordinarily, the submission comes from the offender and the Crown adduces evidence to rebut the claim. The line of distinction is often fine: *R v Holyoak* (unrep, 1/9/95, NSWCCA), adopting *R v Reiner* (1974) 8 SASR 102 and *R v H* (unrep, 23/8/96, NSWCCA); compare Hulme J at 515–517 doubting the use of the term "representative" as calculated to lead to the introduction of inadmissible considerations.

This method of taking into account representative counts does not infringe the principle that a person should not be punished for a crime for which he or she has not been convicted. There is a distinction between not increasing a penalty based on aggravation and not granting leniency on account of the fact that the events as charged were not isolated incidents: *R v JCW* per Spigelman CJ at [68], applying *Siganto v The Queen* (1998) 194 CLR 656.

Approach to sentencing

The accepted approach when courts are imposing a sentence in respect of "representative" charges to which pleas of guilty have been entered is:

- that the overall history of the conduct from which the representative charges have been selected may be looked at for purposes of understanding the relationships between the parties
- to exclude any suggestion that the offences charged were of an isolated nature, and
- as bearing upon the degree of any leniency the court might be considering in regard to sentencing.

The history should not be used as the basis for sentencing the convicted person for charges other than those in the indictment or as matter of aggravation of those charges: *R v D* (unrep, 22/11/96, NSWCCA) per Priestley JA; *R v EMC* (unrep, 21/11/96, NSWCCA). In *R v JCW* [2000] NSWCCA 209 at [3], Spigelman CJ expressed the view that when there are two isolated instances of admitted sexual assault, a lower sentence is called for than if the two assaults were part of a general course of conduct.

In *R v JCW* there was an express admission by the offender that the particular counts with respect to daughter DW were "representative". That admission extended to an admission of the general nature of the relationship as set out in the uncontested evidence of DW, but this admission did not extend to any of the specific allegations contained in DW's evidence. Chief Justice Spigelman at [68] said:

> An admission of this general character is appropriate to be taken into account for purposes of rejecting any claim to mitigation and attendant reduction of an otherwise appropriate sentence. It is not, however, in my opinion, appropriate to be taken into account as a circumstance of aggravation, if that be permissible at all.

In *Giles v R* [2009] NSWCCA 308 (also referred to in *Einfeld v R* [2010] NSWCCA 87 at [145]), the court re-considered the issue of whether uncharged matters can be taken into account not just to rebut a claim that the incidents were isolated, but also to increase the objective seriousness of the offences charged. The applicant's commission of numerous additional offences similar to those charged was relevant to his state of mind in committing the offences charged: per Basten JA at [67]. The fact that the charged offences constituted part of an ongoing course of conduct placed them in the higher range of objective seriousness: per Basten JA at [68]. Although Basten JA's reasoning was persuasive, the issue should await determination in an appropriate case: per Johnson J at [102]. There is no basis for qualifying the settled law on the subject: per RS Hulme J at [86].

Where the prisoner has committed an offence of persistent child sexual abuse under s 66EA *Crimes Act*, he or she is sentenced in the same way for the representative counts as existed before the creation of the offence. Parliament did not intend to create a harsher sentencing regime for representative counts constituting a s 66EA offence: *R v Fitzgerald* (2004) 59 NSWLR 493.

See further **Sexual assault** at [20-840].

[10-040] Premeditation and planning

At common law the degree of premeditation or planning has long been recognised as a factor in weighing the seriousness of an offence: *R v Morabito* (unrep, 10/6/92, NSWCCA) at 86. It permits a court to treat the conduct as a more serious example of the offence charged than would otherwise be the case. Conversely, offences which are unplanned, impulsive, opportunistic and committed spontaneously are generally regarded as less serious than those that are planned: *R v Mobbs* [2005] NSWCCA 371 at [50]. A court is not entitled to make a finding that an offence was planned when such an adverse finding is not open: *BIP v R* [2011] NSWCCA 224 at [50].

Although intoxication is not a matter in mitigation, an offender's intoxication may be an indication that the offence was impulsive and unplanned: *Waters v R* [2007] NSWCCA 219 at [38] with reference to Wood CJ at CL in *R v Henry* (1999) 46 NSWLR 346 at [273]; see *LB v R* [2011] NSWCCA 220 at [42].

The armed robbery guideline in *R v Henry* (above) at [162] refers to the circumstance of a "a limited degree of planning" (see **Robbery** at [20-250]). Planning is also referred to as a factor in the break, enter and steal guideline (see **Break and enter offences** at [17-020] and cases at [17-070]). For fraud offences a distinction has been drawn

between offences where there has been planning with a degree of sophistication and those committed on impulse: see *R v Araya* [2005] NSWCCA 283 at [96]; *R v Tadrosse* (2005) 65 NSWLR 740; *Golubovic v R* [2010] NSWCCA 39 at [23]. In such cases, general deterrence is an important factor in sentencing: *R v Pont* (2000) 121 A Crim R 302 at [43].

See discussion in **Fraud offences in New South Wales** at [19-970] and [19-990].

Planning is referred to as an aggravating factor under s 21A(2)(n) (see [11-190]). The terms of s 21A(2)(n) conveys more than simply that the offence was planned: *Fahs v R* [2007] NSWCCA 26 at [21]. It is only when the particular offence is part of a more extensive criminal undertaking that [s 21A(2)(n)] is engaged": *Williams v R* [2010] NSWCCA 15, per McClellan CJ at CL at [20]. Where the offence was not planned it can be considered as a mitigating factor under s 21A(3)(b) (see [11-220]). This binary approach in s 21A to matters such as planning has been criticised on the basis that "[c]ategories of aggravating and mitigating factors are … not readily separable": *Einfeld v R* [2010] NSWCCA 87 at [72].

See further the application of ss 21A(2)(n) and 21A(3)(b) at [11-190] and [11-220] respectively.

[10-050] Degree of participation

Where more than one offender is involved in the commission of an offence, a consideration of sentencing is the degree of participation of the offender in the offence: *Lowe v The Queen* (1984) 154 CLR 606 per Gibbs CJ at 609; *R v Pastras* (unrep, 5/3/93, VSC).

The application of this principle to robbery is discussed in **Robbery** at [20-270] and its application to drugs is discussed in **Drug Misuse and Trafficking Act 1985 (NSW) offences** at [19-870].

An offender's criminal liability may be based on joint enterprise or extended joint enterprise or as an aider or abettor. For a discussion of the sentencing principles that are applied in the former category see A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", *Sentencing Trends and Issues*, No 38, Judicial Commission of NSW, 2009 and for a discussion of the latter category see "Sentencing in complicity cases — Abettors, accessories and other secondary participants (Part 2)", *Sentencing Trends and Issues*, No 39, Judicial Commission of NSW, 2010.

See also the discussion in **Robbery** at [20-290].

[10-060] Breach of trust

Where an offence involves a breach of trust, the court regards it as a significant aggravating factor. For a breach of trust to exist there must be a special relationship between the victim and offender at the time of offending: *Suleman v R* [2009] NSWCCA 70 at [26]. It is a common feature of many fraud and child sexual assault offences. In the most serious examples these offences are often associated with planning or premeditation and may also involve a course of criminality or periodic criminality that may extend over a lengthy period of time. Generally, persons who

occupy a position of trust or authority can expect to be treated severely by the criminal law: *R v Overall* (unrep, 16/12/93, NSWCCA); *R v Hoerler* [2004] NSWCCA 184; *R v Martin* [2005] NSWCCA 190.

Breach of trust is an aggravating factor under s 21A(2)(k): see **Section 21A factors** at [11-160].

The application of the principle to child sexual assault is discussed in **Sexual offences against children** at [17-560] and for fraud or dishonesty offences see "Breach of trust" in **Fraud offences in New South Wales** at [19-970].

[10-070] Impact on the victim

At common law, the impact of an offence on the victim has always been taken into account. It is a matter relevant to assessing the objective seriousness of the offence. A sentencing judge is entitled to have regard to the harm done to the victim as a consequence of the commission of the crime: *Siganto v The Queen* (1998) 194 CLR 656 at [29]. The court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen, and the application of s 3A(g) ("harm done to the victim and community") and s 21A(2)(g) ("the injury, emotional harm, loss or damage caused by the offence is substantial") in a given case are limited by the common law rule: *Josefski v R* [2010] NSWCCA 41 at [38]. All other things being equal, the greater the harm, the more serious the circumstances of the offence. Care needs to be taken, however, that in giving consideration to the harmful consequences of an offence, the *De Simoni* principle is not infringed: *De Simoni v The Queen* (1981) 147 CLR 383.

Where there is sought to be established an impact more deleterious than generally anticipated from the circumstances of the offence (such as an aggravating circumstance) one would generally require evidence supporting that issue: *R v Solomon* [2005] NSWCCA 158 at [26]; *R v Youkhana* [2004] NSWCCA 412.

This common law factor is discussed further: **Victims and victim impact statements** at [12-800]; **Section 21A factors** at [11-120], [11-210]; and **Robbery** at [20-290].

Age of victim

Disparity in the offender and victim's ages may inform the assessment of the objective seriousness of the offence: *R v KNL* [2005] NSWCCA 260.

The younger the victim, the more serious the criminality: *R v BJW* (2000) 112 A Crim R 1 at [21]; *MLP v R* [2006] NSWCCA 271 at [22]; *R v PWH* (unrep, 20/2/92, NSWCCA). A child aged 13 years or under is virtually helpless in a family unit when abused by a step-parent, and all too often the child is afraid to inform on the step-parent: *R v BJW* per Sheller JA at [21].

[10-080] Possibility of summary disposal

In some circumstances the Supreme or District Court can take into account the fact that the offence or offences before the court could have been disposed of in the Local Court: *R v Palmer* [2005] NSWCCA 349 at [14]–[15]; *Bonwick v R* [2010] NSWCCA

177 at [43]–[45]; *Peiris v R* [2014] NSWCCA 58 at [85]. While it is a matter that may be relevant it is not always the case that a lost chance to be dealt with summarily will be a matter of mitigation: *R v Doan* (2000) 50 NSWLR 115 at [42].

In *Bonwick v R* at [45], the failure of the sentencing judge to refer to the Local Court limitation on sentence amounted to "an error justifying the intervention". The prescription of a standard non-parole period for an offence such as indecent assault does not displace the principle: *Bonwick v R* at [47].

In *Baines v R* [2016] NSWCCA 132 at [12], Basten JA expressed misgivings about the basis of the principle given that it only operates where the prosecutor has already elected to have the matter dealt with upon indictment, under s 260 *Criminal Procedure Act* 1986. Basten JA stated at [12]–[13]:

> [12] It is doubtful whether there is "a rule of law"; if there is, it should be applied, not "taken into account". However, what was meant was that there is a factor to be taken into account with varying significance in different contexts. Again, the particular nature of the significance is not articulated, except to suggest that it concerns the subjective circumstances of the offender.
>
> [13] To approach the matter on the basis of a presumptive fetter on the exercise of the court's sentencing discretion implies a power to review the exercise of prosecutorial discretion in the selection of jurisdiction. As noted in the joint reasons in *Magaming v The Queen* [(2013) 252 CLR 381 at [20]], "[i]t is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences." To which one might add, and in what court. The court should impose the appropriate sentence for the offence as proved, within the limits of the sentencing court's jurisdiction and discretion.

Other recent cases have narrowed or confined the application of the principle. A court can only take into account as a mitigating factor the possibility that an offence could have been disposed of summarily in "rare and exceptional" circumstances: *Zreika v R* [2012] NSWCCA 44 at [83]. It must be clear that the offence ought to, or would have, been prosecuted in the Local Court: *Zreika v R* at [83]. Johnson J said in *Zreika v R* at [109]:

> Unless [the Court of Criminal Appeal] is able to clearly determine that the offence in question, committed by the particular offender with his or her criminal history, ought to have remained in the Local Court, then the argument is theoretical at best. The bare theoretical possibility of the matter being dealt with in the Local Court does not suffice: *Wise v R* [2006] NSWCCA 264 at [31]; *R v Cage* [2006] NSWCCA 304 at [31]; *Edwards v R* at [47]; *McIntyre v R* [2009] NSWCCA 305 at [62]–[67].

An example is where the Crown withdraws an indictable offence following committal or where the offender is found not guilty of a purely indictable offence and the District Court is left with offences which — but for the serious offence — would have been dealt with in the Local Court: *Zreika v R* at [103]–[104] citing *McCullough v R* (2009) 194 A Crim R 439 at [22]–[23] and *R v El Masri* [2005] NSWCCA 167 at [30]; and see *Peiris v R* at [4] where the offender was acquitted of an offence charged under s 61J *Crimes Act* 1900 but found guilty of two counts of indecent assault under s 61M *Crimes Act*.

The court should give consideration as to whether a reduced maximum penalty would apply in the Local Court: *McCullough v R* at [22]–[23]. See penalties set out for

specific offences in s 268(2) *Criminal Procedure Act*. Section 268(1A) also provides for a general jurisdictional limit for the Local Court of two years imprisonment. The extent of the criminality is also an important consideration in having regard to the Local Court penalty: *Bonwick v R* at [43]. The principle does not apply if the offence is too serious to be dealt with in the Local Court even though the magistrate may technically have had jurisdiction: *R v Royal* [2003] NSWCCA 275 at [38]; *R v Hanslow* [2004] NSWCCA 163 at [21]. In *Peiris v R* at [84]–[85] after accepting that the principle applied, the judge had regard to the sentencing patterns and statistics of the Local Court for indecent assault. The court did not prohibit such an approach but held that the manner the statistics had been interpreted and used by the judge disclosed a material error: *Peiris v R* at [89].

Where the court takes the factor into account, the sentence to be imposed is not limited to the two-year jurisdictional limit of the Local Court and there is no obligation to indicate in any arithmetical sense how it affected the sentence imposed: *SM v R* [2016] NSWCCA 171 at [24], [27]; *R v Palmer* at [15(a)]. In *SM v R*, the court said at [26]:

> As explained in *Baines v R*, there has been little explanation in the caselaw as to precisely *how* the possibility that the matter could have been dealt with in the Local Court should be taken into account. If, as in the present case, the sentencing judge is satisfied that a term of imprisonment exceeding 2 years is required, the fact that the prosecutor might have taken a different view would not appear to be a relevant consideration.

However, in an appeal to the Court of Criminal Appeal against sentence, the court in *Zreika v R* held at [83] the fact that an offender's legal representative does not raise the issue in the District Court is "a very practical barometer as to whether such an argument was realistically available". In determining whether the factor was taken into account, although not explicitly mentioned, the experience of the judge is a relevant matter: *Hendra v R* [2013] NSWCCA 151 at [18].

In *Baines v R*, the court found the fact the charges could all have been dealt with in the Local Court was of no significance in circumstances where criminal liability was in issue. Liability in that case turned upon acceptance of the evidence of several female complainants and it was within the discretionary judgment of the Director of Public Prosecutions to elect that these issues be tried by jury: *Baines v R* at [133].

A failure of the sentencing judge to mention the matter does not constitute error: *R v Jammeh* [2004] NSWCCA 327 at [28] but see *Bonwick v R* at [45].

[10-085] Relevance of less punitive offences

There is no common law principle that a court is required to take into account, as a matter in mitigation, a lesser offence (with a lower maximum penalty) that the prosecution could have proceeded upon: *Elias v The Queen* (2013) 248 CLR 483 at [5], [25]; *Pantazis v The Queen* [2012] VSCA 160 at [43] overruled. The so-called *Liang* principle (*R v Liang and Li* (unrep, 27/7/95, VCA), which permitted such a course, is said to be premised on the idea that the prosecution's selection of the charge should not constrain a court's sentencing discretion and require it to impose a heavier sentence than what is appropriate: *Elias v The Queen* at [26]. It is wrong to suggest that the court is constrained by the maximum penalty: *Elias v The Queen* at [27]. It

is one of many factors that the sentencing court takes into account in the exercise of the sentencing discretion designed to attain individualised justice: *Elias v The Queen* at [27]. The *Liang* approach, of reducing a sentence for an offence to take account of a lesser maximum penalty for a different offence, "does not promote consistency" in sentencing for an offence and is inconsistent with the separation of the prosecutorial and judicial functions: *Elias v The Queen* at [29], [33], [34].

The holding in *Elias v The Queen* supports the view of the NSWCCA that a sentence imposed in the exercise of State judicial power on conviction for the State offence is not to be reduced to conform to a lesser maximum penalty applicable to a Commonwealth offence: *R v El Helou* (2010) 267 ALR 734 at [90]; *Standen v DPP (Cth)* (2011) 254 FLR 467 at [29].

[The next page is 5561]

Guilty plea to be taken into account

[11-500] Introduction

Until the introduction of Pt 3, Div 1A *Crimes (Sentencing Procedure) Act* 1999 on 30 April 2018, the common law recognised that sentencing judges had a broad discretion to discount a sentence for the utilitarian value of a plea of guilty.

In *Siganto v The Queen* (1998) 194 CLR 656 at [22], Gleeson CJ, Gummow, Hayne and Callinan JJ said:

> a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case.

A "sentencing discount" is a reduction in the otherwise appropriate sentence by a quantifiable amount due to a specific policy consideration — in the case of a guilty plea — a utilitarian benefit: *R v Borkowski* [2009] NSWCCA 102. It is applied after the otherwise appropriate sentence has been determined: at [32].

However, in the Second Reading Speech to the Justice Legislation Amendment (Committals and Guilty Pleas) Bill, the Attorney General said Pt 3, Div 1A was introduced to replace "the existing common law discount for the utilitarian value of a guilty plea" for offences dealt with on indictment: NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 October 2017, p 9.

[11-503] Impermissible to penalise offender for pleading not guilty

A court is not permitted to penalise an offender for pleading not guilty. In *Siganto v The Queen* at [22] it was said:

> A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise have been imposed.

The court judges an offender for the crime, not for the defence: at [21], affirming the proposition expressed in DA Thomas, *Principles of Sentencing* (2nd Ed), 1979, Heinemann, London, p 50. See also *Cameron v The Queen* (2002) 209 CLR 339. The High Court in *Siganto v The Queen* at [21] also affirmed the following passage from *R v Gray* [1977] VR 225 at 231:

> It is impermissible to increase what is a proper sentence for the offence committed, in order to mark the court's disapproval of the accused's having put the issues to proof or having presented a time-wasting or even scurrilous defence.

[11-504] Obligations of the court taking the plea

Where both parties to proceedings are present, s 192(2) *Criminal Procedure Act* 1986 provides that the court must "state the substance of the offence" to an accused and ask if they plead guilty or not guilty. The stating by the court of the substance of the offence is not of itself a condition precedent to the validity of a plea of guilty, and it is not the purpose of ss 192 and 193 that the power to convict is not enlivened unless this has occurred: *Collier v Director of Public Prosecutions* [2011] NSWCA 202 at [59].

The purpose of s 192(2) is to ensure that, to the knowledge of the court, an accused adequately understands the charge they are pleading to: at [53]. Generally in the case of an unrepresented accused, to ensure they understand the charges and unequivocally plead to those charges, it is necessary that the court state the substance of each offence to the accused and take separate pleas for each: at [59]. On the other hand, an "accused person" is defined to include "a legal practitioner representing an accused person": s 3. Where an accused is legally represented, the practitioner can enter a plea.

The court should, as a matter of practice, at least draw the legal representative's attention to the Court Attendance Notice/s (CAN) and the offences stated in them. This would amount to substantial, if not exact, compliance with s 192(2): at [55], [59]. In a busy Local Court it may be highly inconvenient to individually state multiple charges suggesting that it was not the purpose of s 192(2) to invalidate pleas or convictions if that section is not complied with: at [55].

Section 193(1) *Criminal Procedure Act* provides that the court must convict the accused or make the order accordingly *if* "the accused person pleads guilty, and does not show sufficient cause why he or she should not be convicted or not have an order made against him or her".

[11-505] Setting aside a guilty plea

Section 207 *Criminal Procedure Act* 1986 makes provision for the setting aside of a conviction after the withdrawal of a plea of guilty. It provides:

> (1) An accused person may, at any time after conviction or an order has been made against the accused person and before the summary proceedings are finally disposed of, apply to the court to change the accused person's plea from guilty to not guilty and to have the conviction or order set aside.
>
> (2) The court may set aside the conviction or order made against the accused person and proceed to determine the matter on the basis of the plea of not guilty.

An accused seeking to withdraw a guilty plea must demonstrate a miscarriage of justice has occurred: *R v Boag* (unrep, 1/6/94, NSWCCA). The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered: *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA); *R v Van* [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163] extensively reviews the case law.

Johnson J in *R v Wilkinson (No 4)* [2009] NSWSC 323 at [41]–[48] summarised the principles in appellate decisions governing an application to withdraw a plea of guilty [case references and citations omitted]:

> [41] There is a well-recognised discretion to allow a person leave to withdraw a plea of guilty, at least prior to conviction.
>
> [42] The Court may, in the exercise of discretion, grant leave to a person to withdraw a plea of guilty at any time before sentence is passed … Each case must be looked at in regard to its own facts and a decision made whether justice requires that such a course be taken.
>
> [43] The onus lies upon the Applicant to demonstrate that leave should be granted … The Applicant must establish a good and substantial reason for the Court taking the course of granting leave to withdraw the plea … An application to withdraw a plea of guilty is to be approached with caution bordering on circumspection.

> [44] The plea of guilty itself is a cogent admission of the ingredients of the offence … Indeed, it has been described as the most cogent admission of guilt that can be made.
>
> [45] On an application for leave to withdraw a plea of guilty, the question is not guilt or innocence as such but the integrity of the plea of guilty.
>
> [46] A person may plead guilty upon grounds which extend beyond that person's belief in his guilt, and the entry of a plea of guilty upon such grounds nevertheless constitutes an admission of all the elements of the offence, and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred, and this will normally only arise where the accused person did not understand the nature of the charge, or did not intend by his plea to admit his guilt of it … Although these principles were expressed in the context of an appeal, the same principles apply where application is made at first instance for leave to withdraw a plea of guilty.
>
> [47] Where an application is made for leave to withdraw a plea of guilty, evidence ought be adduced from the accused person as to the circumstances in which he or she came to plead guilty.
>
> [48] The various circumstances identified by Spigelman CJ in *R v Hura* [2001] NSWCCA 61 at [32] provide assistance where application is made for leave to withdraw a plea of guilty. These are:
>
> 1. Where the Appellant "did not appreciate the nature of the charge to which the plea was entered".
> 2. Where the plea was not "a free and voluntary confession".
> 3. The "plea was not really attributable to a genuine consciousness of guilt".
> 4. Where there was "mistake or other circumstances affecting the integrity of the plea as an admission of guilt".
> 5. Where the "plea was induced by threats or other impropriety when the applicant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt".
> 6. The "plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt".
> 7. If "the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt".

An application to withdraw a plea of guilty in the Local Court cannot be treated on appeal as an application for an annulment of a conviction and the District Court will fall into jurisdictional error by doing so: *DPP v Arab* [2009] NSWCA 75 at [39].

[11-510] Summary of the two guilty plea discount schemes

There are two distinct guilty plea discount schemes provided for in the *Crimes (Sentencing Procedure) Act* 1999:

1. A mandatory sentencing discount scheme contained in Pt 3, Div 1A which applies to an offence dealt with on indictment, whenever it was committed, provided the proceedings commenced on or after 30 April 2018: see [11-515].
2. Section 22 concerns offences dealt with summarily and indictable offences where the proceedings commenced before 30 April 2018: see [11-520] and [11-525].

A guilty plea is a factor to be taken into account in mitigation of a sentence under s 21A(3)(k) of the Act. An offer to plead guilty to a different offence, where the offer

is not accepted and the offender is subsequently found guilty of that offence, or a reasonably equivalent offence, is a mitigating factor under s 21A(3)(n). See **Section 21A — aggravating and mitigating factors** at [11-000].

[11-515] Guilty plea discounts for offences dealt with on indictment

Part 3, Div 1A of the *Crimes (Sentencing Procedure) Act* 1999 provides for a scheme of fixed sentencing discounts for the utilitarian value of a guilty plea for offences dealt with on indictment (whenever committed) provided the proceedings commenced on or after 30 April 2018: Sch 2, Pt 30.

This scheme replaces the common law discount for the utilitarian value of a guilty plea (see **Introduction** at [11-500]. The provisions limit the discretion of a sentencing judge with respect to the quantum of the discount for a guilty plea after an offender has been committed for trial. A maximum discount of 25% is now only available if the plea was entered in the Local Court.

The new scheme does not apply to:

- Commonwealth offences: s 25A(1)(a)
- offences committed by persons under 18 years at the time of the offence if they were under 21 years when the relevant proceedings commenced: s 25A(1)(b)
- a sentence of life imprisonment: s 25F(9)
- offences dealt with summarily or an offence dealt with on indictment to which Pt 3, Div 1A does not apply: s 22(5).

An offender bears the onus of proving, on the balance of probabilities, that there are grounds for the sentencing discount: s 25F(5).

The court must indicate how the sentence imposed was calculated where a discount is applied, or give reasons for reducing or refusing to apply the discount: s 25F(7). Failure to comply with Pt 3, Div 1A does not invalidate the sentence: s 25F(8).

Mandatory discounts

Section 25D(2) *Crimes (Sentencing Procedure) Act* prescribes the following mandatory discounts for the utilitarian value of a guilty plea:

- 25%, if the guilty plea was accepted in committal proceedings: s 25D(2)(a)
- 10%, if the offender pleaded guilty at least 14 days before "the first day of trial of an offender" (defined in s 25C(1)), or at the first available opportunity after complying with the pre-trial notice requirements: s 25D(2)(b)
- 5%, in any other case: s 25D(2)(c).

The mandatory discount scheme also applies to an offence the subject of an ex officio indictment or a count for a new offence added to an existing indictment where the offender pleads guilty as soon as practicable after the ex officio indictment is filed or the indictment is amended to include the new count: s 25D(3). However, the offender is not entitled to the 25% discount if:

- the elements of the new offence are substantially the same as those of the offence in the original indictment (and the penalty is the same or less), or
- the offender previously refused an offer to plead guilty to the new offence made by the prosecutor which was recorded in a negotiations document: s 25D(4).

The legislative intention behind s 25D(4) can be construed as foreclosing the availability of large sentencing discounts when there are earlier opportunities for both parties to offer and negotiate a guilty plea. It would otherwise be inimical to the principle objective of the early appropriate guilty plea scheme to allow for the maximum discount to be available during sentence proceedings: *R v Doudar* [2020] NSWSC 1262 at [63]. "Substantially the same" in s 25D(4)(a) should be given its natural and ordinary meaning: at [64]. In *R v Doudar* the sentencing judge rejected a submission that a 25% discount should be given and concluded a 10% discount for a guilty plea to accessory after the fact for murder was appropriate, because that offence occurred within substantially the same factual and evidentiary matrix as the original murder charge for which the offender had been committed for trial: [63], [65], [67].

The new scheme also applies to an offender who pleads guilty after being found fit to be tried and whose matter was not remitted to a magistrate for further committal proceedings: s 25D(5). A 25% discount is only available if the offender pleads guilty as soon as practicable after being found fit: s 25D(5)(a).

Discounts when plea offer to different offences refused when made

Section 25E provides for discounts where a guilty plea is made for a different offence but refused. The relevant discounts are set out in s 25E(3) and are available if the offender's offer to plead guilty to a different offence was recorded in a negotiations document, was for an offence that was not "the subject of the proceedings" and was not accepted by the prosecutor:

- and the offender was subsequently found guilty of the different offence or a reasonably equivalent offence (s 25E(1)), or
- was accepted by the prosecutor after committal and the offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender (s 25E(2)).

The discounts prescribed in s 25E(3) are intended to operate as incentives to offenders to offer realistic pleas of guilty: *Black v R* [2022] NSWCCA 17 at [41].

A "negotiations document" is defined in s 25B to include a case conference certificate. In *Ke v R* [2021] NSWCCA 177, the court concluded it was unfair that the applicant's sentence was discounted by 10%, and not 25%, following her guilty plea in the District Court to an offence of dealing with the proceeds of crime being reckless to that fact (*Crimes Act* 1900, s 193B(3)). She had offered to plead guilty to that offence before being committed for trial but it had been rejected. Nor was it recorded in the case conference certificate filed on committal as required by s 75 *Criminal Procedure Act* 1986. Bellew J (Adamson J agreeing; see also Brereton JA at [63] to similar effect) held that the phrase "an offer recorded in a negotiations document" in s 25E(2)(a) should be construed as meaning "an offer which was recorded *or which was required to be recorded* in a negotiations document" (emphasis added). His Honour said, at [338], that accepting any other interpretation would:

> …bring about a result which … could not possibly have been intended by the Parliament when enacting the scheme. Specifically … it could not possibly have been the Parliament's intention, in enacting s 25E, to bring about a result whereby an offender was deprived of the benefit of a significant discount on [their] sentence as the result of both parties to the proceedings simply overlooking a requirement to record the undisputed

> fact of a previous offer to plead guilty. That is particularly so in circumstances where the clear intention of the Parliament, reflected in s 75(1)(b), was that any offer to plead guilty to (inter alia) a different offence be recorded in the case conference certificate.

The phrase "the offence the subject of the proceedings", in s 25E(1)(b) and s 25E(2)(b), was considered in *Black v R*. Simpson AJA (Ierace and Dhanji JJ agreeing) concluded that it was clear that only one offence, the principal offence, was intended to be the subject of the proceedings, and that it was irrelevant that, for the purposes of the charge certificate, multiple offences may be "the subject of the proceedings": [30]–[36]. This, her Honour observed, produced a fair result: at [38]. Denying a discount to an offender who had offered a realistic plea of guilty to an alternative charge, merely because it was specified in either the charge certificate or case conference certificate, undermines the purpose for which the reduction was prescribed, and was potentially unfair: at [41].

Not allowing or reducing the discount

Despite the mandatory terms of s 25D(1), s 25F provides that the court can refuse to give a discount or a reduced discount if:

- the offender's culpability is so extreme the community interest in retribution, punishment, community protection and deterrence warrants no, or a reduced, discount: s 25F(2), or
- the utilitarian value of the plea was eroded by a factual dispute which was not determined in the offender's favour: s 25F(4).

If a case conference certificate was filed, the prosecutor cannot submit that no discount should be given unless the defence was notified of the prosecution's intention to do so either at or before the conference: s 25F(3).

[11-520] Guilty plea discounts for offences dealt with summarily and exceptions to Pt 3 Div 1A

Part 3, Div 1A *Crimes (Sentencing Procedure Act* 1999 limits the operation of s 22 to offences dealt with summarily and "to a sentence for an offence dealt with on indictment to which Div 1A does not apply": s 22(5). Section 22(1) provides that a court may impose a lesser penalty after considering:

(a) the fact of the guilty plea,

(b) the timing of the plea or indication of intention to plead, and

(c) the circumstances in which the offender indicated an intention to plead guilty.

Section 22(1A) provides that the lesser penalty imposed must not be unreasonably disproportionate to the nature and circumstances of the offence. It reflects the common law on the subject.

The "circumstances" a court can take into account for the purposes of s 22(1)(c) can include those beyond the offender's control such as number and type of charges, the fitness of the offender to plead, offers to plead which are initially rejected but later accepted, or where the prosecution adds to the charges and indicates it will amend the charge at a later time to specify a more appropriate offence.

Guideline for guilty plea discount

In *R v Thomson and Houlton* (2000) 49 NSWLR 383 Spigelman CJ (Wood CJ at CL, Foster AJA, Grove and James JJ agreeing) set out the following guideline at [160]:

(i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.

(ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.

(iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25 per cent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.

[*Note*: The top of the range would be expected to be restricted to pleas at the earliest possible opportunity and should not be given, save in an exceptional case, after a matter has been set down for trial. A discount towards the bottom of the range is appropriate for late pleas, for example, those entered on the date fixed for trial, unless there are particular benefits arising from the prospective length and complexity of the trial: at [155]. The complexity of the issues about which evidence will have to be gathered and adduced will affect the value of the plea. The greater the difficulty of assembling the relevant evidence and the greater the length and complexity of the trial, the greater the utilitarian value of a plea: at [154]. Rare cases involving exceptional complexity and trial duration may justify a higher discount: at [156]. A discount within the range specified will not mean that a trial judge's exercise of discretion cannot be subject to appellate review: at [158].]

(iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

[*Note*: There are circumstances in which the protection of the public requires a long sentence to be imposed such that no discount for the plea is appropriate: at [157].]

The range of discount referred to in *R v Thomson and Houlton* is a guideline only. In a given situation it creates no presumption or entitlement to a particular discount: *R v Scott* [2003] NSWCCA 286 at [28]; *R v Newman* [2004] NSWCCA 113 at [12] and *R v Araya* [2005] NSWCCA 283 at [44].

The R v Borkowski principles

In *R v Borkowski* [2009] NSWCCA 102, Howie J (McClellan CJ at CL and Simpson J agreeing) at [32] summarised the following "principles of general application" when a sentence is discounted for a guilty plea:

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].

3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186 [Principle 5 no longer applies: see below].
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic* [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* (*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

The trial judge erred in *R v Borkowski* by giving the offender a 25% utilitarian discount for a guilty plea taken at first arraignment when the discount should not have been more than 15%.

Bathurst CJ in *R v AB* [2011] NSWCCA 229 at [3], said courts should "... generally continue to follow the approach in *R v Borkowski* … the principles have to be applied by reference to the particular circumstances in any case".

The discount for a plea is not fixed and may be eroded as a result of the manner in which the sentence proceedings are conducted: per Johnson J at [33]; Bathurst CJ at [2] agreeing. AB was given a "generous" (at [24]) 25% discount for a guilty plea entered in the Local Court following a significant dispute on sentence which was resolved against him.

The position in relation to principle 5 in *R v Borkowski* is now that reflected in *Panetta v R* [2016] NSWCCA 85 that any *Ellis* discount must be numerically quantified. See **Voluntary disclosure of unknown guilt** at [12-218].

As to principle 6, when an aggregate sentence is imposed a separate discount must be applied to each indicative sentence: *Bao v R* [2016] NSWCCA 16 at [41], [44]. See **Aggregate sentences** below.

As to principle 7, a discount for the guilty plea was withheld in *Milat v R* [2014] NSWCCA 29 at [92] on the basis of the extreme circumstances of the murder. The range of cases where no discount may be given extends to those where the sentence imposed is less than the statutory maximum: *Milat v R* at [72], [75]. The plurality in *R v El-Andouri* [2004] NSWCCA 178 at [34] purported to confine the circumstances in which a plea will not warrant any discount to cases where the protection of the public requires a long sentence, or for which the maximum sentence is appropriate notwithstanding the plea. However, this statement is merely a gloss on the guideline judgment in *R v Thomson and Houlton* (2000) 49 NSWLR 383 and has the potential to misrepresent what the Chief Justice actually said: *Milat v R* at [81], [83]. Spigelman CJ did not define a closed category of cases but merely acknowledged there will be cases where the discount is withheld: *Milat v R* at [84].

Principle 8 in *R v Borkowski*, generally applies subject to Bathurst CJ's statement in *R v AB* at [3] that it is permissible for a court in specific instances to have regard to the reason for the delay in the guilty plea. In *Shine v R* [2016] NSWCCA 149, the applicant at no time denied committing the offence but awaited the outcome of a psychiatric evaluation before entering a plea: at [95]. A similar situation occurred in *Haines v R* [2016] NSWCCA 90. In both cases a utilitarian discount of 25% was warranted in the circumstances notwithstanding the timing of the plea: *Shine v R* at [95]; *Haines v R* at [33].

As to principle 9 in *R v Borkowski*, where the delay in the guilty plea is caused by the offender's legal representative and is not the fault of the offender, its utilitarian value is not undermined: *Atkinson v R* [2014] NSWCCA 262. The whole history of the matter can be considered in assessing the utilitarian value of the plea: *Samuel v R* [2017] NSWCCA 239 at [60]. In *Samuel v R*, the 8-year delay between the offender absconding (after being charged) and his guilty plea in the Local Court, meant his plea could not be characterised as "early". The delay caused unnecessary expenditure of resources and a loss of efficiency for the criminal justice system: at [57]–[59].

Transparency

The guideline encouraged transparency in decision-making and favours expressly quantifying the discount (often expressed as a percentage reduction in the otherwise appropriate sentence) when the court takes a guilty plea into account in sentencing: *R v Thomson and Houlton* (2000) 49 NSWLR 383.

In *R v Lawrence* [2005] NSWCCA 91, Spigelman CJ said at [15] that the reason for issuing the guideline:

> included the need to ensure that participants in the New South Wales criminal justice system had no reason to be sceptical about whether or not the benefits of a guilty plea were in fact made available to accused.

Although quantification of the discount is preferable, a failure to do so does not by itself establish error: *R v Simpson* (2001) 53 NSWLR 704 at [82]–[83]; *R v DF* [2005] NSWCCA 259 at [15]; *R v Henare* [2005] NSWCCA 366 at [26].

Whether a failure to explicitly state that a guilty plea has been taken into account indicates it was not given weight depends on the circumstances of the particular case and the content of the reasons: *Woodward v R* [2014] NSWCCA 205 at [6]. Where there is a real possibility the plea was not properly considered, failure to refer to the issue in the judgment should be treated as a material error: *Lee v R* [2016] NSWCCA 146 at [37].

Aggregate sentences

Where a court imposes an aggregate sentence, the discount for the guilty plea must be stated for each indicative sentence, not the aggregate sentence: *Elsaj v R* [2017] NSWCCA 124 at [56]; *PG v R* [2017] NSWCCA 179 at [71]–[76]; *Berryman v R* [2017] NSWCCA 297 at [29]. However, in *Davies v R* [2019] NSWCCA 45, the court held it was entirely appropriate for the sentencing judge to apply an across-the-board discount in the circumstances of that case where there was no or little information about the plea negotiations for each offence and the pleas were eventually entered at the same time: at [47].

Willingness to facilitate the course of justice

In *Cameron v The Queen* (2002) 209 CLR 339, the majority of the High Court refined the test for taking into account a plea of guilty: at [12]. In their joint judgment, Gaudron, Gummow, Callinan JJ said at [14]:

> Reconciliation of the requirement that a person not be penalised for pleading not guilty with the rule that a plea of guilty may be taken into account in mitigation requires that the rationale for that rule, so far as it depends on factors other than remorse and acceptance of responsibility, be expressed in terms of willingness to facilitate the course of justice and not on the basis that the plea has saved the community the expense of a contested hearing.

According to the majority, a plea of guilty may be taken into account in mitigation of sentence if it evidences a willingness on the part of the offender to facilitate the course of justice and not simply because the plea saves the time and expense of those involved in the administration of criminal justice: at [19]. This is a subjective test and requires more than simply deciding whether economic benefits flow from the plea.

In *R v Sharma* (2002) 54 NSWLR 300 the court held that the reasoning of the majority in *Cameron v The Queen* concerning the application of general sentencing principles, in the context of a WA statute, was not applicable in NSW because the common law principles enunciated there had been modified by statute: at [38]. The court found that the proper construction of s 22 *Crimes (Sentencing Procedure) Act* 1999 permits the sentencer to take into account the objective utilitarian value of the plea: at [62]. Spigelman CJ (with whom Mason P, Barr, Bell and McClellan JJ agreed) said at [52]:

> The mandatory language of s 22 must be followed whether or not by doing so the court can be seen to "discriminate", in the sense that word was used in the joint judgment in *Cameron* … The court must take the plea into account even if there is *no* subjective intention to facilitate the administration of justice. However, viewed objectively, there

> will always be *actual*, as distinct from *intended*, facilitation of the administration of justice by reason of "the fact" of the plea. The use of the word "must" and the reference to "the fact" of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The *actual* facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

Thus a court must take the plea into account even if there is no subjective intention to "facilitate the administration of justice", as explained in *Cameron v The Queen*. The principles outlined in *R v Thomson and Houlton* (2000) 29 NSWLR 383, regarding the weight to be given to the utilitarian value of the plea, for saving the expense of a "contested hearing", must therefore be given their full force.

The court also held that there was nothing in the NSW Act that expressly or implicitly referred to the common law requirement of "equal justice". While the court did not doubt the application of this principle in NSW, it was not a principle that must be invoked to construe s 22 restrictively, in the absence of any indication to the contrary: *R v Sharma* (2002) 54 NSWLR 300 at [65]. There was nothing in *Cameron v The Queen* that called into question the ability of a State Parliament to adopt a form of differentiation which may be, or appear to be, "discriminatory" in the sense that the words were used in *Cameron v The Queen*: at [67].

[11-525] Whether guilty plea discount given for Form 1 offences

There is no statutory or common law requirement to take into account that an offender pleaded guilty to an offence if it is being taken into account on a Form 1: *Gordon v R* [2018] NSWCCA 54 at [95]. Requiring a court to consider the procedural history of Form 1 offences when assessing the discount for the guilty plea for the primary offence would add significant complexity to the sentencing task: at [96]–[98].

See **Taking further offences into account (Form 1 offences)** at [13-200]ff.

[11-530] Combining the plea with other factors

Care needs to be taken when there are a number of grounds for extending leniency, such as a plea of guilty with a measure of remorse, as well as the offender's assistance to authorities and promise of future assistance.

Discounts for assistance and a guilty plea should ordinarily be a single, combined figure: *SZ v R* [2007] NSWCCA 19; *R v El Hani* [2004] NSWCCA 162 at [69]; *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [160(ii)]; *R v Gallagher* (1991) 23 NSWLR 220 at 228.

The court held in *SZ v R* at [9] that, since the decision of *R v Thomson and Houlton*, where the utilitarian value of the plea could be as high as 25%, the courts have had less scope to give a discount for assistance in cases of an early plea. A combined discount for pleas of guilty and assistance should not normally exceed 50%: at [3]. A combined discount exceeding 50% should be reserved for exceptional cases: at [53]. It would be in a rare case that a discount of more than 60% would not result in a manifestly inadequate sentence: at [11].

See **Application of discount** at [12-230].

[The next page is 5851]

Taking further offences into account (Form 1 offences)

Unless otherwise specified, references to sections below are references to sections of the *Crimes (Sentencing Procedure) Act* 1999.

[13-100] Introduction

When sentencing an offender for an offence (the principal offence), a court may take into account additional charges with which the offender has been charged but not convicted (further offences). The offender must want the further offences to be taken into account and a court may only take the criminality of those further offences into account if certain criteria and formalities have been met: ss 32, 33 and 35A.

The offender is only convicted of the principal offence and generally no proceedings can be taken or continued in relation to the further offences.

This is known as the Form 1 procedure.

The Form 1 procedure does not apply to Commonwealth offences. Section 16BA *Crimes Act* 1914 (Cth) provides a similar procedure for federal offences (and only federal offences). See **Taking other offences into account: ss 16A(2)(b) and 16BA** in [16-010]. Where there is mixed State and federal offending, a federal offence cannot be taken into account on the sentence of a State offence: *Ilic v R* [2020] NSWCCA 300 at [44].

A failure to comply with the terms of s 32 does not invalidate a sentence imposed for "the principal offence": s 32(6). However, a sentencing court must be mindful of the need to comply with the various mandatory statutory requirements: *Woodward v R* [2017] NSWCCA 44 at [26]; *Ghalbouni v R* [2020] NSWCCA 21 at [29].

The Form 1 procedure cannot be conflated with the procedures for back-up and related offences in ss 165–167 *Criminal Procedure Act* 1986: *CH v R* [2019] NSWCCA 68 at [7]–[18].

[13-200] The statutory requirements

The provisions governing the authority and procedure for taking additional charges into account are found in Pt 3 Div 3 (ss 31–35) *Crimes (Sentencing Procedure) Act* 1999.

In proceedings for the principal offence (defined in s 31 as an offence the subject of proceedings under s 32(1)), the prosecutor may file in court a list of further offences in an approved form (Form 1) for which the offender has been charged but not convicted and which the offender wants taken into account on sentence for the principal offence: s 32(1); *Crimes (Sentencing Procedure) Regulation* 2017, cl 4. The Form 1 should clearly identify the principal offence, for example, by including, where necessary, the count, sequence or charge number if there are multiple counts of the same offence: *LS v R* [2020] NSWCCA 27 at [90].

A Form 1 may be filed at any time after the court finds the offender guilty and before dealing with them for the principal offence: s 32(2).

A copy of the Form 1, as filed, must be given to the offender and signed both by the offender and by, or on behalf of, the Director of Public Prosecutions: s 32(3), (4).

The Form 1 should not include further offences for which the sentencing court does not have jurisdiction to impose a penalty or offences punishable by life imprisonment: s 33(4)(a), (b). *R v JH* [2021] NSWCCA 299 is an example of a case where error was established because an offence in the latter category was placed on a Form 1. However, the Court of Criminal Appeal, the Supreme Court and the District Court may take summary offences into account: s 33(6).

The procedure the court must follow — s 33

The court must ask the offender "whether the offender wants the court to take any further offences into account in dealing with [them] for the principal offence": s 33(1). The obligation imposed by s 33(1) should not be disregarded because its purpose is to demonstrate whether there is any doubt about an offender's intention with respect to the procedure to be adopted with respect to the offences on the Form 1: *Dale v R* [2021] NSWCCA 320 at [38]–[40]. See *Pham v R* [2021] NSWCCA 234 as an example of where the judge's failure to personally confirm with the offender the charge the offender wanted to be taken into account was an error: at [30]; cf *Dale v R* where the offender's intention could be discerned from the actions of her counsel during the sentence proceedings: at [20].

The court may only take a further offence into account if the offender:

1. admits guilt to the further offence: s 33(2)(a)(i),
2. the offender indicates they want the court to take the further offence into account in dealing with them for the principal offence: s 33(2)(a)(ii), and
3. in all of the circumstances, the court considers it appropriate to do so: s 33(2)(b).

If a Form 1 is taken into account, the court must certify this on the Form 1: s 35(1)(a).

The formal requirements in s 33(2)(a) to ask whether the offender admits guilt and consents to having the further offences taken into account should not be dispensed with because they are important safeguards to ensure the offender is aware of what is taking place and consents to procedures that may significantly "impact upon his freedom or the period during which he will remain in custody": *R v Felton* [2002] NSWCCA 443 per Howie J at [3], cited with approval in *R v Brandt* [2004] NSWCCA 3 at [8]; *Woodward v R* at [26].

A court can only take offences on a single Form 1 into account on a single principal offence not across multiple offences: *LS v R* at [27]. Care should also be taken to ensure the Form 1 offences are taken into account in relation to the correct principal offence: *Ghalbouni v R* [2020] NSWCCA 21 at [49].

There are limits to an offender's capacity to withdraw their consent to the Form 1 procedure. For example, it is unlikely a Form 1 can be withdrawn after the evidence has been presented and both cases closed in the sentence proceedings: *Abel v R* [2020] NSWCCA 82 at [82].

See **[13-270] Effects of Form 1 procedure** and **Charge negotiations: prosecutor to consult with victim and police** at [13-275] for formal requirements where there are charge negotiations involving victims.

Restrictions on Form 1 procedure

Any penalty imposed on the offender for the principal offence must not exceed the maximum penalty the court could have imposed for that offence had the further offence not been taken into account: s 33(3).

Section 31 provides that the full range of penalties for the principal offence can be imposed, including a non-association or place restriction order.

Ancillary orders and penalties

While a court cannot impose a separate penalty for Form 1 offences, certain ancillary orders or directions (restitution, compensation, costs, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege) relating to them may be made: s 34. The offender retains the same right of appeal as if the order had been made on conviction of the further offence: s 34(2). In *Gardner v R* [2003] NSWCCA 199 it was held that by operation of s 34, it was open to the sentencing judge to consider whether, as an ancillary order, a prescribed licence disqualification period (now in ss 205 and 205A *Road Transport Act* 2013) should be reduced or extended.

If the decision in respect of which the offence was taken into account is quashed, or set aside, then any ancillary order lapses: s 34(3).

[13-210] Guideline judgment for Form 1 sentencing

The Attorney General (NSW) applied for a guideline judgment in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 (the Guideline) on the basis there was a need for a guideline setting out the proper approach to be taken by sentencing courts when Form 1 matters were under consideration. Chief Justice Spigelman delivered the judgment of the court with Wood CJ at CL, Grove, Sully and James JJ agreeing.

The rationale for the Form 1 procedure

Chief Justice Spigelman at [62]–[65] noted the following two distinct but consistent rationales for the procedure of taking matters into account on a Form 1.

1. It promotes the objective of rehabilitation by providing an opportunity for an offender to emerge with a "clean slate" following sentencing for the principal offence.
2. There is utilitarian value in the admission of guilt which saves resources utilised in further investigation by law enforcement agencies.

Including offences on a Form 1 gives them a significantly lower prominence in the sentencing process, affording an obvious advantage and a greater incentive to admit guilt: at [66].

Focus throughout is on the principal offence

It is important that Form 1 matters should be taken into account only in relation to the principal offence. At [39]–[42] Spigelman CJ said:

> [39]The sentencing court is sentencing *only* for the "principal offence". It is no part of the task of the sentencing court to determine appropriate sentences for offences listed

> on a Form 1 or to determine the overall sentence that would be appropriate for all the offences and then apply a "discount" for the use of the procedure. This is not sentencing for the principal offence.
>
> [40] In my opinion, it is pertinent to identify the elements to be considered in determining the sentence for the primary offence upon which the commission of other offences, for which no conviction is being recorded, may impinge. The case law has identified a number of distinct and sometimes overlapping purposes to be served by sentencing. In my opinion, not all these purposes are relevant to the process of taking other offences into account, when sentencing for a particular offence, that is, the primary offence.
>
> …
>
> [42] The position, in my opinion, is that, although a court is sentencing for a particular offence, it takes into account the matters for which guilt has been admitted, with a view to increasing the penalty that would otherwise be appropriate for the particular offence. The court does so by giving greater weight to two elements which are always material in the sentencing process. The first is the need for personal deterrence, which the commission of the other offences will frequently indicate, ought to be given greater weight by reason of the course of conduct in which the accused has engaged. The second is the community's entitlement to extract retribution for serious offences … These elements are entitled to greater weight than they may otherwise be given when sentencing for the primary offence. There are matters which limit the extent to which this is so. The express provision in s 33(3) referring to the maximum penalty for the primary offence is one. The principle of totality is another.

Chief Justice Spigelman indicated at [43]–[44] that personal deterrence and retribution are not the only relevant factors to the Form 1 procedure:

> I did not intend these observations to be exhaustive of the elements upon which the fact of other offences may impinge. However, no additional elements for which that could be so have been identified in submissions to this Court. The important point is that the focus throughout must be on sentencing for the primary offence.
>
> The manner and degree to which the Form 1 offences can impinge upon elements relevant to sentencing for the principal offence will depend on a range of other factors pertinent to those elements and the weight to be given to them in the overall sentencing task. For that reason it will rarely be appropriate for a sentencing judge to attempt to quantify the effect on the sentence of taking into account Form 1 offences. (See *R v Kay* at [69]).

"Bottom up" approach appropriate

Chief Justice Spigelman observed at [18] that there were a number of propositions that were well established and uncontroversial. First, the essence of the process is to impose a longer sentence, or to alter the nature of the sentence, that would have been imposed if the primary sentence had stood alone. Secondly, the additional penalty may sometimes be substantial; it is incorrect to suggest that it should be small. However, Spigelman CJ said there was a divergence of approaches, characterised as either a "bottom up" or "top down" approach, raised an important issue of principle which had been the subject of uncertain and sometimes conflicting guidance in previous decisions of the court. The "bottom up" approach focuses on the appropriate sentence for the principal offence, which is increased by reason of the Form 1 offences . In contrast, a "top down" approach considers the sentence that would have been imposed by the application of sentencing principles if the court had been sentencing for the full range of offences.

The starting point of any analysis is the terms of the statutory power, with its emphasis that the court is concerned only with imposing a sentence for the "principal offence". Such a power was held to be inconsistent with the "top down" approach advocated by the Attorney General in his submissions: at [35].

The court endorsed the "bottom up" approach in *R v Timmis* [2003] NSWCCA 158. See also *Abbas v R* [2013] NSWCCA 115 at [15].

[13-212] Should the "utilitarian" benefits of admitting guilt be taken into account?

Although the offender admits guilt to further offences on a Form 1, it is erroneous to confer a further benefit on them because they co-operated in settling the Form 1 and "clear[ed] the slate": *R v Van Ryn* [2016] NSWCCA 1 at [214]–[215] citing *R v Hinchliffe* [2013] NSWCCA 327 at [219]. An offender already obtains an advantage from the Form 1 procedure as there is a cap upon the available sentence confined to the principal offence. It is an erroneous form of double counting to seek to confer a further benefit: *R v Hinchliffe* at [219].

In *Gordon v R* [2018] NSWCCA 54 at [95], RA Hulme J noted there is no statutory or common law requirement to take into account that an offender pleaded guilty to an offence if it is being taken into account on a Form 1 and identified, at [96]–[100], some of the potential difficulties associated with considering the procedural history of Form 1 offences when assessing the discount for the utilitarian value of the guilty plea for the principal offence. However, his Honour observed, at [101], that the procedural history should not be completely disregarded in assessing the sentence for the principal offence as it may have a bearing on other relevant matters including personal deterrence, remorse and prospects of rehabilitation.

See **Whether guilty plea discount given for Form 1 offences** at [11-525].

[13-215] Should the effect of Form 1 matters be quantified?

In the Guideline, Spigelman CJ said, "it will rarely be appropriate for a sentencing judge to attempt to quantify the effect … of Form 1 offences": at [44]. This approach was confirmed in *Abbas v R* [2013] NSWCCA 115 at [14] where Bathurst CJ held that the object of s 33 was not to impose a distinct penalty for the offences to be taken into account.

However, the plurality of the High Court decision in *Markarian v The Queen* (2005) 228 CLR 357 considered that occasionally "it may be useful and certainly not erroneous" to specify the amount by which the penalty for the principal offence has been increased for Form 1 matters. Chief Justice Gleeson, Gummow, Hayne and Callinan JJ said at [43]:

> Just as on occasions, albeit that they may be rare ones, it may not be inappropriate for a sentencing court to adopt an arithmetical approach, it may be useful and certainly not erroneous for a sentencing court to make clear the extent to which the penalty for the principal offence has been increased on account of further offences to which an offender has admitted guilt. Here Hulme J sought to, and in our opinion did make it clear, that the additional period of imprisonment was imposed not as a separate penalty for the further offences but by way of increase of penalty for the principal offence.

[13-217] Deterrence and retribution

A court can take into account the criminality of the Form 1 offences. The Form 1 offence may also demonstrate a greater need for personal deterrence and retribution for the principal offence. That approach is consistent with the terms of s 33 and the Guideline for Form 1 offences: *Abbas v R* at [22], [23]; the Guideline at [42]. When the Form 1 offence is taken into account, the principle of proportionality is assessed by reference to those additional factors. The court takes the Form 1 offence into account within the terms of s 32 as part of the instinctive synthesis process of sentencing: *Abbas v R* at [22], [23].

This does not mean, however, that the Form 1 offences should be taken into account to elevate the objective seriousness of the principal offence. In *RO v R* [2019] NSWCCA 183 the sentencing judge erred by doing so: at [54]–[57].

[13-240] Serious, numerous and unrelated offences on a Form 1

The statutory scheme contemplates that serious offences can be included on a Form 1: the Guideline at [49]–[50]. The statement in *R v Vougdis* (unrep, 19/4/89, NSWCCA) at 132 that serious offences must be separately charged has to be understood in light of s 33(4) which provides that only offences with a maximum of life imprisonment may not be included on a Form 1: at [50]. Nevertheless Spigelman CJ said in the Guideline at [50]:

> It would normally be inappropriate to include more serious offences on a Form 1, where the maximum sentence available for the offence on an indictment would be insufficient to allow for the total criminality revealed by the whole course of the offender's conduct to be appropriately reflected in the sentence.

There is also a difficulty of taking into account further offences which may appear to be disproportionate, not comparable, or not of the same kind and order of gravity as the principal offence under consideration: the Guideline at [51], [56].

A particular difficulty also confronts a court where there are numerous offences, or the number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of criminal conduct revealed by the indictment and the Form 1: the Guideline at [57].

[13-250] Obligation on the Crown to strike a balance

It is predominantly a matter for the Crown as to what offences are included on the Form 1, so as to strike a balance between overloading an indictment and ensuring it adequately reflects the totality of the admitted criminality: the Guideline at [68]. However, it is also necessary for the Crown to have regard to the difficulties faced by a court in undertaking the statutory task if the number and gravity of the charges on the indictment do not appropriately reflect the total criminality of the whole course of conduct revealed by the indictment and the Form 1: at [57].

[13-260] The statutory power to reject a Form 1 under s 33(2)(b)

By the terms of s 33(2)(b), "if, in all of the circumstances, the court considers it appropriate to do so", the court must assess whether it is appropriate to proceed to sentence on a basis where no separate penalty is to be imposed for admitted offences: the Guideline at [67].

The court should recognise the many considerations which may inform a prosecutor's decision to include matters on a Form 1: at [68]. Chief Justice Spigelman said of the exercise of the discretion at [67]:

> There will be cases in which, for example, the administration of justice could be brought into disrepute by the court proceeding to sentence a person guilty of a course of criminal conduct on a manifestly inadequate, unduly narrow or artificial basis. I do not intend the previous sentence to constitute a comprehensive statement of the circumstances in which the broad discretion vested in the sentencing judge by s 33(1)(b) [sic] can be exercised. Nevertheless, the role of the Court must be constrained, to ensure that the independence of the judicial office in an adversary system is protected. (Cf *Maxwell v The Queen* (1995) 184 CLR 501 esp at 513-514 and 534-535.)

In *CP v R* [2009] NSWCCA 291, McClellan CJ at CL at [8] said:

> … when an entirely inappropriate arrangement is proffered and because of it a court would be denied the opportunity to impose a proper sentence, the discretion provided by s 33(2)(b) should be invoked and the court should decline to accept the Form 1.

The applicant in *CP v R* had pleaded guilty to two counts of armed robbery and one count of being an accessory to an aggravated car-jacking. Eight further offences were taken into account on a Form 1, including a charge of armed robbery. According to McClellan CJ at CL, including both the armed robbery offence and the concealing robbery offence on the Form 1 was inappropriate: at [9]. Justice McCallum (with whom Fullerton J agreed) noted at [36] that it would have been open to the sentencing judge to decline to take the armed robbery on the Form 1 into account.

Similarly, in *El-Youssef v R* [2010] NSWCCA 4 at [15], the court held that an armed robbery was inappropriately placed onto a Form 1 with the result the judge could not impose a sentence to reflect the seriousness of that offence.

In *R v Eedens* [2009] NSWCCA 254, the principal offence was sexual intercourse with a child under 10 years on indictment under s 66A *Crimes Act* 1900. Two further offences under ss 66A and 66C(1) were placed on a Form 1. The court held this was inappropriate because the sentence imposed could not sufficiently reflect the seriousness of the totality of applicant's conduct. Generally, it is inappropriate to have a matter that carries a standard non-parole period taken into account on a Form 1, except in a situation which can be justified, such as when the offender is sentenced for numerous similar offences: *R v Eedens* at [19]. Similarly, in *JL v R* [2014] NSWCCA 130, after referring to the power to reject a Form 1 under s 33(2)(b), the court cited *CP v R* and held, at [7], that a charge of anal intercourse committed against an eight-year old girl was not an appropriate one for inclusion on a Form 1.

In *Abbas v R* [2013] NSWCCA 115, Bathurst CJ said at [26] that where the gravity of the Form 1 offences far exceed those for which the offender is being sentenced, or where the magnitude of the offences on the Form 1 make it impossible to take them into account in sentencing for the convicted offence, the court should give consideration to declining to take the Form 1 offences into account.

Hoeben CJ at CL (Garling and Bellew JJ agreeing) in *DG v R* [2017] NSWCCA 139 observed that charging three aggravated indecent assaults contrary to s 61M(1) *Crimes Act* and including sexual offences under subss 66C(2) and 66C(4) *Crimes Act*

on a Form 1 involved "a distortion of the intention behind the Form 1 procedure … [and] … made the sentencing task to be performed by his Honour considerably more difficult than it should have been": at [44]. Similarly, in *Croxon v R* [2017] NSWCCA 213, the inclusion of an aggravated sexual assault offence under s 61J(1) *Crimes Act* was considered by Bellew J at [12] to be "an entirely inappropriate use of the [Form 1] procedure" given the other charges faced by the offender (Hoeben CJ at CL and Davies J agreeing).

It should be noted, however, that there is no reported case (first instance or on appeal) where a court has exercised its power under s 33(2)(b) upon finding that it was inappropriate for a particular charge to be included on a Form 1. Further, the words in s 33(2)(b) have to be read in light of the common law principle that the selection of the charge is within the "absolute discretion" of the prosecutor: *Elias v The Queen* (2013) 248 CLR 483 at [33]. The scope for judicial intervention is thus limited to rare cases.

In *Elias v The Queen*, the High Court criticised a Victorian sentencing practice of sentencing an offender for a lesser charge if the facts could accommodate such an outcome. While the selection and structure of charges may have a bearing on the sentence, the separation of Executive and judicial functions does not permit the court to canvas the exercise of the prosecutor's discretion in a case where it considers a less serious offence to be more appropriate any more than when the court considers a more serious charge to be more appropriate: *Elias v The Queen* at [34]. In expressing such a view, the court is attempting to influence the exercise of a discretion which is not any part of its own function: *Maxwell v The Queen* (1996) 184 CLR 501 at 514. The same reasoning could be applied to the exercise of power under s 33(2)(b).

[13-270] Effects of the Form 1 procedure

The offender is not convicted of Form 1 offences: s 35(4).

If a further offence is taken into account, the court is required to certify on the list of additional charges that the further offence has been taken into account, and no proceedings may be taken or continued in respect of the further offence unless the conviction for the principal offence is quashed or set aside: s 35(1)(a) and (b).

A court is not prevented from taking the further offence into account when sentencing or re-sentencing the offender for the principal offence if it subsequently imposes a penalty when sentencing or re-sentencing the offender for the principal offence: s 35(2).

An admission of guilt for the purposes of Pt 3 Div 3 *Crimes (Sentencing Procedure) Act* (ss 31–35) is not admissible in evidence in further criminal proceedings in relation to any such offence, or any other offence specified in the list of additional charges: s 35(3).

In any criminal proceedings, where reference may be made to, or evidence given about, the fact that the offender was convicted of the principal offence, reference may also lawfully be made to, or evidence given about, the fact that a further offence was taken into account in imposing a penalty for the principal offence: s 35(5).

The fact an offence was taken into account under Pt 3 Div 3 may be proved in the same manner as the conviction for the principal offence: s 35(6).

[13-275] Charge negotiations: prosecutor to consult with victim and police

Section 35A requires the prosecutor to file a certificate verifying consultation with victim and police in relation to charge negotiations before a Form 1 offence or any agreed statement of facts the subject of charge negotiations can be taken into account by the court. Section 35A(2) provides:

> A court must not take into account offences other than the principal offence, or any statement of agreed facts, that was the subject of charge negotiations unless the prosecutor has filed a certificate with the court verifying that—
>
> (a) the requisite consultation has taken place or, if consultation has not taken place, the reasons why it has not occurred, and
>
> (b) any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines.

The reference in s 35A(2)(b) to "prosecution guidelines" is a reference to, inter alia, the Office of the Director of Public Prosecutions (NSW), Prosecution Guidelines [March 2021], Chapter 4, *Charge Resolution*, where it is stated:

> A matter may only be dealt with by way of charge resolution if it is in the public interest to do so. In determining whether a charge resolution is in the public interest, the following factors are to be considered, in addition to the public interest factors outlined in Chapter 1, the decision to prosecute:
>
> 1. the charge or charges to proceed appropriately reflect the essential criminality of the criminal conduct capable of being proven beyond a reasonable doubt and provide an adequate basis for sentencing
> 2. the evidence available to support the prosecution case is weak in a material way, even though it cannot be said that there is no reasonable prospect of conviction, and the public interest will be satisfied with an acknowledgment of guilt to certain lesser criminal conduct
> 3. the cost saving to the community is significant when weighed against the likely outcome of the matter if it went to trial
> 4. charge resolution will save a witness from having to give evidence in court proceedings, where the desirability of this is a particularly compelling factor in the case

See also Chapter 5, *Victims and witnesses*, in particular, at 5.4 "Information to be provided" and 5.6 "Consultation resolving charges and discontinuing prosecutions".

Section 35A(3) provides the certificate must be signed by or on behalf of the DPP or by a person or class of persons prescribed by the regulations. The court may require the prosecution to explain the reason for a failure to file a certificate when it is required to do so: s 35A(5).

Section 35A is not limited to matters dealt with on indictment. It is intended to apply to Local Court matters where a Form 1 is taken into account. Clause 8(a) *Crimes (Sentencing Procedure) Regulation* 2017 provides that s 35A(3) applies to "proceedings being prosecuted by a police prosecutor — police officers".

[The next page is 6141]

Dangerous driving and navigation

[18-300] Statutory history

In 1994, the offence of culpable driving was replaced with four dangerous driving offences under s 52A *Crimes Act* 1900 (NSW) which carry heavier penalties than was previously the case.

In 1998, following "a pattern of inadequacy" of sentences, a guideline was promulgated: *R v Jurisic* (1998) 45 NSWLR 209 at 229–230. The guideline was reformulated in *R v Whyte* (2002) 55 NSWLR 252 and is set out at [18-320]. The guideline has statutory force because of Pt 3, Div 4 of the *Crimes (Sentencing Procedure) Act* 1999 and must be taken into account on sentence: *R v Whyte* at [32]–[67]; *Moodie v R* [2020] NSWCCA 160 at [24]; see also [13-600] **Sentencing guidelines**. However, it must only be taken into account as a "check or sounding board": *Kerr v R* [2016] NSWCCA 218 at [96].

In 2006, new offences against s 52AB *Crimes Act* 1900 were introduced concerning the failure to stop and assist after a vehicle impact causing the death of, or occasioning grievous bodily harm to, another person.

[18-310] The statutory scheme for dangerous driving offences

A person is guilty of a s 52A dangerous driving offence if, they were driving under the influence of an intoxicating liquor or drug, at a dangerous speed or in a dangerous manner, when they drove a vehicle involved in an impact resulting in death or grievous bodily harm.

The maximum penalties for the four dangerous driving offences are as follows:

Section	Offence	Maximum penalty
52A(1)	Dangerous driving occasioning death	10 yrs imprisonment
52A(2)	Aggravated dangerous driving causing death	14 yrs imprisonment
52A(3)	Dangerous driving occasioning grievous bodily harm	7 yrs imprisonment
52A(4)	Aggravated dangerous driving occasioning grievous bodily harm	11 yrs imprisonment

Circumstances of aggravation are set out in s 52A(7). These include driving more than 45 km per hour, driving to escape police and being very substantially impaired by drugs and/or alcohol.

Where a person knows, or ought to reasonably know, an impact has caused death or grievous bodily harm to another person, it is an offence to fail to stop and give assistance. A maximum penalty of 10 years imprisonment applies if the other person dies (s 52AB(1)) and 7 years where the person suffers grievous bodily harm (s 52AB(2)). See further at [18-415].

Further offences may be committed when the relevant dangerous driving offence causes the loss of a foetus of a pregnant woman: see ss 54A and 54B. These provisions only apply to offences allegedly committed on, or after, 29 March 2022: *Crimes*

Legislation Amendment (Loss of Foetus) Act 2021, Sch1[2]. If the offence is a "relevant GBH provision" (defined in s 54A(7)), the maximum penalty is the total of the maximum penalty and 3 years imprisonment: ss 54A(3). For example, an offence against s 52A(3) would be a relevant GBH provision. As such, the maximum penalty would be a total of 10 years imprisonment (7 years imprisonment being the maximum penalty for an offence against s 52A(3) plus the 3 years specified in s 54A(3)). If the victim of the offence is a pregnant woman and the relevant conduct constitutes an offence under a "homicide provision" (defined in s 54B(6) to include offences against ss 52A(1), 52A(2) and 52AB(1)), the maximum penalty is 3 years imprisonment: s 54B(3).

[18-320] Guideline judgment

The guideline judgment in *R v Whyte* (2002) 55 NSWLR 252, provides as follows:

A typical case

A frequently recurring case of an offence under s 52A has the following characteristics:

(i) young offender

(ii) of good character with no or limited prior convictions

(iii) death or permanent injury to a single person

(iv) the victim is a stranger

(v) no or limited injury to the driver or the driver's intimates

(vi) genuine remorse

(vii) plea of guilty of limited utilitarian value.

Guideline with respect to custodial sentences

> A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgment: at [214].

Aggravating factors

(i) extent and nature of the injuries inflicted

(ii) number of people put at risk

(iii) degree of speed

(iv) degree of intoxication or of substance abuse

(v) erratic or aggressive driving

(vi) competitive driving or showing off

(vii) length of the journey during which others were exposed to risk

(viii) ignoring of warnings

(ix) escaping police pursuit

(x) degree of sleep deprivation

(xi) failing to stop.

Items (iii) to (xi) relate to the moral culpability of an offender.

Guideline with respect to length of custodial sentences

For offences against s 52A(1) and (3) for the typical case:

> Where the offender's moral culpability is high, a full-time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate: at [229].

For the aggravated version of each offence under s 52A an appropriate increment is required. Other factors, such as the number of victims, will also require an appropriate increment.

Spigelman CJ said at [228]:

> In the above list of aggravating factors, items (iii)–(xi) are frequently recurring elements which directly impinge on the moral culpability of the offender at the time of the offence. Individually, but more often in some combination, they may indicate that the moral culpability is high. One way of expressing such a conclusion is to ask whether the combination of circumstances are such that it can be said that the offender has abandoned responsibility for his or her own conduct. That is not the only way of expressing such a conclusion.

The guideline is a check or indicator

The guideline is a "check" or "indicator", and in a given case the sentence "… will be determined by the exercise of a broad discretion": *R v Whyte* (2002) 55 NSWLR 252 at [232], *Kerr v R* [2016] NSWCCA 218 at [96]. The reference to a head sentence of three years is not prescriptive: *R v Nguyen* [2008] NSWCCA 113 at [48]. A guideline is "not a tramline" and should not be used to impermissibly confine the exercise of sentencing discretion: *Legge v R* [2007] NSWCCA 244 at [59]. It is also erroneous to treat the *Whyte* guideline as a "starting point" rather than a reference point: *R v Errington* [2005] NSWCCA 348 at [40]. While formal reference to the guideline is not necessarily required, it is expected that a sentencing judge will advert to the presence or absence of the factors identified in the guideline relevant to assessing moral culpability and objective seriousness in the particular case: *Moodie v R* [2020] NSWCCA 160 at [47]–[48].

The guideline is not a comprehensive checklist

Relevant factors influencing the assessment of the objective serious of these offences are found in three distinct, but related areas: the elements of the offence, the guideline and s 21A of the *Crimes (Sentencing Procedure) Act* 1999: there is a degree of overlap between them: *R v Berg* [2004] NSWCCA 300 at [15]; *SBF v R* [2009] NSWCCA 231 at [77].

In *R v Berg*, Howie J, (Spigelman CJ and Wood CJ at CL agreeing), said at [21]:

> The factors in the list set out in *Whyte*, as indicative of a typical case, do not operate as a checklist, the presence or absence of characteristics having some mathematical relationship with the sentence to be imposed. They merely describe the typical case and were not intended to circumscribe the sentencing judge's discretion …

Further, while the guideline outlines a list of frequently recurring aggravating factors, there may be other circumstances of aggravation, not found in the guideline, which may also be taken into account: *R v Tzanis* [2005] NSWCCA 274 at [24]-[25]; *Kerr v R*

at [96]. For example, speed may be taken into account as an aggravating factor where it is excessive in light of the surrounding circumstances: *Kerr v R* at [97]. In that case, the court concluded the sentencing judge was entitled to treat the offender's driving at a speed of 70 kph in the near vicinity of a group of cyclists as a matter of aggravation even though it was within the speed limit.

While the guideline focuses attention on the objective circumstances of the offence, the subjective circumstances of the offender such as contrition, good prospects of rehabilitation and the unlikelihood of re-offending also require consideration and may be deserving of considerable weight: *R v Tzanis* [2005] NSWCCA 274 at [28]; *R v Whyte* at [233].

Impact of changes in sentence practice since guideline

Changes in sentencing practice since *Whyte* was decided should be taken into account when applying the guideline. For example, while the "typical case" in *Whyte* included an offender who had offered a guilty plea of limited utilitarian value, suggesting the guideline allowed for the effect of the plea, guilty plea discounts, for offences on indictment, are now specified by statute: *Stanton v R* [2021] NSWCCA 123 at [29]; see **[11-515] Guilty plea discounts for offences dealt with on indictment**. Further, those factors identified in *Whyte* relevant to an offender's moral culpability (which can include subjective factors such as an offender's mental illness) may be relevant to an assessment of their "objective criminality": *Stanton v R* at [29].

[18-330] The concepts of moral culpability and abandonment of responsibility

The guideline indicates that an assessment of the offender's moral culpability, which is a critical component of the objective circumstances of these offences, is relevant to determining whether a custodial sentence should be imposed, as well as to determining the appropriate length of the sentence: *R v Whyte* (2002) 55 NSWLR 252 at [205], [214] and [229]; *R v Errington* [2005] NSWCCA 348 at [26]. This is because a wide range of negligence or recklessness may result in commission of any of the offences: *Lawson v R* [2018] NSWCCA 215 at [32].

Although a full-time custodial sentence may be inevitable where it is determined the offender has abandoned responsibility, it does not follow that where the offender has not abandoned responsibility that a full-time custodial sentence can be avoided: *R v Dutton* [2005] NSWCCA 248 at [29].

The expressions "abandonment of responsibility", "low level of culpability" and "the offender's moral culpability is high", employed in the guideline, are useful but necessarily flexible and were not intended to become "terms of art in this branch of sentencing law": *Markham v R* [2007] NSWCCA 295 per Hidden J at [25].

Assessing moral culpability and abandonment of responsibility

Sentencing judges must make a clear finding of where on the continuum of criminality the moral culpability of the offender lies: *DPP v Samadi* [2006] NSWCCA 308 at [21]. The requirement to do so is not discharged by a finding that an offender's culpability is "significantly below the upper end of the scale, yet not at the lowest point in the scale". Within those two points lies a considerable continuum of criminality: *DPP v Samadi* at [21].

It is wrong to "take a restrictive view of the circumstances that can lead to the conclusion that there is a high degree of moral culpability", the judge must have regard to all the objective circumstances relevant to the assessment: *R v Gardiner* [2004] NSWCCA 365 at [41]. Evidence relevant to an offender's moral culpability should not be narrowly confined and can include evidence about any disability or impairment laboured by the offender: *Rummukainen v R* [2020] NSWCCA 187 at [26]; *R v Shashati* [2018] NSWCCA 167 at [24]; *R v Manok* [2017] NSWCCA 232 at [4]–[7]; [74], [76]. The entirety of the surrounding circumstances is relevant to the assessment of moral culpability: *R v Shashati* at [23]–[24].

Howie J said in *Gonzalez v R* [2006] NSWCCA 4 at [13]:

> There is a high degree of moral culpability displayed where there is present to a material degree one or more of the aggravating factors numbered (iii) to (ix) set out in *Whyte*. However, there may be other factors that reflect on the degree of moral culpability involved in a particular case and the factors identified in *Whyte* can vary in intensity: *R v Tzanis* (2005) 44 MVR 160 at [25]. The list of factors is illustrative only and not definitive: *Errington* at [36].

According to *Rosenthal v R* [2008] NSWCCA 149 at [16], abandonment of responsibility:

> … is directed to the objective gravity of the offence. It is concerned, where relevant, with the extent to which the driver was affected by alcohol or a drug and, generally, with the course of driving and the danger posed by it in its attendant circumstances.

The fact the offender was disqualified from driving, on conditional liberty at the time of the offence and had previous driving offences is not relevant to the question of whether he or she had abandoned responsibility: *Rosenthal v R* at [16].

In *R v Errington*, Mason P, with whom Grove and Buddin JJ agreed, said at [27]:

> The jurisprudence in this field recognises "abandonment of responsibility" as one method of describing a high degree of moral culpability (cf *Whyte* at 287 [224]). This does not however endorse a brightline sub-category. There is a wide spectrum of behaviour indicative of differing levels of moral culpability, indeed differing degrees of abandonment. It is not required that cases be assigned to one or other of two pigeon holes marked respectively "momentary inattention or misjudgment" and "abandoned responsibility". In *R v Khatter* [2000] NSWCCA 32, Simpson J (dissenting) held at [31]:
>
> > "Offences under s 52A are not divided into those of momentary inattention and those of abandonment of responsibility. Those are the two extremes. There are shades and gradations of moral culpability in different instances of the offence and it is proper for the courts to recognise a continuum, rather than a dichotomy, when assessing moral culpability."
>
> Sully J (Carruthers AJ concurring) agreed with these remarks, while differing from her Honour in the disposition of the appeal.

Latham J in *DPP v Samadi* said at [21]:

> … it is not correct to assert that an offender's moral culpability must be low, once the circumstances of the offence do not warrant the description "abandonment of responsibility" or do not justify a finding of high moral culpability.

[18-332] Momentary inattention or misjudgment

The *R v Whyte* guideline provides at [214]:

> A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgement.

This aspect of the guideline is premised upon the fact that, since the offence may be committed where the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence. A non-custodial sentence for an offence against s 52A is almost invariably confined to cases involving momentary inattention or misjudgment: *R v Pisciuneri* [2007] NSWCCA 265 at [75]; see, for example, *R v Balla* [2021] NSWCCA 325.

However, a failure to see a vehicle because the offender did not look properly and assess oncoming traffic will not constitute "momentary inattention": *Elphick v R* [2021] NSWCCA 167 at [24]–[25].

If a collision is not due to momentary inattention, the time and distance travelled by the offender without attention to the road becomes a relevant and aggravating factor: *Kerr v R* [2016] NSWCCA 218 at [98]–[99].

[18-334] Prior record and the guideline

An offender's prior driving record is to be ignored when assessing the objective seriousness of the offence: *R v McNaughton* (2006) 66 NSWLR 566 at [25]. An offender's prior record is relevant to determining where a sentence should lie within a boundary set by the objective circumstances of the offence: *R v McNaughton* at [26]; *Kerr v R* [2016] NSWCCA 218 at [69]. It "cannot be given such a weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence": *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

In *Rosenthal v R* [2008] NSWCCA 149 at [16]–[17], the judge erroneously used the fact that the offender was subject to a 12-month licence disqualification at the time of the offence as relevant to the question of whether the offender had abandoned responsibility. The court held that prior record was not relevant to that issue but rather to issues of personal and general deterrence. The commission of prior driving offences may be indicative of "an attitude of disobedience towards the law" and require increased weight to be given to retribution and deterrence: *R v Nguyen* [2008] NSWCCA 113 at [51]; *R v Scicluna* (unrep, 19/9/1991, NSWCCA).

Generally it is matter for the sentencing court to decide whether a criminal record will be used for or against an offender: *R v Borkowski* [2009] NSWCCA 102 at [47]. It was open to the judge in *R v Borkowski* to find that the offender's previous record disentitled him to the leniency usually extended to a first offender: *R v Borkowski* at [47]. In *Kerr v R* at [117], the judge was entitled to hold that the offender's traffic record indicated a need for personal deterrence. In *Stanyard v R* [2013] NSWCCA 134, it was permissible for the judge (see [25]–[26]) to hold that the offender's traffic history distinguished him from the typical case of a young offender with good character with limited or no prior convictions for the purposes of the guideline: *Stanyard v R* at [38]. In *Rummukainen v R* [2020] NSWCCA 187 at [29], it was permissible for the judge to take a prior drink driving offence into account in a "limited way … as a matter of context".

The *Whyte* ((2002) 55 NSWLR 252) guideline applies to a frequently recurring case which is said to include a young person of good character with no or limited prior convictions: see **Mitigating factors** at [18-380]. However, youth, good character and a clear record are not afforded the same weight for dangerous driving offences as they are for other offences. It is erroneous to hold that the fact that the offender has no criminal record should be regarded as an "important mitigating factor": *R v Price* [2004] NSWCCA 186 at [45].

See further discussion in **Prior record** at [10-400].

[18-336] Length of the journey

The guideline provides that an aggravating factor is the "[l]ength of the journey during which others were exposed to risk": see item (vii) in [18-320]. This permits the judge to take into account the distance travelled and the distance intended to be travelled before detection: *R v Takai* [2004] NSWCCA 392 at [39]. In short "the journey" contemplated in *R v Whyte* (2002) 55 NSWLR 252 was not just the journey attenuated by the collision. There is no absolute demarcation of what is a "long journey", a "not long journey" or a "short journey". The danger created by the length of the journey will vary according to other circumstances, such as the time at which the journey is undertaken, the amount of traffic, and the locale: *R v Takai* at [39]; *R v Shashati* [2018] NSWCCA 167 at [28].

[18-340] General deterrence

In *R v Jurisic* (1998) 45 NSWLR 209, Spigelman CJ at CL at 228 quoted the following passage from the judgment of Hunt CJ at CL in *R v Musumeci* (unrep, 30/10/97, NSWCCA) describing it as being in many respects a guideline relating to the approach to be taken in sentencing for offences under s 52A *Crimes Act* 1900:

> This court has held that a number of considerations which had to be taken into account when sentencing for culpable driving must also be taken into account when sentencing for this new offence of dangerous driving:
>
> 1. The legislature has always placed a premium upon human life, and the taking of a human life by driving a motor vehicle dangerously is to be regarded as a crime of some seriousness.
> 2. The real substance of the offence is not just the dangerous driving; it is the dangerous driving in association with the taking of a human life.
> 3. Such is the need for public deterrence in this type of case, the youth of any offender is given less weight as a subjective matter than in other types of cases.
> 4. The courts must tread warily in showing leniency for good character in such cases.
> 5. So far as youthful offenders of good character who are guilty of dangerous driving, therefore, the sentence must be seen to have a reasonable proportionality to the objective circumstances of the crime, and persuasive subjective circumstances must not lead to inadequate weight being given to those objective circumstances.
> 6. Periodic detention has a strong element of leniency built into it and, as presently administered, it is usually no more punitive than a community service order.
> 7. The statement made by this court in relation to the previous offence of culpable driving — that it cannot be said that a full-time custodial sentence is required

> in every case — continues to apply in relation to the new offence of dangerous driving. As that offence is committed even though the offender has had no more than a momentary or casual lapse of attention, there must always be room for a non-custodial sentence (although that does not mean that a non-custodial sentence is ordinarily appropriate in such a case), but the case in which a sentence other than one involving full-time custody is appropriate must be rarer for this new offence.

Spigelman CJ added that although these observations were made in the context of dangerous driving causing death, the comments can be readily adapted to the cognate offence of dangerous driving causing grievous bodily harm: *R v Jurisic* at 228.

It can readily be seen that, particularly in cases involving death of the victim, general deterrence is usually given primacy over other considerations personal to the offender. In *R v Musumeci*, Hunt CJ at CL also said:

> It is never easy to send a youthful person of good character to gaol but, where it is appropriate, it is something which must be done as a deterrent to others. The need for public deterrence will usually outweigh the fact that the particular offender has already learned his or her lesson. Also, retribution remains an important purpose which the sentence must serve.

In *R v Manok* [2017] NSWCCA 232, Wilson J reiterated the importance of general deterrence, explaining that this was "because of the prevalence of the activity of driving, and the terrible consequences that can flow from a failure by a driver in the management of a motor vehicle": at [78]–[79]. The risk any driver could commit an offence resulting in death or severe injury meant all drivers must be deterred from driving dangerously by the sentences imposed on those who transgress: *R v Manok* at [79].

Where the offence involves the intoxication of the offender, there is a particular need for sentences to adequately reflect general deterrence: *R v Carruthers* [2008] NSWCCA 59 at [29]–[31]. McClellan CJ at CL there emphasised the fact that a licence is a privilege, and that the use of alcohol significantly increases the risk to other drivers on the road. Where the blood alcohol reading of an offender is high and that person has previous convictions for driving a motor vehicle while under the influence of alcohol, a term of full time imprisonment may be the only appropriate sentence to deter both that offender and others contemplating similar offending: *R v Carruthers* at [30]. Even if the Crown cannot prove an offender was above the legal limit, evidence of alcohol consumption remains relevant to general deterrence: *Rummukainen v R* [2020] NSWCCA 187 at [29].

In *Kerr v R* [2016] NSWCCA 218, general deterrence was considered important to emphasise that cyclists lawfully using the road are entitled to do so without the danger of a random act of dangerous driving: *Kerr v R* at [117].

In *Elphick v R* [2021] NSWCCA 167, where the offender's conduct in driving into the side of a highly visible vehicle on a highway was found to demonstrate an egregious want of care, the court found general deterrence was not served by ordering the sentence be served by way of an intensive correction order: at [26]–[27].

For young offenders, in some cases, general deterrence is a dominant factor on sentence: *SBF v R* [2009] NSWCCA 231 at [152]; *Byrne v R* [2021] NSWCCA 185 at [102]–[103]. See further [18-380] below.

[18-350] Motor vehicle manslaughter

The question of whether a motor vehicle manslaughter falls under the manslaughter category of gross criminal negligence or an unlawful and dangerous act is determined by applying the test in *R v Pullman* (1991) 25 NSWLR 89 at 97:

> (1) An act which constitutes a breach of some statutory or regulatory prohibition does not, for that reason alone, constitute an unlawful act sufficient to found a charge of manslaughter within the category of an unlawful and dangerous act.
>
> (2) Such an act may, however, constitute such an unlawful act if it is unlawful in itself — that is, unlawful otherwise than by reason of the fact that it amounts to such a breach.

In some cases, the requirements of both manslaughter by gross criminal negligence and manslaughter by unlawful and dangerous act will be satisfied: *Crowley v R* [2021] NSWCCA 45 at [18].

There is no hierarchy of seriousness within manslaughter and it will be the particular facts rather than the class of manslaughter that determines the seriousness of the offending: *R v Borkowski* [2009] NSWCCA 102 at [49], [51], applying *R v Pullman*.

Further, manslaughter is no less serious a crime because it is committed by the use of a motor vehicle: *Lawler v R* [2007] NSWCCA 85 at [41]; see also, *R v McKenna* (1992) 7 WAR 455. In *Lawler v R*, the applicant appealed his sentence of 10 years 8 months, with a non-parole period of 8 years, for manslaughter caused when his prime mover collided with the victim's vehicle. The applicant was aware the braking system was defective, but continued driving for commercial gain. In dismissing the appeal, the Court of Criminal Appeal emphasised the importance of general deterrence in cases where people are prepared to blatantly disregard the safety of other users of the road: *Lawler v R* at [42].

When sentencing for motor vehicle manslaughter, it is "unproductive" to consider what might have been the appropriate sentence for an offence of aggravated dangerous driving occasioning death, which is a much less serious offence, carrying a maximum penalty of 14 years imprisonment compared to 25 years for manslaughter: *R v Cameron* [2005] NSWCCA 359 at [26]; *R v Cramp* [1999] NSWCCA 324 at [108].

Examples of these cases include: *Director of Public Prosecutions v Abdulrahman* [2021] NSWCCA 114 (a particularly serious example); *Smith v R* [2020] NSWCCA 181 at [49]–[78], *Day v R* [2014] NSWCCA 333 at [17]–[28], *Spark v R* [2012] NSWCCA 140 at [48] and *Bombardieri v R* [2010] NSWCCA 161 at [41]–[55].

[18-360] Grievous bodily harm

The extent and nature of injuries inflicted will contribute to the determination of the appropriate penalty for these offences: *R v Whyte* (2002) 55 NSWLR 252 at [214]. Where the injuries are serious, both retribution and general deterrence need to be reflected to a considerable level in the sentence imposed: *R v Dutton* [2005] NSWCCA 248 at [34]. Grievous bodily harm encompasses a very broad range of consequences extending from, at one end of the spectrum, a broken leg, and, at the other, a permanent vegetative state: *Conte v R* [2018] NSWCCA 209 at [5].

Offences relating to the infliction of grievous bodily harm extend to the destruction of the foetus of a pregnant woman: s 4(1) *Crimes Act* 1900. See also the discussion of s 54A at [18-310] above.

[18-365] Victim impact statements

See generally **Victims and victim impact statements** at [12-790]ff, **Victim impact statements of family victims** at [12-838].

A victim impact statement cannot be taken into account to indicate that the offence of dangerous driving occasioning death caused "substantial" harm to the victim for the purposes of aggravating the offence under s 21A(2)(g) *Crimes (Sentencing Procedure) Act* 1999. The fact the victim suffered "substantial" harm is already an element of the offence. Issues of fact or degree may, however, arise in the case of grievous bodily harm: *R v Tzanis* [2005] NSWCCA 274 at [11]–[13].

There is no statutory or other restriction upon the extent to which a court may set out the contents of victim impact statements providing the limitations of such statements are acknowledged: *SBF v R* [2009] NSWCCA 231 at [88].

[18-370] Application of the De Simoni principle

The statutory hierarchy

Manslaughter sits above a s 52A offence in the hierarchy of offences. This is evidenced by s 52AA(4) which provides that on a trial for an offence of manslaughter a jury can return a verdict of guilty of an offence under s 52A: *SBF v R* [2009] NSWCCA 231 at [108].

The suggestion in *R v Borkowski* [2009] NSWCCA 102 at [56] and *SBF v R* at [97] that the driving offences in *Crimes Act* 1900 (including manslaughter) "involve varying degrees of negligence" was not accepted by the High Court in *King v The Queen* (2012) 245 CLR 588 at [38]. The High Court in *King v The Queen* at [38] said in the course of analysing a materially similar dangerous driving causing death offence that it:

> … takes its place in a coherent hierarchy of offences relating to death or serious injury arising out of motor vehicle accidents. It is not necessary to that coherence that the terms of the section be embellished by reading into them a requirement for proof of some species of criminal negligence.

There are differences between dangerous driving causing death and manslaughter by criminal negligence. Dangerous driving is not a species of negligent driving and negligence is not an element of dangerous driving: *King v The Queen* at [44]–[46]. The offence of dangerous driving causing death does not require the Crown to prove an element of negligence: *King v The Queen* at [44]–[46]. As to the concept of negligence having "no role to play" for an offence of dangerous driving, see *King v The Queen* at [45]. The assessment of whether the manner of driving was dangerous depends on whether it gave rise to the degree of risk set out by Barwick CJ in *McBride v The Queen* (1966) 115 CLR 44 at 50, approved in *Jiminez v The Queen* (1992) 173 CLR 572. Therefore, an assessment of a dangerous driving causing death offence should avoid reference to degrees of negligence or an evaluation of the breach of duty of care.

Nonetheless, in the statutory hierarchy of offences, manslaughter should be treated as a most serious offence for the purposes of the principle in *The Queen v De Simoni*

(1981) 147 CLR 383: *SBF v R* at [118]. The distinction between the extent of culpability for an offence of manslaughter and an offence of dangerous driving causing death may be a fine one: *R v Vukic* [2003] NSWCCA 13 at [10]; *Thompson v R* [2007] NSWCCA 299 at [15].

According to *SBF v R* at [128]:

> An assessment of the level of moral culpability and the degree of abandonment of responsibility may in some cases involve language which is close to aspects of manslaughter.

The factual findings by the court in *SBF v R* — that the applicant must have realised the very serious danger in driving in the way he did and that it was "potentially lethal" — did not cross "the line into findings which took into account circumstances of aggravation which would have warranted a conviction for the more serious offence of manslaughter": *SBF v R* at [129].

Facts constituting a more serious offence

It is not an error to take into account other circumstances of aggravation different from the circumstances supporting the charge. The offence of dangerous driving causing death under s 52A(1) has three variations: driving under the influence, driving at a speed dangerous, and driving in a manner dangerous. Each variation carries the same penalty. The *De Simoni* principle can have no application in a case where the so-called matters of aggravation are merely variations of the same offence and do not render the offender to a greater penalty: *R v Douglas* (1998) 29 MVR 316.

The appellant in *R v Vale* [2004] NSWCCA 469 was intoxicated to an extent that was sufficient to establish the more serious offence of aggravated dangerous driving occasioning death (carrying a maximum penalty of 14 years). However, the appellant's charge and plea were based on the lesser offence under s 52A(1)(a) of dangerous driving occasioning death (carrying a maximum penalty of 10 years). Santow JA said at [31]:

> … the sentencing judge explicitly used the language of "the aggravating factors" thus wrongly conflating the more serious offence of "aggravated dangerous driving occasioning death" (s 52A(2)) to the still serious but lesser offence of "dangerous driving occasioning death" (s 52A(1)).

The judge breached the *De Simoni* principle by taking into account the higher level of intoxication as an aggravating factor.

Where an act of dangerous driving causes the death of a pregnant woman, it is an error to have additional regard to the death of her foetus as a matter increasing the seriousness of the offence: *Hughes v R* [2008] NSWCCA 48 at [33]. The death of a foetus constitutes grievous bodily harm: *R v King* (2003) 59 NSWLR 472 at [96].

It is already comprehended in the charge of dangerous driving causing death that the victim has sustained grievous bodily harm: *Hughes v R* at [28].

See further **Fact Finding at Sentence** at [1-400]ff.

Conduct of the victim

It is not appropriate to have regard to the conduct of the victim as mitigating the offender's criminal behaviour in putting members of the public, including passengers, at risk: *R v Dutton* [2005] NSWCCA 248.

It is not a mitigating factor that the victim knew the driver was intoxicated and willingly travelled in the vehicle fully aware of the danger. The fact the passenger was also intoxicated and did not try to dissuade the offender from driving cannot go to mitigation: *R v Errington* [1999] NSWCCA 18 at [27]–[28].

In *R v Dutton* at [35], the fact the victim had her arm out the window was not a relevant matter, whether the respondent was aware of it or not. It was noted at [36] that a driver is responsible for the safety of his or her passengers. In *R v Berg* [2004] NSWCCA 300 at [26] the fact the passenger was not wearing a seat belt and so suffered the injuries leading to his death was held to be an aggravating factor in the circumstances of that case rather than a matter of mitigation.

[18-380] Mitigating factors

Youth

Generally, deterrence is given less weight in cases involving young offenders and there is a greater emphasis on rehabilitation. This is often not the case for dangerous driving offences because there is a prevalence of these offences among young drivers and the courts have a duty to seek to deter this behaviour: *R v Smith* (unrep, 27/8/97, NSWCCA).

In some cases general deterrence is a dominant factor on sentence: *SBF v R* [2009] NSWCCA 231 at [152]. The fact young men may perceive themselves as "bullet proof" is a significant reason for general deterrence to be a prominent factor in dangerous driving cases: *SBF v R* at [151]; *Byrne v R* [2021] NSWCCA 185 at [101]–[103]. "Inexperience and immaturity, in persons aged 17 years and over, cannot operate as mitigating factors where the offender commits grave driving offences, with fatal consequences …": *SBF v R* at [151]. Persuasive subjective considerations, such as youth and good character, must not lead to inadequate weight being given to the objective circumstances: *R v Slattery* (unrep, 19/12/96, NSWCCA); *R v Musumeci* (unrep, 30/10/97, NSWCCA); *R v Jurisic* (1998) 45 NSWLR 209 per Spigelman CJ at 228–229. See also **General Deterrence** at [18-340].

Section 6(b) *Children (Criminal Proceedings) Act* 1987 provides that courts exercising criminal jurisdiction over children consider that "children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance". It is a misconception to see s 6 *Children (Criminal Proceedings) Act* 1987 as having some talismanic quality which entitles a young person of 17 years and 11 months (the age in the case) who commits a serious criminal offence to be dealt with as though a child in the colloquial understanding of the description: *R v Williams* (unrep, 17/12/1996, NSWCCA). See discussion of s 6 *Children (Criminal Proceedings) Act* 1987 in **Principles relating to the exercise of criminal jurisdiction** at [15-010]; **Relevance of youth at sentence** at [15-015].

However, even where the relevant dangerous driving offences are close to the worst kind, youth remains a relevant factor. In *Conte v R* [2018] NSWCCA 209, the 20 year old applicant's offending demonstrated an atrocious abandonment of responsibility — he was disqualified from driving, under the influence of drugs, and seen to be driving in what witnesses described as "the most reckless form of driving imaginable": at [40]. However, Payne JA and Button J (Schmidt J dissenting) concluded an aggregate

sentence of 14 years imprisonment with a non-parole period of 10 years 6 months, did not appropriately reflect the applicant's youth or his deprived upbringing, the fact the offences (against ss 52A(2), 52A(4) and 52AB(1)) arose from one incident, and that the maximum penalty for aggravated dangerous driving causing death is 14 years imprisonment, compared to manslaughter which is 25 years: at [23].

To suggest youth cannot operate as a mitigating factor when the offender commits grave driving offences is not to dispense with the principles that apply to youth, but involves balancing those principles against the greater need and greater significance of general deterrence to deter persons in that class from undertaking such conduct by an understanding of the dire consequences: *Byrne v R* at [103]. In *Byrne v R*, Bell P (Button J agreeing) observed at [3] that the fact both drivers, youths engaging in a street race, were on provisional licences exacerbated the culpability of their offending and made deterrence particularly important. His Honour said at [5]:

> The message must be sent in unequivocal terms that motor vehicles are not playthings or dodgem cars to be raced by young people for fun or thrills and with impunity. They are to be used responsibly and strictly in accordance with the rules of the road … The holding of a driver's licence conferring the right to drive a motor vehicle is a privilege which carries heavy responsibilities.

Good character

The courts must tread warily in showing leniency for good character in these cases to avoid giving the impression that persons of good character may, by their irresponsible actions, take the lives of others and yet receive lenient treatment: *R v MacIntyre* (unrep, 23/11/88, NSWCCA); *R v Musumeci* (see above under **General deterrence** at [18-340]).

In *R v Whyte* (2002) 55 NSWLR 252, Spigelman CJ said at [145]:

> Some sentencing judges find it very difficult to accept that a person of good character who is unlikely to re-offend should be sent to gaol. However, Parliament has made it quite clear that the injuries occasioned by driving dangerously and, no doubt, the prevalence of the offence, require condign punishment.

Extra-curial suffering

The offender's relationship with the victim "may be some indication of extra-curial suffering flowing from the occurrence": *R v Howcher* [2004] NSWCCA 179 at [16]. In *R v Koosmen* [2004] NSWCCA 359, Smart AJ at [32]–[33] cautioned:

> *Dhanhoa* [[2000] NSWCCA 257] is authority for the proposition that the effect of the death in the accident on the offender and self punishment (the self inflicted sense of shame and guilt) were often highly relevant factors, that the weight to be given to these depended on the circumstances and that different judges may give different weight to those factors. Where the facts reveal gross moral culpability judges should be wary of attaching too much weight to considerations of self punishment. Genuine remorse and self punishment do not compensate for or balance out gross moral culpability.
>
> In the present case the judge took the self punishment into account, including the major depression and the post traumatic stress disorder. His reasons indicate some real understanding of the applicant's position.

In *Hughes v R* [2008] NSWCCA 48 at [23], Grove J emphasised that "leniency does not derive from the mere fact that the deceased was not a stranger: *R v Howcher*

[2004] NSWCCA 179, but from the consequential quality and depth of the remorse and shock". The despair and depression experienced by the applicant was a significant element of mitigation: *Hughes v R* at [25].

The impact of the crime upon the offender's mental health where the victim has not died may also be a matter in mitigation, on the same basis as if a physical injury had been suffered: *R v Dutton* [2005] NSWCCA 248 at [38]. It was also relevant in *R v Dutton* that the victim was the offender's friend, and the offender had given her assistance and support following the accident. In *Rosenthal v R* [2008] NSWCCA 149 at [20], the injury occasioned to the applicant's wife and the loss suffered by the applicant at the death of his unborn child were taken into account in re-sentencing.

Injuries to the offender

The fact the offender suffered serious injuries in the collision may be taken into account: *R v Turner* (unrep, 12/8/91, NSWCCA); *R v Slattery* (unrep, 19/12/96, NSWCCA); *Rosenthal v R* at [20].

Family hardship

Hardship caused to family/dependents by full-time imprisonment is only taken into account in extreme or highly exceptional cases where the hardship goes beyond the sort of hardship that inevitably results when the breadwinner is imprisoned: *R v Edwards* (unrep, 17/12/96, NSWCCA); *R v Grbin* [2004] NSWCCA 220; *R v X* [2004] NSWCCA 93. The fact that young children will be left without a carer as a result of the imposition of a gaol term is not normally an exceptional circumstance: *R v Byrne* (unrep, 5/8/98, NSWCCA); *R v Sadebath* (1992) 16 MVR 138; *R v Errington* [1999] NSWCCA 18 at [29]–[30].

Payment of damages

The fact the offender has lost their car or suffered significant financial loss because their car was damaged in the collision is not a mitigating factor: *R v Garlick* (unrep, 29/7/94, NSWCCA). However, the court may take into account that the offender has paid or is required to pay a significant amount in damages: *R v Thackray* (unrep, 19/8/98, NSWCCA).

[18-390] Other sentencing considerations

Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A(2)(i) *Crimes (Sentencing Procedure) Act* 1999 provides that an aggravating feature that a court may take into account is where "the offence was committed without regard to public safety". Section 21A(2) provides that the court is not to have regard to a factor if it is an element of the offence. In *R v Elyard* [2006] NSWCCA 43 at [10] it was held that the prohibition in s 21A(2) extends to inherent characteristics of an offence. An inherent characteristic of dangerous driving offences is that they are committed without regard for public safety.

Basten JA said at [10]:

> … acting without regard for public safety should not, in [s 52A cases], be given additional effect as an aggravating factor in its own right, unless the circumstances of the case involve some unusually heinous behaviour, or inebriation above the statutory precondition.

Howie J said at [43]:

> … in a particular case the lack of regard for public safety may be so egregious that it transcends that which would be regarded as an inherent characteristic of the offence.

In this case there was no evidence to support that finding of unusually heinous behaviour. The court approved of the approach in *R v McMillan* [2005] NSWCCA 28 at [38] and disapproved the comment in *R v Ancuta* [2005] NSWCCA 275 at [12]. The approach taken in *R v Elyard* has been followed in other decisions: *Hei Hei v R* [2009] NSWCCA 87 at [15]–[21]; *Rose v R* [2010] NSWCCA 166 at [9].

Section 21A(2)(g), that "the injury, emotional harm, loss or damage caused by the offence was substantial", cannot be taken into account as an aggravating factor of an offence causing death. Spigelman CJ said in *R v Tzanis* [2005] NSWCCA 274 at [11] that: "[i]n the case of death there can be no issue of fact and degree. The injury was necessarily 'substantial'". The seriousness of the injuries to the victim of the grievous bodily harm remains relevant to the objective seriousness of the offence: *R v Tzanis* at [12]–[13].

[18-400] Totality

It is legitimate in sentencing for dangerous driving to have regard to the consequences of that driving. In terms of seriousness, the greater the number of deaths, the greater the number of persons injured, the graver the crime becomes.

In *R v Janceski* [2005] NSWCCA 288, the sentencing judge erred in imposing concurrent sentences for two dangerous driving occasioning death offences and taking the approach of sentencing for a single action aggravated by multiple victims. Hunt AJA said at [23]:

> … separate sentences should usually be fixed which are made partly concurrent and partly cumulative, each such sentence being appropriate to the existence of only one victim and the aggregate of the sentences reflecting the fact that there are multiple victims resulting from the same action by the offender.

The principle was applied in *Kerr v R* [2016] NSWCCA 218 at [109] where there were seven victims. In *Richards v R* [2006] NSWCCA 262 at [78], the sentencing judge's failure to accumulate sentences for one dangerous driving occasioning death offence and three dangerous driving occasioning grievous bodily harm offences "appears to have been a failure to acknowledge the harm done to the individual victims".

See the discussion of dangerous driving cases in **Structuring sentences of imprisonment and the principle of totality** at [8-230].

Worst cases

See generally the discussion with regard to worst cases and the abolition of the word "category" at [10-005] **Cases that attract the maximum**.

A determination of whether or not offences fall into the worst class of case is not dependent precisely on whether all of the matters referred to in s 52A(7) are present, but is to be determined on a consideration of all objective and subjective features: *R v Black* (unrep, 23/7/98, NSWCCA), per Ireland J. For examples of the most serious cases (causing grievous bodily harm), see *R v Austin* [1999] NSWCCA 101 and *R v Scott*

[1999] NSWCCA 233. Examples of serious cases of offences of aggravated dangerous driving causing death include *R v Wright* [2013] NSWCCA 82 where the offence was described, at [86], as "close to the worst type of offence of its kind" and *Conte v R* [2018] NSWCCA 209 where the offending was said, at [7], to demonstrate an atrocious abandonment of responsibility and was towards the upper end of the scale.

[18-410] Licence disqualification

In all cases of dangerous driving and failing to stop and provide assistance (a "major offence" as defined in s 4 *Road Transport Act* 2013), licence disqualification is mandatory and additional to any penalty imposed for the offence: s 205 *Road Transport Act* 2013.

Where an offender is sentenced to imprisonment for a major disqualification offence (defined in s 206A(1)), the specified licence disqualification period is extended "by any period of imprisonment under that sentence" so that it is served after the person is released: s 206A(2)–(4) *Road Transport Act* 2013. A "period of imprisonment" does not include any period that the person has been released on parole: s 206A(4). If a "major disqualification offence" is one of a number of offences dealt with by imposing an aggregate sentence, the sentence for the purpose of determining the period by which the disqualification is extended is the aggregate sentence: *Gray v R* [2018] NSWCCA 39 at [43]–[44]. The extension of the disqualification period is subject to any order of a court sentencing an offender: s 206A(5); *Hoskins v R* [2020] NSWCCA 18 at [23].

[18-415] Failure to stop and assist

Offences of failing to stop and assist another person after causing an accident resulting in their death or occasioning grievous bodily harm are serious offences, with maximum penalties of 10 years, when death is occasioned, 7 years, for grievous bodily harm: *Crimes Act* 1900, s 52AB(1). Section 52A(5) and (6), which prescribe the circumstances in which a vehicle is taken to be involved in an impact, apply to this section in the same way as they apply for the purposes of s 52A: s 52AB(3).

These offences are directed to a driver's obligation to assist police and the injured person including where assistance could have been of material benefit to "save a life, minimise injury, improve the prospect of recovery, alleviate suffering and preserve… dignity": Second Reading Speech quoted in *Geagea v R* [2020] NSWCCA 350 at [44]. While s 52AB offences range in seriousness, they "will rarely bear the same degree of moral culpability" as dangerous driving causing death and "giving excessive weight to the statutory maximum for the failure to stop may lead to anomalous results": *Hoskins v R* [2020] NSWCCA 18 at [14]–[16]; *Geagea v R* [2020] NSWCCA 350 at [43].

In *Hoskins v R* the offender struck a woman crossing the street then fled, aware she was likely dead. He was not sentenced for dangerous driving causing death and the Court of Criminal Appeal (Basten JA; RA Hulme and N Adams JJ agreeing) found the judge erred by imposing a sentence "within the range for an offence of causing death by dangerous driving, which is inappropriate for the lesser offence of failing to stop": at [16].

In *Geagea v R* the offender struck a man standing on a suburban street with his van and then fled. Despite being promptly assisted by local residents the victim died at

the scene. The applicant was sentenced for dangerous driving occasioning death and failing to stop to render assistance. The court concluded the sentencing judge erred by assessing the failure to stop and assist offence at a higher level of objective seriousness than was warranted. The court said at [40]:

> Where an offender is to be sentenced both for causing death by dangerous driving and for failing to stop at the scene, care is required not to give undue weight to the fact that Parliament has prescribed the same maximum penalty for each offence. Each sentence must of course take into account the prescribed maximum but at the same time the comparative length of the two sentences must be capable of being reconciled, rationally and coherently, with the very different criminality involved in each... In relation to failing to stop, the result of the offending will be highly variable. If the victim could have been saved by assistance being promptly rendered, or if his or her suffering could have been relieved, then the result of the offence may be very grave. Otherwise, as in the present case, the result may be limited to impeding a police investigation, which is obviously a much less serious matter than a death. A constant in all offences of failing to stop will be that it is dishonest to fail to identify oneself and to take responsibility. But the gravity of failing to assist a police investigation of the accident, in any circumstances of which one can conceive, appears far less than the gravity of causing a death by dangerous driving.

[18-420] Dangerous navigation

The dangerous navigation offences under s 52B(1)–(4) mirror the categories of offences and penalties for dangerous driving under s 52A(1)–(4). Further offences are created when the dangerous navigation offence causes the loss of a foetus of a pregnant woman: see ss 54A and 54B and the commentary at [18-310] above.

While "navigate" or "navigation" are not defined in the *Crimes Act* 1900, for the purpose of assessing culpability it is clear that s 52B is directed at persons driving, steering or helming vessels and there is no reason to confine the term to the person with overall responsibility for management of the vessel rather than the person physically controlling the vessel: *Small v R* [2013] NSWCCA 165 at [43].

[18-430] Application of the guideline to dangerous navigation

The guideline for dangerous driving offences, *R v Whyte* (2002) 55 NSWLR 252, affords guidance in dangerous navigation cases: *R v Reynolds; R v Small* [2010] NSWSC 691 at [96]–[97]; *Buckley v R* [2012] NSWCCA 85 at [41]. This includes assessing moral culpability which, depending on the circumstances of the dangerous navigation, may involve consideration of the defendant's level of experience and any delegation of responsibility, the degree of irresponsibility demonstrated by alcohol or drug consumption, whether persons on the vessel were wearing life jackets and could swim, and efforts by the defendant immediately after the incident to assist or obtain assistance: *Buckley v R* at [43]–[48]. For a case involving a low level of moral culpability, where the sentencing judge found the death was a result of momentary inattention and a sentence of period detention was imposed, see *R v MacIntyre* [2009] NSWDC 209.

One of the potentially aggravating factors listed in *R v Whyte* at [216] is the length of the journey. Although an extended journey elevates the period of risk, a short journey

in a vessel or a brief period spent at the helm does not become a matter of mitigation. To postulate a factor which might make an offence worse does not mean its absence lessens the seriousness of the offence: *R v Reynolds; R v Small* at [49].

Consideration of the number of persons put at risk involves having regard to the number of persons on a vessel, compared to the licensed capacity of the vessel, as well as other users of the area. The vessel in *R v Reynolds; R v Small* was licensed to carry eight persons but was in fact carrying 14 persons, six of whom were killed in the collision: at [9], [12].

[The next page is 9301]

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.

In *R v Harris* (2000) 50 NSWLR 409 (*R v Harris (CCA)*) at [87]–[88], [90] the court held that s 61(1) effectively restates the common law concerning the imposition of life sentences for murder.

A convenient summary of the legislative history of s 61(1) and the relevant caselaw can be found in *Rogerson v R* [2021] NSWCCA 160 at [616]–[637]. See also the summary of the relevant principles in *Knight v R* [2006] NSWCCA 292 at [23]. The proper approach to s 61(1) is that stated in *R v Harris* [2000] NSWCCA 285 at [76]–[86] (*R v Harris (Bell J)*) and *R v Harris (CCA): Rogerson v R* at [636].

The burden is on the Crown to establish beyond reasonable doubt that a case falls within s 61(1): *R v Merritt* (2004) 59 NSWLR 557 at [35]. However, not all of the factors which would lead to a conclusion that s 61(1) is applicable must be established beyond reasonable doubt: *Adanguidi v R* [2006] NSWCCA 404 at [55]. It is the combined effect of the findings concerning the indicia in s 61(1) (that is, the interest in (i) retribution (ii) punishment (iii) community protection, and (iv) deterrence) that must be considered: *R v Merritt* at [52], [54].

Section 61 is subject to s 21(1) of the same Act (see s 61(3)), which provides that, even though liable to a sentence of life imprisonment, an offender may receive a determinate sentence. This necessarily involves a two-stage process when determining whether a life sentence is appropriate (see *R v Valera* [2002] NSWCCA 50 at [8] and *R v Merritt* (2004) 59 NSWLR 557 at [37]), but one that is different to the staged approach to sentencing disavowed in *Markarian v The Queen* (2005) 228 CLR 357 and *Muldrock v The Queen* (2011) 244 CLR 120: *Rogerson v R* at [636]; *Dean v R* [2015] NSWCCA 307 at [96].

In applying s 61(1), the court assesses first, whether the offence warrants a life sentence because of the circumstances surrounding or causally connected to the offence, and second, whether a lesser sentence is warranted because of other matters such as remorse, confessions, pleas of guilty and prospects of rehabilitation: *Rogerson v R* at [626]–[629], [635]–[636]; *R v Harris (Bell J)* at [84]–[85]; *R v Harris (CCA)* (2000) 50 NSWLR 409 at [60]; *CC v R* [2021] NSWCCA 71 at [81]–[83].

The first stage involves considering the requirements of s 61(1), which focuses on the offender's "level of culpability". This directs attention to objective factors, such as the objective seriousness of the offence, and subjective factors with a causative influence on the offender's culpability: see *R v Harris (Bell J)* at [84]–[87]; *Rogerson v R* at [636]. The latter may include the offender's background and any mental health impairment, disorder or incapacity with a causative influence on their level of

culpability but *not* consideration of remorse, admissions, whether or not there was a guilty plea or the offender's prospects of rehabilitation: *R v Harris (Bell J)* at [84]–[85]; *Rogerson v R* at [623]–[625].

In *CC v R*, Adamson J at [81]–[83] described the distinction drawn in *R v Harris (Bell J)* as one between factors relevant to the offender's level of culpability and factors relevant to the sentence to be imposed, observing that there was a degree of overlap between the two, but that "the instinctive synthesis required as part of the exercise of the sentencing discretion" involved considering *all* relevant matters, not just those affecting the offender's culpability in the commission of the offence. This approach was subsequently approved in *Rogerson v R* at [635], but as to the use of the descriptors "objective" and "subjective" in relation to the two-stage process the court said at [636]:

> [C]are must be taken in describing s 61 as differentiating between an assessment of the "objective gravity" of the offending and the offender's subjective circumstances. … what differentiates the two stages is whether the relevant factor is a "circumstances surrounding or causally connected to the offence" and that can include matters such as the offender's mental state, motive or personal background. Some matters may be relevant to both stages.

The second, discretionary, stage under s 21(1) is deciding whether a lesser sentence is warranted. This invites consideration of subjective matters such as remorse, confessions, pleas of guilty and their timing, and the offender's prospects of rehabilitation: *Rogerson v R* at [626]–[629], [635]–[636]; *R v Harris (CCA)* at [60]; *R v Harris (Bell J)* at [84]–[85].

R v Warwick (No 94) [2020] NSWSC 1168 and *Rogerson v R* are examples of cases where s 61(1) was found to be satisfied: see *R v Warwick (No 94)* at [18], [94]–[95]; *Rogerson v R* at [638]–[642]; *R v Rogerson; R v McNamara (No 57)* [2016] NSWSC 1207 at [230]–[242].

Life sentences may be imposed despite presence of subjective mitigating factors

The absence of criminal antecedents does not render an offender immune to the maximum penalty, either under s 61(1) (for example, *Adanguidi v R* [2006] NSWCCA 404 at [34]: *Knight v R* [2006] NSWCCA 292), or the common law (for example, *R v Ngo* [2001] NSWSC 1021).

A life sentence may also be imposed either at common law or under s 61(1) even if the offender pleads guilty: *R v Baker* (unrep, 20/9/95, NSWCCA); *R v Garforth* (unrep, 23/5/94, NSWCCA) (both sentenced prior to the introduction of the predecessor to s 61(1)); *R v Coulter* [2005] NSWSC 101 at [56]–[57]; *Knight v R* at [37]; *R v Miles* [2002] NSWCCA 276 at [213].

Section 61(1) does not apply to offenders under the age of 18 years (s 61(6)), although arguably the common law still applies to such offenders. Life sentences have been imposed on young adults in *Gonzales v R* [2007] NSWCCA 321 (20 years at the time of offence); and *R v Valera* [2002] NSWCCA 50 (19 years). These were cases to which s 61(1) applied. In *R v Leonard* (unrep, 7/12/98, NSWCCA), a case in which the common law applied, McInerney J said:

> to sentence the applicant to imprisonment for the term of his natural life is a terrible punishment to impose on a young man aged twenty-four. However, as the Crown has

> pointed out, the legislature has seen fit to pass such legislation and it expects this Court to carry out the intention of the legislature should the situation call for such a sentence. We should not shirk from our responsibility in so doing, no matter how distasteful it may be.

Both at common law and in the application of s 61(1), life sentences have been imposed regardless of whether there is some prospect of rehabilitation. In *R v Baker* (unrep, 20/9/95, NSWCCA), Barr AJ rejected the proposition that a life sentence should never be imposed where there is some prospect of rehabilitation. Similarly, in *R v Garforth* (unrep, 23/5/94, NSWCCA), the court said:

> We reject the applicant's submission that it is only where there is no chance of rehabilitation that the maximum penalty of life imprisonment can be imposed. There are some cases where the level of culpability is so extreme that the community interest in retribution and punishment can only be met through the imposition of the maximum penalty.

These cases concerned sentences imposed prior to the introduction of the predecessor to s 61. Similar observations were made in *Knight v R* at [23], a case to which s 61 applied.

Murder of police officers

The *Crimes Amendment (Murder of Police Officers) Act* 2011 amended the *Crimes Act* 1900 by inserting s 19B. Section 19B requires a court to impose a sentence of life imprisonment where a police officer is murdered in the course of executing their duty; or as a consequence of, or in retaliation for, actions undertaken by any police officer in the execution of their duty where the person knew or ought to have known that the person killed was a police officer. The person must have intended to kill the police officer, or have been involved in criminal activity that risked serious harm to police officers. Section 19B applies to offences committed after 23 June 2011: s 19B(7).

Section 19B was applied in *R v Jacobs (No 9)* [2013] NSWSC 1470.

Multiple murders

One of the factors that might justify the imposition of a life sentence is where the offender commits multiple murders: *R v Baker* (unrep, 20/9/95, NSWCCA) per Gleeson CJ.

It is permissible to take the fact that there are multiple murders into account in determining whether an offence should attract the maximum: see *R v Harris* (2000) 50 NSWLR 409 at [94]–[95]; *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

The categories of murder warranting a life sentence are not closed and the conclusion that a life sentence should be imposed is a severe one: *Rogerson v R* [2021] NSWCCA 160 at [645]. Life sentences can impose "intolerable burdens upon most prisoners because of their incarceration for an indeterminate period" and cause difficulties in prison management: *R v Garforth* (unrep, 23/5/94, NSWCCA) at 11. Below are factors which may, in certain circumstances, warrant imposition of the maximum penalty.

See generally the discussion with regard to worst cases at [10-005] **Cases that attract the maximum**; see also *The Queen v Kilic* (2016) 259 CLR 256.

Contract killings

In *R v Baartman* (unrep, 7/12/94, NSWSC), Abadee J said that the "[p]lanned and deliberate shooting of another human being for no better reason than economic gain is surely to be regarded by a civilised society as being a very serious crime."

Similar comments were made by the Court of Criminal Appeal in *R v Kalajzich* (unrep, 13/4/89, NSWCCA); and *R v Lo* [2003] NSWCCA 313 at [16], where it was also held that the gravity of the offence was enhanced by the fact the murder was motivated by a desire to prevent the victim from giving evidence in criminal proceedings.

In *R v Crofts* (unrep, 6/12/96, NSWSC) Grove J said, "A deliberate killing for payment would prima facie find its place in the worst category of case with a potential for imposition of the maximum penalty of penal servitude for life." In *R v Kalajzich* (unrep, 16/5/97, NSWSC), Hunt CJ at CL endorsed this statement, but added:

> The word "potential" is important, for not every case of a contract killing would attract the maximum penalty. There will sometimes be a distinction to be drawn between the person who pays and the person who kills. Facts mitigating the objective seriousness of the crime may well eliminate that potential, at least so far as the person who pays. [Citations omitted.]

For a contract killing to which the standard non-parole period provisions applied, see *R v Willard* [2005] NSWSC 402 at [28].

Circumstances surrounding the offence

The mutilation of the deceased's body can be taken into account as an aggravating factor in assessing the seriousness of the offence: *R v Knight* [2006] NSWCCA 292 at [28]–[29]; *R v Yeo* [2003] NSWSC 315 at [36]; *DPP v England* [1999] VSCA 95 at [35], [37], [41].

In *R v Garforth* (unrep, 23/5/94, NSWCCA), the court held that the sentencing judge was entitled to take the abduction and sexual assault of the victim into account in determining whether the offence fell within the worst case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). In *R v Hillsley* [2006] NSWCCA 312 at [20]–[22], the court held that the sexual assault of the deceased's child, which was part of the motive for the killing of the deceased, was rightly considered in assessing the objective gravity of the murder.

In *TL v R* [2020] NSWCCA 265 at [333]–[335], the court found it was not an error to take into account as part of the circumstances of the offending, evidence of previous assaults as a factor increasing the objective seriousness of the offence.

In *Charbaji v R* [2019] NSWCCA 28, the court found it was not an error to assess a murder, committed with an intent to kill, as being well above the mid-range and approaching the worst case, in circumstances where the offence was brutal, cruel and callous and involved torturing the deceased over a prolonged period of time: at [182]–[184].

Substantial harm

The harm caused by an offence can be taken into account in different ways. Part 3, Div 2 *Crimes (Sentencing Procedure) Act* 1999 empowers a court to receive a victim impact statement from the victim of an offence (defined in s 26 as either a "primary" or "family" victim). See further **Victim impact statements of family victims** at [12-838].

Another situation identified in *R v Lewis* [2001] NSWCCA 448 at [67], is where the offender knowingly deprives a child or children of their parent. In that case, Hodgson JA said the degree of harm an offender knows will be caused by the offence is highly relevant to their moral culpability and that:

> In this case, quite plainly the applicant knew that the death of Ms Pang would deprive five children of their mother, and prima facie that is serious harm, in addition to the death of Ms Pang, which the applicant knew would be caused by his offence. That is not to say that the crime is more serious because Ms Pang was in some way more worthy than other possible victims, merely to recognise the harm caused to children by the loss of their mother; and to recognise that where the offender knows that this harm will be caused, that can be relevant to the offender's culpability.

However, there is no requirement to find an intention to kill; this principle may also apply where the offender intends to inflict grievous bodily harm: *Sheiles v R* [2018] NSWCCA 285 at [40]. In *Sheiles v R,* the offender stabbed the deceased intending to inflict grievous bodily harm but this did not exclude her also being aware of the real possibility or risk of causing death by that action. She was well aware of the likely effect of the deceased's death on his daughter and terminally ill wife, and that was relevant to her moral culpability: at [39]–[42].

An aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999 is where the "injury, emotional harm, loss or damage caused by the offence was substantial". In *Aslett v R* [2006] NSWCCA 360 at [37] it was said that s 21A(2)(g) is not limited to the harm suffered by the primary victim.

Future dangerousness

Dangerousness alone is not sufficient to justify imposing the maximum penalty for murder: see *R v Hillsley* [2006] NSWCCA 312 at [24]. It is impermissible to increase an otherwise appropriate sentence merely to achieve preventative detention: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 473, 474. An offender's future dangerousness is, however, a highly relevant factor. In *R v Harrison* (unrep, 20/2/91, NSWCCA) it was held that "a sentencing judge is not required to be satisfied beyond reasonable doubt that a prisoner will in fact re-offend in the future. It is sufficient if a risk of re-offending be established by the Crown." This was confirmed in *R v Robinson* [2002] NSWCCA 359 at [48]–[50]; and *R v SLD* (2003) 58 NSWLR 589 at [40]. In

addition to any other evidence before the court, the sentencing judge is entitled to take the circumstances of the offence into account in determining the question of future dangerousness: *R v Garforth* (unrep, 23/5/95, NSWCCA). In that case it was also said:

> It is now well settled that the protection of society — and hence the potential dangerousness of the offender — is a relevant matter on sentence (*Veen v The Queen (No 2)* (1988) 164 CLR 465). This factor cannot be given such weight as to lead to a penalty which is disproportionate to the gravity of the offence. But it can be used to offset a potentially mitigating feature of the case, such as the offender's mental condition, which might otherwise have led to a reduction of penalty … in the case of homicides involving a high degree of culpability, the fact that the offender will be likely to remain a danger to the community for the rest of his or her life might justify the imposition of life imprisonment.

The High Court discussed the issue of predicting dangerousness in *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [12], [124]–[125].

Other factors

Some other factors which have been identified in murder cases as aggravating the offence or indicating that it attracts the maximum include:

- murders motivated by financial greed: *Adanguidi v R* [2006] NSWCCA 404 at [34]; *R v Smith* [2000] NSWCCA 202 at [164] and [166]
- where the motive for murder is to conceal another offence: *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].
- where the offence involved a premeditated and cold-blooded execution: *Rogerson v R* [2021] NSWCCA 160 at [645].

In *R v Hore; R v Fyffe* [2005] NSWCCA 3 the applicants sought leave to appeal against life sentences imposed for the murder of a fellow prison inmate. In his sentencing remarks with respect to each offender, Barr J said (*R v Hore* [2002] NSWSC 749 at [41]; *R v Fyffe* [2002] NSWSC 751 at [33]):

> A serious feature of the murder is that it was carried out in prison. It was a minimum security prison and the offender abused the freedom that his classification in that environment afforded him. It is particularly important that courts impose sentences calculated to deter the commission of offences in prison.

On appeal it was held that the sentencing judge did not err in treating the fact that the murder occurred in a minimum security prison as a factor warranting condign punishment: *R v Hore; R v Fyffe*, above, at [351].

[30-045] Relevance of motive

The absence of a motive for a murder may require consideration as part of the factual circumstances of the offence. In *Louizos v R* [2009] NSWCCA 71, a solicit to murder case, a finding that the absence of motive warranted a lesser non-parole period was held to be erroneous: *Louizos v R* at [102]. Absent proof of a motive, there will be no causal explanation of the crime that might be taken into account to calculate whether repetition of the circumstances leading to it is likely or whether the applicant's prospects for rehabilitation are greater or less: *Cramp v R* [2016] NSWCCA 305 at [28]–[31].

In *DL v R* [2018] NSWCCA 302, a 16-year-old boy murdered a 15-year-old girl with no apparent motive. Critical features on re-sentence in that case were the combination of the frenzied nature of the attack and the absence of any satisfactory explanation, motive or the trigger for such an attack: *DL v R* at [61].

[30-047] Murders committed in a domestic violence context

Significant weight should be given to general deterrence, denunciation and community protection when sentencing an offender who takes their partner's or former partner's life. A just sentence must accord due recognition to the dignity of the domestic violence victim: *Quinn v R* [2018] NSWCCA 297 at [243]; *Munda v Western Australia* (2013) 249 CLR 600 at [54]–[55]. The High Court in *The Queen v Kilic* (2016) 259 CLR 256 at [21] recognised a societal shift in attitudes to domestic violence which may require current sentencing practices to depart from past practices: *Quinn v R* at [245]. Domestic violence offences not infrequently conform to a pattern where a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship: *Quinn v R* at [244]; *Patsan v R* [2018] NSWCCA 129 at [39]. This is an aspect of the protection which should be accorded by the law to persons in domestic relationships: *Quinn v R* at [244]. Rigorous and demanding consequences for the perpetrators of domestic violence are necessary to protect partners, family members and the wider community: *Cherry v R* [2017] NSWCCA 150 at [78].

In *Goodbun v R* [2020] NSWCCA 77, the court (by majority) dismissed an appeal against an aggregate sentence of 41 years, 6 months imprisonment with a non-parole period of 31 years, 1 month for offences including the murder of the applicant's wife in their adult daughter's presence, notwithstanding its practical effect was to impose a life sentence. The offending was correctly found to be at the "very top of the notional range of objective seriousness" — it was carefully planned, callous and motivated by hatred of the deceased: [128], [132]; [215], [267]–[270].

See also **Domestic violence offences** at [63-500]ff.

[30-048] 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]

Commonwealth drug offences

[65-100] Criminal Code offences

Commonwealth serious drug and precursor (chemical substances used in making illicit drugs) offences are found in "Serious drug offences" Pt 9.1 Criminal Code (Cth). The offences fall into two broad groups:

1. import-export offences, including possession in this context (Div 307), and import-export offences involving children (Div 309, ss 309.12–309.15); and
2. offences arising in a domestic context, including trafficking controlled drugs (Div 302), commercial cultivation of controlled plants (Div 303), selling controlled plants (Div 304), commercial manufacture of controlled drugs (Div 305), pre-trafficking controlled precursors (Div 306), possession offences (Div 308), and drug offences involving children (Div 309, excluding ss 309.12–309.15, Div 310).

For Commonwealth drug offences the pure quantity of the drug is the critical amount: see **Quantity and purity of drug** at [65-130].

Aggregation provisions enable quantities of drugs, plants, or precursors from the same occasion or different occasions (within seven days) to be combined: (Div 311).

The import-export offences are the most commonly prosecuted offences, but many of the principles discussed in these cases are relevant to all commonwealth drug offences. These principles include: the importance of general deterrence (see [65-100]); the significance of the drug quantity and the offender's role in the offence as key determinants of objective seriousness (see [65-130]); the fact prior good character may carry less weight than for other offences (see [65-140]. Division 307 also includes offences relating to the possession (and attempted possession) of imported drugs. A sentencing court must be astute not to sentence an offender charged with a such offences for the drug's importation: see discussion at **Different offences and De Simoni** at [65-130].

Offences arising in the domestic context tend to have fewer comparative sentencing cases. This issue is discussed at **Achieving consistency** at [65-150].

For a discussion of the rationale for the introduction of the new offences and a brief outline of relevant provisions, see Ch 2 **Commonwealth serious drug offences framework** in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Summary disposal

Commonwealth indictable and summary offences are defined respectively in ss 4G and 4H *Crimes Act* 1914 (Cth). Section 4J provides for indictable offences to be dealt with summarily if certain conditions are met. Unless there is provision to the contrary, offences with a maximum penalty of greater than 10 years are strictly indictable.

[65-110] The requirements of s 16A Crimes Act 1914 (Cth)

Section 16A(1) *Crimes Act* 1914 (Cth) requires a court to "impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". This

subsection does not stand alone but must be read in conjunction with s 16A(2), which obliges a court sentencing a federal offender to take into account such matters identified as are "relevant and known to the court".

See "General sentencing principles" in **Sentencing Commonwealth offenders** at [16-010]. See also Ch 4 **The relevant sentencing principles** in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

Johnson J summarised the relevant sentencing principles for Commonwealth serious drug offences in *R v Nguyen; R v Pham* [2010] NSWCCA 238 at [72]. That summary has been referred to with approval in Victoria in *R v Nguyen* (2011) 31 VR 673 at [33] and in Queensland in *R v Hill* [2011] QCA 306 at [277].

The importance of deterrence

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held at [64] that the difficulty of detecting the offence of being knowingly concerned in the importation of heroin and the great social consequences flowing from its commission, suggest that deterrence is to be given chief weight in the sentencing task and that stern punishment will be warranted in almost every case. The majority identified other features of the offence at [64]:

> Those features will also include those that differentiate between particular cases: the quantity of drug involved, the offender's knowledge about what was being imported, the offender's role in the importation, the reward which the offender hoped to gain from participation. All these are matters properly to be taken into account in determining a sentence.

The significance of general deterrence in the context of serious drug offences irrespective of an offender's role and because of the pernicious nature of the drug trade has been repeatedly emphasised by appellate courts: *R v Chen* [2002] NSWCCA 174 at [286]; *R v Riddell* [2009] NSWCCA 96 at [57]–[58]; *Nguyen v R* (2011) VR 673 at [34]; *DPP (Cth) v Bui* (2011) 32 VR 149 at [38]–[39].

In very limited circumstances, such as when an offender comes forward to assist law enforcement authorities to frustrate the completion of a drug offence, deterrence may be of less significance: *RCW v R (No 2)* [2014] NSWCCA 190 at [74]. In such circumstances the offender should be sentenced "to provide an example of what might become of someone who has the good conscience to come forward and assist … in order to thwart serious criminal activity".

Non-custodial sentences for drug importation must be restricted to truly exceptional cases: *R v Wong and Leung* (1999) 48 NSWLR 340 per Spigelman CJ at [104]; *R v Fabian* (unrep, 16/10/92, NSWCCA) per Sully J.

[65-130] Objective factors relevant to all Commonwealth drug offences

For a discussion of the use of appellate cases and statistics in sentencing for drug offences, see **Special Bulletin 9 — November 2015 The Queen v Pham [2015] HCA 39** and **Special Bulletin 10 — December 2015 Post The Queen v Pham (2015) 90 ALJR 13 appellate cases**. The latter Bulletin has a collection of intermediate appellate cases for importing a marketable quantity of a border controlled drug which has regard to *The Queen v Pham* (2015) 256 CLR 550.

Quantity and purity of drug

While Parliament distinguishes between the maximum sentence that may be imposed for both Commonwealth and State offences on the basis of quantity, for Commonwealth offences the relevant quantity refers to the pure weight of the narcotic: *R v King* (1978) 24 ALR 346.

The lists of applicable trafficable, marketable and commercial quantities for each type of border controlled, or controlled, drug are set out in the *Criminal Code Regulations* 2019 (Cth): see Pt 3, Div 1 and Schs 1 and 2. The amounts for Commonwealth drug offences are based on the pure amount of the drug.

In *Wong v The Queen* (2001) 207 CLR 584, Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal erred in offering a grid founded entirely on the gravity of the offence, as measured only by the weight of narcotic concerned and against which future sentences were to be judged: at [71]. The starting point given by the Court of Criminal Appeal was based on the false premise that the gravity of the offence can usually, or perhaps even always, be assessed by reference to the weight of the narcotic involved: at [73]; see also Kirby J at [135].

The matters properly taken into account in fixing a sentence include the quantity of the drug involved, the offender's knowledge and role in the importation and the offender's anticipated reward from participating. Weight is not the chief factor to be considered in fixing a sentence: *Wong v The Queen* at [67]ff.

Both Parliament and the courts have eschewed the approach that penalties should be proportional to quantity: *R v Doan* (unrep, 27/9/1996, NSWCCA); *R v Postiglione* (1991) 24 NSWLR 584; *R v Schofield* [2003] NSWCCA 3. In *R v Vo* [2000] NSWCCA 440, Wood CJ at CL said at [32]:

> Error can enter into the sentencing process if an attempt is made thereafter to graduate sentences by some mathematical exercise referable to the precise quantity involved or known by the offender to have been imported.

However, that there is some relationship between the quantity of drug involved in the offence and the sentence ultimately imposed is reflected by the statement of the majority in *Wong v The Queen* at [64]:

> In general, however, the larger the importation, the higher the offender's level of participation, the greater the offender's knowledge, the greater the reward the offender hoped to receive, the heavier the punishment that would ordinarily be exacted. It is by these kinds of criteria that comparisons are to be made between examples of the offence and the sentences that are or were imposed.

See also: *Tyn v R* [2009] NSWCCA 146 at [28]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [307]. In *R v Nguyen* [2005] NSWCCA 362 at [110], Howie J concluded that in an appropriate case the quantity involved might place an offence in the worst case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). His Honour's approach was endorsed by the WA Court of Appeal in *Sukkar v R (No 2)* [2008] WASCA 2 at [46].

In *Wong v The Queen* at [68], the court recognised that not all offenders involved in importation of narcotics will know or even suspect how much pure narcotic is being imported but the size of an importation has increased significance when an offender does have some knowledge of the quantity involved.

In addition, as Greg James J observed in *R v Soonius* (unrep, 29/5/98, NSWCCA) in referring to reliance being placed upon quantity alone:

> The very provisions of the *Crimes Act* 1914, and in particular s 16A, speak against such a simplistic approach. The quantities involved must be considered along with all the matters to which a court's attention is directed by the Act and by principle.

Importing more than one border controlled drug

Whether importing more than one kind of border controlled drug on the same occasion significantly increases the overall criminality of the offending conduct depends on the facts of the particular case. Some degree of accumulation is not necessarily required where the importation of more than one type of drug is the subject of separate counts. The guiding principle is to ensure the total effective sentence properly reflects the overall criminality involved in all the offences: *MEG v R* [2017] WASCA 161 at [22].

Prohibition on harm-based categories

Any attempt to rank the seriousness of narcotics either under the *Customs Act* 1901 (Cth) or the *Criminal Code* (Cth) is inappropriate. In *Adams v The Queen* (2008) 234 CLR 143, Gleeson CJ, Hayne, Heydon, Crennan and Kiefel JJ stated at [10]:

> … Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme.

The High Court in *Adams v The Queen* rejected the appellant's assertion that he should have been sentenced on the basis that MDMA was less harmful than heroin: at [9]–[10].

In *R v Corbett* [2008] NSWCCA 42 (decided before *Adams v The Queen*), the sentencing judge erred by concluding that "GBL is a drug of a lesser order than the so called 'hard drugs'": at [4]. The many border controlled drugs and quantities listed in s 314.4 *Criminal Code* (Cth) "are only connected by the common thread of legislative proscription": at [45]. Harrison J stated at [47]:

> Except by reference to quantity, there would appear to be no scope for judicial or forensic enquiry about the individual characteristics of any of the listed substances. For example, even with the benefit of the most highly respected expert opinion that listed substance "A" is socially, pharmacologically, or in every other relevant way wholly benign or alternatively exceedingly dangerous, there does not appear to be a legitimate avenue for the use of that information to inform the sentencing discretion or to substantiate a submission.

Notwithstanding these statements of principle, past analysis of the sentences imposed for offences involving different types of drugs suggest that there is some difference of treatment, in terms of the sentence imposed, based on drug type. See Ch 6 **Sentencing patterns for the period 2008–2012** in particular at 6.3.11–6.3.12 in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014. See also *DPP (Cth) v Maxwell* [2013] VSCA 50; *R v Hill* [2011] QCA 306.

Role of offender and level of participation

In order to determine an offender's culpability in an importation offence it is essential for the sentencer, if possible, to determine the offender's role in the criminal enterprise:

R v Laurentiu (unrep, 1/10/92, NSWCCA); *R v Bimahendali* [1999] NSWCCA 409. The shortcomings of attempting to categorise the role of the offender were recognised by the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, in *Olbrich v The Queen* (1999) 199 CLR 270 at [14]:

> However, the utility of such an exercise is necessarily limited by the extent to which the material facts are known. What may be a convenient shorthand method of describing the facts of particular cases should not be elevated to an essential task to be undertaken in every case, regardless of whether that is possible or appropriate.

Sometimes, the offender's role is not known to the court. In such cases, the court is not obliged to find facts favourable to the offender or to accept his or her version of events: *Olbrich v The Queen* at [27]–[28].

It is accepted that the offender's role and level of participation in the criminal enterprise are more important than the mere quantity of drugs, subject to the recognition that the gradation of seriousness is reflected in the increase in statutory maximum penalties as the quantity of drug increases: *R v MacDonnell* [2002] NSWCCA 34. The quantity of the drug remains material, given that the size of the profit and the harm inflicted are likely to be proportional to the weight of the drug: *R v Stanbouli* [2003] NSWCCA 355 at [102].

In *R v Stanbouli*, Spigelman CJ at [3], with whom Carruthers AJ agreed at [179], held that life imprisonment should be reserved as "the norm" for those at the top of the importation hierarchy, rather than those who "provide important assistance", as Hulme J held at [113]. Note the schedule of cases assembled by Hulme J at [144]–[170], including several where sentences of life imprisonment were imposed on offenders described as "mid-level executives". See **Mandatory Life Sentences under s 61** at [8-600].

In *R v Flavel* [2001] NSWCCA 227, the court rejected a submission that the categorisation of the offender's role as a mid-level manager in the importation of 117 kg of pure cocaine called for the imposition of less than the statutory maximum penalty. The court upheld a sentence of life with a non-parole period of 25 years as being within the sentencing judge's discretion. Similarly, in *R v Gonzales-Betes* [2001] NSWCCA 226, the court upheld the sentence of life with a non-parole period of 22 years for a co-offender regarded as a "mid-level" executive, "not the ring leader, chief executive or chairman of the board" in the same importation.

Distinguishing between "couriers" and "principals"

In *Olbrich v The Queen* (1999) 199 CLR 270, the majority, Gleeson CJ, Gaudron, Hayne and Callinan JJ, recognised that a distinction between "couriers" and "principals" may usefully describe different kinds of participation in a single enterprise of importation. However, too much reliance should not be placed upon these terms when sentencing a particular offender. The majority said at [19]:

> Further, it is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a "courier" or a "principal" must not obscure the assessment of what the offender did.

The importance of this principle and the difficulty of making an assessment of a particular offender's role were reiterated in *Kuo v R* [2018] NSWCCA 270 at [118] and

in *Klomfar v R* [2019] NSWCCA 61 at [40]. Drug syndicates, which by their nature are secretive, do not operate transparently and the "rank" of a drug offender within the criminal organisation is necessarily opaque and "more a matter of speculation than a process of rationally drawing inferences": *Kuo v R* at [118], [123]. It remains important for a sentencer to focus on what the offender actually did: *Kuo v R* at [118]; see also *Kook v R* [2001] NSWCCA 122 at [15].

Couriers, and those low in the drug hierarchy, generally receive a lesser sentence than persons at a higher level: *Tyler v R* [2007] NSWCCA 247 at [79]; *R v Chea* [2008] NSWCCA 78 at [34]. Justice Simpson explained in *Tyler v R* at [79]–[80]:

> Those low in the hierarchy, such as couriers, are usually to be sentenced less harshly, because, although they are of fundamental importance in the execution of the object of the conspiracy — in a drug importation conspiracy, without couriers, no drug could or would be imported — they have no managerial or decision making function; and, experience shows, usually derive the least monetary reward.
>
> By contrast, those who have managerial or decision making functions are seen to occupy a more senior position, and, accordingly, to be more culpable. A relevant factor here is the level of profit to be derived.

Nonetheless, there is no inevitable correlation between an offender said to be in the lower echelon of a hierarchy, and the severity of the punishment they can expect to, and will, receive: *Klomfar v R* at [41].

Couriers involved in the same importation can be differentiated on the basis of their reward: *Seng v R* [2007] NSWCCA 335. At first instance, the applicant in *Seng v R* was sentenced by the same judge to an identical non-parole period as the co-offender, and a head sentence of only 6 months less. The couriers travelled on the same flight after ingesting pellets of heroin but the Court of Criminal Appeal found that their roles were materially different. The co-offender participated in the importation for significant financial reward, being promised a cash payment of $30,000 to $35,000, and he secured the applicant's involvement, whereas the applicant acted out of a sense of obligation to a man higher in the enterprise: at [22]. The applicant's financial gain amounted to payment of his expenses while he stayed in Cambodia for a month, and the airfare to Australia which would allow him to see his son.

Role and conspiracies

The Court of Criminal Appeal in *Tyler v R* [2007] NSWCCA 247 confirmed that the relevance of the offender's role in sentencing for drug conspiracies refers to the seniority of the offender whose sentence is under consideration: at [79]. The court found that the sentencing judge erred in assessing the role of one co-offender, Chalmers, who booked flights and obtained tickets for the courier (the other co-offender, Tyler), as being relatively minor in the overall operation. The judge also found that the role of Chalmers was diminished by his lack of involvement in travelling overseas to obtain the drugs. Ordinarily, those who carry the drugs are at the bottom of the hierarchy, while those in higher positions distance themselves from physical contact with the drugs: at [75]. To treat Tyler as more culpable because of his close physical connection to the drugs inverts the conventional approach to blameworthiness in drug conspiracies: at [76]. Justice Simpson stated at [83]–[84]:

> Identifying the "role" of a participant by reference to his position in the organisational hierarchy is a very different proposition from isolating the precise physical acts that can

> be attributed to the particular offender, and selecting the punishment by reference solely to those isolated acts. It would be quite artificial, and contrary to the very concept of a conspiracy, to dissect with precision the physical acts of each of the conspirators, and to sentence that conspirator for those acts alone. That would be a negation of the complex inter-connection between the various participants, and the organisational nature of a conspiracy. It would represent too literal an application of the decisions that identify the "role" of any participant as a relevant factor in the sentencing exercise. It would be to ignore the essential feature of the offence of conspiracy — the agreement to participate in an organised criminal activity.
>
> That is not to say that the physical acts of the offender whose sentence is under consideration are irrelevant. They are relevant, as one part of a complex tapestry: see *R v Nguyen* [2005] NSWCCA 362; 157 A Crim R 80 at [102]. That, in my opinion, is the first, and most fundamental, flaw in the approach to sentencing here taken.

Different offences and De Simoni

There has been a debate about the extent to which a judge can take into account at sentence facts relating to an importation when an offender is charged with a possession offence (and attempted possession): *El-Ghourani v R* [2009] NSWCCA 140. The starting point is that there is no obligation to inquire about the course of events before or after an offence and it is wrong to sentence an offender for criminality for which they have not been charged: *El Jamal v R* [2021] NSWCCA 105 at [24], [26]; [64]; *The Queen v Olbrich* (1999) 199 CLR 270 at [18], [22]; *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

However, some circumstances relating to the process of the drug's importation may also be relevant to a charge of possession: *El-Ghourani v R*, per Spigelman CJ at [30]. His Honour said at [33] that:

> … the act of possession can be attended by a wide range of moral culpability. The circumstances in which a person charged with a possession offence came into possession of the offending matter, and what it was that the person intended to do with that matter, can all be relevant to determining the degree of moral culpability attached to the act of possession itself.

Having regard to the broader circumstances or overall context of an offender's involvement in a drug importation for a possession offence is not inconsistent with *The Queen v Olbrich* provided the sentencing judge focuses on the crime charged and does not treat complicity in the uncharged importation as an aggravating factor: *El-Ghourani v R* [2009] NSWCCA 140 at [30]; *The Queen v Olbrich* at [18] referring to *The Queen v De Simoni*. Prosecuting authorities have an obligation not to seek to rely on circumstances as aggravating the possession offence, where those circumstances constitute proof of a distinct charge: *El Jamal v R* at [64] per Garling J (Payne JA and Wright J agreeing).

It is not always easy to distinguish between permissible and impermissible evidence concerning an importation when an offender is only charged with possession: *El Jamal v R* at [32], referring to *Balloey v R* [2014] NSWCCA 165 at [24]. The judge must keep firmly in mind that the offender is not charged with importing the drugs and acknowledge that the evidence could not be used to impose a greater penalty on the offender: *R v Guiu* [2002] NSWCCA 181 at [2]–[3]; *El-Ghourani v R* at [6], [9], [32]. In *El Jamal v R*, the Court of Criminal Appeal found the sentencing judge erred by

making frequent references to "the importation offence" and placing importance on the findings about the offender's role in the uncharged importation: at [38]. Likewise, the judge in *R v Bousehjin* [2003] NSWCCA 86 erred by incorrectly focusing on the uncharged importation and failing to focus on the attempted possession offence: at [26]. By contrast, the judge in *El-Ghourani v R* stated that the offender "was acting as a principal in Australia in this importation" but correctly maintained the focus on the possession charge: at [35].

[65-140] Subjective factors

Assistance to authorities

In sentencing federal offenders, ss 16A(2)(h) and 16AC (previously s 21E) *Crimes Act* 1914 (Cth) provide statutory obligations for an offender's assistance to authorities to be taken into account.

Assistance to authorities takes on particular significance in importation offences because of the "notorious difficulties of detecting the crime of importation": *R v Wong and Leung* (1999) 48 NSWLR 340. The fundamental importance of general deterrence in sentencing drug offenders, at whatever level in the hierarchy, gives way to the greater community interest in allowing a significant discount for assistance by couriers whose implication of principals contributes to the disruption of drug importation networks: *R v Perrier (No 2)* [1991] 1 VR 717 at 725.

However, as was said by Gleeson CJ in *R v Gallagher* (1991) 23 NSWLR 220 at 232:

> Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which support the principles set out above, it constitutes an affront to community standards

ZZ v R [2019] NSWCCA 286 is an importation case under s 307.2 of the *Criminal Code* (Cth), in which fresh evidence established that the applicant's assistance to the authorities was of much greater value than was thought at the time of sentence: at [30]. Evidence of events post-sentencing is only admissible to determine whether to quash a sentence in confined circumstances. One exception is to show the true significance of facts in existence at the time of sentence: *ZZ v R* at [20]–[22]; *R v Smith* (1987) 44 SASR 587 at 588; *Khoury v R* [2011] NSWCCA 118 at [113]. In resentencing the applicant, the initial discount of 25% for the plea of guilty was increased 35% to also take account of the assistance: *ZZ v R* at [33].

See **Power to Reduce Penalties for Assistance to Authorities** for constraints on the application of the discount at [12-220] and *Co-operation with law enforcement agencies: ss 16A(2)(h) and 16AC* in **General sentencing principles applicable** at [16-010] for a discussion of the relevant principles.

Entitlement to discount and extent of the benefit

In *R v A* [2004] NSWCCA 292, Wood CJ at CL said at [25]:

> The availability of a discount for assistance, depending on its worth, in order to foster the interests of law enforcement and to recognise the contrition involved as well as the potential risks to the offender, is well recognised: *R v Salameh* (1991) 55 A Crim R

> 384, *R v Gallagher* (1991) 23 NSWLR 220, *R v Cartwright* (1989) 17 NSWLR 243 and *R v Dinic* NSWCCA 3 September 1997. It is important, if the purpose for allowing a discount is to be achieved, that the offender standing for sentence be clearly appraised of the fact that a benefit was conferred.

While entitlement to a discount does not necessarily depend on the effectiveness of the information supplied, the value of the assistance is relevant to the evaluation of the discount. In *R v Barrientos* [1999] NSWCCA 1, Abadee J reviewed the authorities on assistance in Commonwealth offences, including *R v Dinic* (1997) 149 ALR 488 and *R v Cartwright* (1989) 17 NSWLR 243, and said at [47]:

> Thus in the determination of any discount the relevance and importance of the benefits flowing from assistance is important: see also *R v Gallagher* (1991) 23 NSWLR 220. There is no fixed tariff for assistance given. Where there is significant assistance the amount "customarily given in New South Wales which with few exceptions, appears to range from 20 per cent to 50 per cent": see *R v Chu* per Spigelman CJ at 6–7. That said, the law does not mandate the identification of a precise discrete quantifiable discount for assistance or that the assistance falls within the range. The matter of that discount or its quantification will depend upon a number of factors and the facts of the particular case under consideration. I do not see the authorities suggesting that once any assistance is found then the allowance for such must reflect a range. The worth of the assistance may take it below the range. Whether it does is a matter of fact to be evaluated in accordance with the proved circumstances of the case.

Good character

Good character carries less weight in crimes involving drugs than for many other offences: *R v Leroy* [1984] 2 NSWLR 441 per Street CJ at 446–447. This principle is usually of particular relevance in relation to drug couriers involved in importation where persons with clear records are selected so as to not attract suspicion: *R v Lopez-Alonso* (unrep, 7/3/96, NSWCCA); *R v Salgado-Silva* [2001] NSWCCA 423.

In *R v X* [2002] NSWCCA 40, the court rejected a submission that, as good character has limited significance in crimes involving drugs, then having a previous conviction cannot be of major significance in determining an appropriate sentence. On the contrary, Smart AJ said at [57] that:

> This does not follow. Having a conviction for a previous serious drug offence is significant for sentencing purposes.

[65-150] Achieving consistency

The primary responsibility of a sentencing judge is to ensure that the sentence imposed on an offender is consistent with others and the primary mechanism for achieving this is through the application of the relevant sentencing principles: *Hili v The Queen* (2010) 242 CLR 520 at [40]; *Barbaro v The Queen* (2014) 253 CLR 58 at [26].

In *Barbaro v The Queen*, the High Court held (at [40]) that the prosecutor's duty to assist the court on sentence did not extend to providing the court with an available range of sentences but that that practice was to:

> … be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less comparable cases.

The synthesis of "raw material" which includes sentencing statistics and information about the sentences imposed in comparable cases is the task of the sentencing judge: *Barbaro v The Queen* at [41]. See *Achieving consistency in sentencing* in **Relevance of decisions of other State and Territory courts** at [16-002].

In *Wong v The Queen* (2001) 207 CLR 584, the High Court overturned the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* (1999) 48 NSWLR 340. In their joint judgment, Gaudron, Gummow and Hayne JJ held at [87] that, not only was there no jurisdiction or power to issue the guideline, but the principles which informed its construction were flawed by the error in selecting weight of the narcotic as the chief factor in sentencing.

As to the continuing usefulness of the guideline promulgated by the Court of Criminal Appeal in *R v Wong and Leung* see in particular *Guideline judgments and s 16A* in **General sentencing principles applicable** at [16-010] and *Impact of repeal of s 16G* in **Remissions** at [16-060].

A number of intermediate appellate decisions concerning Commonwealth serious drug offences annex comparative case schedules: see, for example, *R v Lee* [2007] NSWCCA 234; *Law v R* [2006] NSWCCA 100; *R v To* [2007] NSWCCA 200; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *DPP (Cth) v Maxwell* (2011) 31 VR 673; *OPQ v R* [2012] VSCA 115; and *Pham v R* [2014] VSCA 204. These schedules may usefully promote sentence consistency at a national level because they can inform a court of national sentencing practice: *DPP (Cth) v De La Rosa* at [193]. However, it would be wrong to use schedules, such as the one reproduced in *DPP (Cth) v De La Rosa*, by endeavouring to fit an offender into one of the nominated categories, because of the individual nature of each sentencing exercise: *R v Holland* [2011] NSWCCA 65 at [3].

In *R v Maldonado* [2009] NSWCCA 189 at [54], the court accepted that cases decided in respect of different offences under the Code with the same maximum penalty provided "a rough guide to the range of sentences imposed for Commonwealth offences".

For some of the newer offences in Pt 9.1 Criminal Code (Cth), such as manufacturing or trafficking controlled drugs, it is also open to a sentencing judge to have regard to sentences imposed for the more established Commonwealth drug offences and to seek guidance from the long-established State equivalent offences: see *R v Cheung* (2010) 203 A Crim R 398 at [130]–[131]; *R v Nakash* [2017] NSWCCA 196 at [18].

However, in *Rajabizadeh v R* [2017] WASCA 133, the WA Court of Appeal observed that equating sentences for Commonwealth offences with similar State offences to achieve consistency was wrong as a matter of principle and that attempting to achieve consistency with the State offences in each jurisdiction could result in inconsistency between States in sentences for the same federal offence due to differing maximum penalties and sentencing ranges: *Rajabizadeh v R* at [68]. Given the sentencing framework under Pt IB *Crimes Act* 1914 (Cth) applies, in the absence of comparable cases, an assessment of the sentence imposed must have regard to the maximum penalty, the seriousness of the offence, the relevant mandatory factors set out in s 16A(2) *Crimes Act* and any other relevant aggravating or mitigating factors: *Rajabizadeh v R* at [71].

See further the discussion at 5.3.2.3 concerning the use of comparable cases in Ch 5 **The imperative of achieving reasonable consistency** in P Mizzi, Z Baghizadeh and P Poletti, *Sentencing Commonwealth drug offenders*, Research Monograph 38, Judicial Commission of NSW, Sydney, 2014.

[The next page is 32301]