Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 51

October 2022

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

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SUMMARY OF CONTENTS

Update 51

Update 51, October 2022

Update 51 amends the Bench Book to incorporate recent case law and legislative developments. The following chapters have been revised:

Fact finding at sentence
This chapter has been revised at:

- [1-405] **Onus of proof**, [1-410] **Standard of proof** and [1-450] **Fact finding following a guilty plea** to add *Strbak v The Queen* (2020) 267 CLR 494 confirming a plea of guilty admits those matters which are the essence of the charge and does not relieve the prosecution of its obligation to prove the facts.
- [1-440] **Fact finding following a guilty verdict** to add *Tarrant v R* [2018] NSWCCA 21 where it was not permitted to rely on evidence at sentence, favourable to the prosecution, that was inconsistent with that given at trial..
- [1-460] **Agreed statements of fact** to add *Kareem v R* [2022] NSWCCA 188 where unnecessary complexity was caused by the tender of different agreed facts for two co-offenders making the proper assessment of the roles of each difficult.
- [1-490] **Untested self-serving statements** to add *Luque v R* [2017] NSWCCA 226 and *Lloyd v R* [2022] NSWCCA 18 concerning the approach to be taken to untested self-serving statements by an offender to an expert witness.

Setting terms of imprisonment
Commentary has been updated at [7-516] **Giving effect to finding of special circumstances** to add a reference to the case of *Ozan v R* [2021] NSWCCA 231.

Concurrent and consecutive sentences
This chapter has been revised at [8-220] **Totality and sentences of imprisonment** and [8-240] **Sentences for offences involving assault by convicted inmate** with the addition of the cases of *Hraichie v R* [2022] NSWCCA 155, concerning whether a particular sentence is a "crushing sentence" and the application of s 56 of the *Crimes (Sentencing Procedure) Act* 1999, and *R v Perrin* [2022] NSWCCA 170 concerning the operation of s 58 *of the Crimes (Sentencing Procedure) Act*.

Parity
This chapter has been revised at [10-840] **Severity appeals and parity** to add a reference to the case of *Kadwell v R* [2021] NSWCCA 42.

Guilty plea to be taken into account
This chapter has been revised at [11-515] **Guilty plea discounts for offences dealt with on indictment** to take into account *Doyle v R* [2022] NSWCCA 81 and *Gurin v R* [2022] NSWCCA 193 concerning mandatory discounts for the utilitarian value of a guilty plea.

Victims and victim impact statements
This chapter has been revised at [12-870] **Federal offences** to update a change in the section number of the federal provisions related to victims (s 16AAAA) in the *Crimes Act* 1914 (Cth).

Dangerous driving and navigation
This chapter has been revised at [18-350] **Motor vehicle manslaughter** to include *Davidson v R* [2022] NSWCCA 153, and at [18-410] **Licence disqualification** to include *Pearce v R* [2022] NSWCCA 68 which concerns licence disqualifications under ss 205 and 206B of the *Road Transport Act* 2013.

Murder
This chapter has been amended at [30-020] **Standard non-parole periods** to include reference to *R v Hopkinson; R v Robertson* [2022] NSWCCA 80 which considered the standard non-parole period

in the case of child victims, and at [30-080] **Accessories** to include reference to *Ah Keni v R* [2021] NSWCCA 263 concerning accessories after the fact to murder. At [30-095] **Cause loss of foetus (death of pregnant woman)** commentary has been added on the offence of cause loss of foetus (death of pregnant woman) following the commencement of the *Crimes Legislation Amendment (Loss of Foetus) Act* 2021. The new provision s 54B applies to offences committed on/after 29 March 2022. [30-100] **Attempted murder** has been revised in light of *R v Askarou* [2020] NSWCCA 222, an example of an offence against s 29 of the *Crimes Act* 1900.

Manslaughter and infanticide
Commentary has been updated at [40-010] **Categories of manslaughter** in light of *Newburn v R* [2022] NSWCCA 139 which summarises principles of the offence of manslaughter, including the necessity to identify the circumstances as the offender perceived them at the time of the criminal conduct, and a reference to *Davidson v R* [2022] NSWCCA 153 has been added. Commentary has been added at [40-075] on the offence of **cause loss of foetus (death of pregnant woman)** following the commencement of the *Crimes Legislation Amendment (Loss of Foetus) Act*. The new provision s 54B applies to offences committed on/after 29 March 2022.

Firearms and prohibited weapons offences
This chapter has been substantially revised and rewritten. Commentary on **definitions** at [60-025] and remote-controlled possession and use of firearms at [60-055] **Other miscellaneous offences** has been added. The chapter has also been revised at:

- [60-040] **Assessing the objective seriousness of possession/use** to add *Barnes v R* [2022] NSWCCA 40, *Chandab v R* [2021] NSWCCA 186 and *R v SY* [2020] NSWCCA 320 where the objective seriousness of the offender's possession of a firearm as part of their involvement in an offence was addressed.
- [60-050] **Section 51D: possession of more than three firearms** to add *Aird v R* [2021] NSWCCA 35 where the objective seriousness of the offender's possession of firearms for over 10 years was considered, and *Weaver v R* [2021] NSWCCA 215 where the fact an offender shortens a firearm, although not an element of the offence, may be taken into account as part of the context of the offending.
- [60-070] **Firearms offences under the Crimes Act 1900** to add *Sumrein v R* [2019] NSWCCA 83 and *Ah-Keni v R* [2020] NSWCCA 122 concerning the consideration of motive in firearms offences relating to public order.

Appeals ,
This chapter has been revised and rewritten, and outdated tables for sentence appeals removed. References to Criminal Appeal Rules have been updated to refer to the Supreme Court (Criminal Appeal) Rules 2021 (NSW) which commenced on 1 May 2021. The chapter has also been revised at:

- [70-040] **Section 6(3) — some other sentence warranted in law** to add *Newman (a pseudonym) v R* [2019] NSWCCA 157, *Tomlinson v R* [2022] NSWCCA 16 and *Ibrahim v R* [2022] NSWCCA 134 which address the use of the term "material" to distinguish between errors impacting on the sentencing discretion and those that do not, and *Li v R (Cth)* [2021] NSWCCA 100 where an arithmetical error was found to affect the non-parole period and was corrected without the court proceeding to re-sentence.
- [70-060] **Additional, fresh and new evidence received to avoid miscarriage of justice** to add *Barnes v R* [2022] NSWCCA 140 containing a summary of the relevant principles relating to the admission of fresh or new evidence on appeal, and *Lissock v R* [2019] NSWCCA 282 where the applicant was re-sentenced due to his medical condition.
- [70-090] **Purpose and limitations of Crown appeals** to add *R v Primmer* [2020] NSWCCA 50 where the court, in a Crown appeal, took into account the respondent's mental distress in exercising its discretion to decline to intervene.

Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 51

October 2022

FILING INSTRUCTIONS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

FILING INSTRUCTIONS

Update 51

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Fact finding at sentence

[1-400] The judicial task of finding facts

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

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

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

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

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

[1-405] Onus of proof

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

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

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

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

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

[1-410] Standard of proof

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

[1-420] Disputed factual issues

The court must do its best to find facts concerning the offending and the offender's moral culpability. In some cases it is not possible to ascertain everything that is relevant especially where an offender chooses not to offer any evidence on the plea: *Filippou v The Queen* (2015) 89 ALJR 776; [2015] HCA 29 at [70]. Framing the fact finding process by using terms such as the onus and standard of proof may give a misleading impression that all disputed issues of fact related to sentencing must be resolved for or against the offender: *Weininger v The Queen* (2003) 212 CLR 629 at [19]. Some disputed issues of fact cannot be resolved in a way that goes either to increase or to decrease the sentence that is to be imposed: *Weininger v The Queen* at [19]. It is sometimes not possible for the court to ascertain everything that is relevant. Where that occurs the court must proceed on the basis of what is proved and leave to one side what is not proved to the requisite standard: *Filippou v The Queen* at [70]. The court is not bound to adopt the view of the facts most favourable to the offender: *Filippou v The Queen* at [5], [70], [72]; *Weininger v The Queen* at [20]. In this respect, the fact finding process in Australia differs from the common law jurisdictions of England, Canada and New Zealand: *Filippou v The Queen* at [71]. Therefore, in *Filippou v The Queen*, there was no error for the court to sentence the offender on the basis that the origin of the gun was unknown after the court had rejected the offender's submissions to the contrary.

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

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

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

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

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

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

[1-440] Fact finding following a guilty verdict

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

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

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

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

In *Chiro v The Queen* [2017] HCA 37, the court held that the approaches taken in *Cheung v The Queen* (2001) 209 CLR 1 and *R v Isaacs* (1997) 41 NSWLR 374 were not intended to govern sentencing for a persistent sexual offence charge. See further **Persistent sexual abuse of child: s 66EA** at [17-500].

[1-450] Fact finding following a guilty plea

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

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

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

[1-455] Plea agreements

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

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

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

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

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

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

Plea agreements should ordinarily be recorded in writing

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

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

[1-460] Agreed statements of facts

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

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

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

However, in *CL v R* [2014] NSWCCA 196, the applicant unsuccessfully sought to challenge the agreed statement of facts to which his legal representatives did not

object. The court held that the applicant was bound by the conduct of his counsel at the sentence hearing: *CL v R* at [44]. On the other hand, the statement of facts tendered by the applicant had no such standing: *CL v R* at [45].

Must be comprehensible

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

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

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

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

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

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

Tender of additional documents

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

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

Assigning a higher degree of culpability

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

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

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

Form 1 documents and agreed facts

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

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

Parity and agreed facts

For a discussion on parity and agreed facts, see *Baquiran v R* [2014] NSWCCA 221 in **Parity** at [10-800].

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

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

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

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

(c) the judge thinks fit to do so.

Section 102(1) states that the court "may proceed to sentence or otherwise deal with an accused person brought before the Court under section 97 as if [they] had on arraignment … pleaded guilty to the offence on an indictment filed or presented". Of the equivalent provision, s 51A(1)(d)(ii) *Justices Act* 1902 (rep), Carruthers AJ said, in *R v Radic* [2001] NSWCCA 174 at [38], that the judge can direct that a plea of not guilty be entered and the matter proceed to trial.

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

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

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

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

Section 4(3) provides:

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

Section 4(4) provides:

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

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

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

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

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

[1-490] Untested self-serving statements

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

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

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

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

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

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

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

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

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

[1-500] De Simoni principle

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

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

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

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

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

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

See also **Section 21A Factors "in addition to" any Act or rule of law** at [11-050].

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

Taking into account aggravating facts for offences with the same maximum

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

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

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

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

[The next page is 2001]

Setting terms of imprisonment

Part 4 Div 1 *Crimes (Sentencing Procedure) Act* 1999 (ss 44–54, inclusive) contains provisions for setting terms of imprisonment, including non-parole periods, the conditions relating to parole orders, and fixed terms. Different provisions apply depending on whether the court imposes a sentence for a single offence or an aggregate sentence, and whether the offence is in the standard non-parole period Table of Pt 4 Div 1A. Unless the court is imposing an aggregate sentence, it must comply with the requirements of Pt 4 Div 1 by imposing a separate sentence for each offence: s 53(1).

[7-500] Court to set non-parole period

Section 44(1)–(3) *Crimes (Sentencing Procedure) Act* 1999 provides:

> (1) Unless imposing an aggregate sentence of imprisonment, when sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
>
> (2) The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).
>
> (2A) Without affecting the requirement to set a non-parole period for a sentence, a court imposing an aggregate sentence of imprisonment in respect of 2 or more offences on an offender may set one non-parole period for all the offences to which the sentence relates after setting the term of the sentence.
>
> (2B) The term of the sentence that will remain to be served after the non-parole period set for the aggregate sentence of imprisonment is served must not exceed one-third of the non-parole period, unless the court decides that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).
>
> (2C) The court need not indicate the non-parole period that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence unless it is required to do so by section 54B.
>
> (3) The failure of a court to comply with subsection (2), (2B) or (2C) does not invalidate the sentence.

Use of "first required to set" in s 44(1) does not mean "determine"

The fact s 44(1) provides that "the court is first required to set a non-parole period" does not mean the non-parole period must first be determined: *Musgrove v R* [2007] NSWCCA 21 at [44], or that a non-parole period should be set first which is thereafter immutable: *R v Way* (2004) 60 NSWLR 168 at [111]–[113], citing *R v Moffitt* (1990) 20 NSWLR 114 with approval; *Perry v R* [2006] NSWCCA 351 at [14]. It is well established that s 44(1) does not require that the reasoning process begin with the selection of the non-parole period; it is the pronunciation of orders that is required to be done in that way: *Eid v R* [2008] NSWCCA 255 at [31]. Simpson J added in *Musgrove v R* at [44] that a literal reading of s 44(1) may lead the court into error:

> To determine, initially, the non-parole period, before determining the total sentence, would, in my opinion, (where special circumstances are then found) be conducive to error of the kind exposed in *Huynh* [[2005] NSWCCA 220]. A finding of special

> circumstances, after the determination of the non-parole period, would provoke an extension, beyond proper limits, of the balance of term. Sentencing judges need to be wary of taking a course that might lead to that error.

Section 44(1) error in pronouncement of individual sentence

The failure to follow the terms of s 44(1) by pronouncing the non-parole period first and then the balance of term is a technical error which must be corrected: *R v Cramp* [2004] NSWCCA 264; *Itaoui v R* [2005] NSWCCA 415 at [17]–[18]; *Eid v R* [2008] NSWCCA 255 at [31]. If that is the only error, the appellate court should not proceed on the assumption that the exercise of the sentencing discretion miscarried: *R v Cramp* at [44]; *R v Smith* [2005] NSWCCA 19 at [10].

Considerations relevant to setting the non-parole period

The non-parole period is imposed because justice requires that the offender serve that period in custody: *Muldrock v The Queen* (2011) 244 CLR 120 at [57]. It is the minimum period of actual incarceration that the offender must spend in full-time custody having regard to all the elements of punishment including rehabilitation, the objective seriousness of the crime and the offender's subjective circumstances: *Power v The Queen* (1974) 131 CLR 623 at 628–629, applied in *Deakin v The Queen* [1984] HCA 31; *R v Simpson* (2001) 53 NSWLR 704 at [59]; *R v Ogochukwu* [2004] NSWCCA 473 at [33]; *R v Cramp* [2004] NSWCCA 264 at [34]; *Caristo v R* [2011] NSWCCA 7 at [27]; *R v MA* [2004] NSWCCA 92 at [34]; *Hili v The Queen* (2010) 242 CLR 520 at [40]. This principle sets a lower limit to any reduction that might be thought appropriate on the basis of converting punishment into an opportunity for rehabilitation: *R v MA* at [33].

The risk of re-offending is a relevant factor in setting the minimum term: *Bugmy v The Queen* (1990) 169 CLR 525 at 537. However, while great weight may be attached to the protection of society in an appropriate case, the sentence imposed should not be more severe than that which would otherwise be appropriate: *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.

The factors relevant to fixing the term of the sentence are the same as the non-parole period, but the weight given to each factor may differ: *R v MA* at [33]. For example, a serious offence warrants a greater non-parole period due to its deterrent effect upon others, but the nature of the offence does not assume the importance it has when the head sentence is determined: *R v MA* at [33], citing *Bugmy v The Queen* at 531–532. Chief Justice Spigelman said of the factor general deterrence in *R v Simpson* at [64]:

> Considerations of general deterrence are at least equally significant to both decisions [fixing the term of the sentence and the non-parole period] which are, in any event, interrelated. Indeed the purport of the High Court's decision in *Power* was to reject the proposition that considerations of punishment and deterrence were of primary relevance to the determination of the head sentence and of lesser relevance to the specification of the non-parole period.

In *R v Hall* [2017] NSWCCA 313, the offender was sentenced to an aggregate sentence of 5 years with a non-parole period of 1 year for historical offences of violence and sexual assault. The judge said the head sentence recognised the objective seriousness of the offences and the non-parole period reflected "considerations of leniency". That approach was found by the CCA to be contrary to the principles in *Power v The Queen* and *R v Simpson*: *R v Hall* at [90].

[7-505] Aggregate sentences

Section 53A(1) *Crimes (Sentencing Procedure) Act* 1999 enables a court sentencing an offender for multiple offences to impose an aggregate sentence of imprisonment instead of separate individual sentences.

The aggregate sentencing provisions were not intended to create a substantive change to sentencing law: *PG v R* [2017] NSWCCA 179 at [90]. The scheme was introduced to remove some of the complexity involved when sentencing for multiple offences, while preserving the transparency of the sentencing process. It was intended to overcome the difficulties of applying *Pearce v The Queen* (1998) 194 CLR 610 and the requirement to set commencement and expiry dates for each sentence: *JM v R* [2014] NSWCCA 297 at [39]; *R v Rae* [2013] NSWCCA 9 at [45]; *Truong v R* [2013] NSWCCA 36 at [231]. The overriding principle is that an aggregate sentence must reflect the totality of the offending behaviour: *Burgess v R* [2019] NSWCCA 13 at [40]; *Aryal v R* [2021] NSWCCA 2 at [46]. See [8-220] **Totality and sentences of imprisonment**.

Section 53A(2) requires a court imposing an aggregate sentence to indicate to the offender, and make a written record of:

- the fact an aggregate sentence is being imposed: s 53A(2)(a)
- the sentence that would have been imposed for each offence (after taking into account relevant matters in Pt 3 or any other provision of the Act) had separate sentences been imposed: s 53A(2)(b).

Failure to comply with s 53A does not invalidate an aggregate sentence: s 53A(5).

An aggregate sentence imposed by the Local Court must not exceed 5 years: s 53B.

A court may impose one non-parole period "*after* setting the term of the [aggregate] sentence" [emphasis added]: s 44(2A).

Use of the word "after" in s 44(2A) is an indication that it is only possible to determine an aggregate non-parole period after deciding the sentence that would have been imposed for each offence. However, failure to comply with s 44(2A) by pronouncing the non-parole period before the total aggregate sentence is a technical error that does not invalidate the sentence: *Hunt v R* [2017] NSWCCA 305 at [79].

Section 49(2) sets limits as to the duration of the term of an aggregate sentence of imprisonment stating that it:

> (a) must not be more than the sum of the maximum periods of imprisonment that could have been imposed if separate sentences of imprisonment had been imposed in respect of each offence to which the sentence relates, and
>
> (b) must not be less than the shortest term of imprisonment (if any) that must be imposed for any separate offence or, if the sentence relates to more than one such offence, must not be less than the shortest term of imprisonment that must be imposed for any of the offences.

The expression in s 49(2)(a) "maximum periods of imprisonment that could have been imposed" appears to mean the maximum penalties for the offences in question. This is based on the text of s 49(1) which provides a single sentence cannot exceed the maximum penalty for the offence.

The aggregate sentence cannot exceed the total of the indicative sentences which should, unless otherwise indicated, be regarded as head sentences for each offence: *Dimian v R* [2016] NSWCCA 223 at [49]. Indicative sentences should be regarded as head sentences for each of the offences: *Dimian v R* at [49]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly states the indicative sentence was to be treated as a fixed term: *Dimian v R* at [47] with reference to *McIntosh v R* [2015] NSWCCA 184. See [7-520] **Indicative sentences: fixed term or term of sentence**.

[7-507] Settled propositions concerning s 53A

In *JM v R* [2014] NSWCCA 297, RA Hulme J (Hoeben CJ at CL and Adamson J agreeing) at [39], summarised the approach a court should take where it chooses to utilise s 53A:

> [39] A number of propositions emerge from the above legislative provisions [ss 44(2C), 53A, 54A(2) and 54B] and the cases that have considered aggregate sentencing:
>
> 1. Section 53A was introduced in order to ameliorate the difficulties of applying the decision in *Pearce v The Queen* [1998] HCA 57; 194 CLR 610 in sentencing for multiple offences: *R v Nykolyn* [2012] NSWCCA 219 at [31]. It offers the benefit when sentencing for multiple offences of obviating the need to engage in the laborious and sometimes complicated task of creating a "cascading or 'stairway' sentencing structure" when the principle of totality requires some accumulation of sentences: *R v Rae* [2013] NSWCCA 9 at [43]; *Truong v R*; *R v Le*; *Nguyen v R*; *R v Nguyen* [2013] NSWCCA 36 at [231]; *Behman v R* [2014] NSWCCA 239; *R v MJB* [2014] NSWCCA 195 at [55]–[57].
>
> 2. When imposing an aggregate sentence a court is required to indicate to the offender and make a written record of the fact that an aggregate sentence is being imposed and also indicate the sentences that would have been imposed if separate sentences had been imposed instead (the indicative sentences): s 53A(2). The indicative sentences themselves should not be expressed as a separate sentencing order: *R v Clarke* [2013] NSWCCA 260 at [50]–[52]. See also *Cullen v R* [2014] NSWCCA 162 at [25]–[40].
>
> 3. The indicative sentences must be assessed by taking into account such matters in Part 3 or elsewhere in the *Crimes (Sentencing Procedure) Act* as are relevant: s 53A(2)(b).
>
>   There is no need to list such matters exhaustively, but commonly encountered ones in Part 3 include aggravating, mitigating and other factors (s 21A); reductions for guilty pleas, facilitation of the administration of justice and assistance to law enforcement authorities (ss 22, 22A and 23); and offences on a Form 1 taken into account (Pt 3 Div 3). Commonly encountered matters elsewhere in the Act are the purposes of sentencing in s 3A, and the requirements of s 5 as to not imposing a sentence of imprisonment unless a court is satisfied that there is no alternative and giving a further explanation for the imposition of any sentence of 6 months or less.
>
>   *SHR v R* [2014] NSWCCA 94 is an example of a case where a sentencing judge took pleas of guilty into account only in relation to the aggregate sentence, and not in relation to the indicative sentence. This was held (at [42]) to be in breach of the requirement in s 53A(2)(b) …
>
> 4. It is still necessary in assessing the indicative sentences to have regard to the requirements of *Pearce v The Queen* [1998] HCA 57; 194 CLR 610. The criminality

involved in each offence needs to be assessed individually. To adopt an approach of making a "blanket assessment" by simply indicating the same sentence for a number of offences is erroneous: *R v Brown* [2012] NSWCCA 199 at [17], [26]; *Nykolyn v R*, supra, at [32]; [56]–[57]; *Subramaniam v R* [2013] NSWCCA 159 at [27]–[29]; *SHR v R*, supra, at [40]; *R v Lolesio* [2014] NSWCCA 219 at [88]–[89]. It has been said that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges": [*Khawaja v R*, [2014] NSWCCA 80] at [18].

5. The imposition of an aggregate sentence is not to be used to minimise the offending conduct, or obscure or obliterate the range of offending conduct or its totality: *R v MJB*, supra, at [58]–[60].

6. One reason why it is important to assess individually the indicative sentences is that it assists in the application of the principle of totality. Another is that it allows victims of crime and the public at large to understand the level of seriousness with which a court has regarded an individual offence: *Nykolyn v R*, supra, at [58]; *Subramaniam v R*, supra, at [28]. A further advantage is that it assists when questions of parity of sentencing as between co-offenders arise: *R v Clarke*, supra, at [68], [75].

7. Non-parole periods need not be specified in relation to indicative sentences except if they relate to an offence for which a standard non-parole period is prescribed: ss 44(2C) and s 54B(4); *AB v R* [2014] NSWCCA 31 at [9].

8. Specification of commencement dates for indicative sentences is unnecessary and is contrary to the benefits conferred by the aggregate sentencing provisions: *AB v R*, supra, at [10]. Doing so defeats the purpose of a court availing itself of the power to impose an aggregate sentence: *Behman v R* [2014] NSWCCA 239 at [26]. See also *Cullen v R*, supra, at [25]–[26].

9. If a non-custodial sentence is appropriate for an offence that is the subject of the multiple offence sentencing task, it should be separately imposed as was done in *Grealish v R* [2013] NSWCCA 336. In my respectful view, there was error involved in *Behman v R* [2014] NSWCCA 239 where an offence with an indicative, but unspecified, non-custodial sentence was included in an aggregate sentence imposed by this Court. The provision for imposing an aggregate sentence in s 53A appears within Part 4 of the *Crimes (Sentencing Procedure) Act* which is headed "Sentencing procedures for imprisonment", and within Division 1 of that Part which is headed "Setting terms of imprisonment".

JM v R has been described as the seminal case explaining the aggregate sentencing scheme: *Vaughan v R* [2020] NSWCCA 3 at [92]; *Taitoko v R* [2020] NSWCCA 43 at [130]. However, cases since *JM v R* elaborate on aspects of the propositions summarised.

Purpose of indicative sentences (proposition 2)

Indicative sentences are required for the purpose of understanding the components of the aggregate sentence in general terms but have no practical operation: *Vaughan v R* at [90]–[91]; *Aryal v R* [2021] NSWCCA 2 at [46]. Upon indicating the separate sentences that would have been imposed, the court must then apply the principal of totality to determine an appropriate aggregate sentence: *ZA v R* [2017] NSWCCA 132 at [70], [74]. There is no requirement to precisely specify any (notional) accumulation of the separate sentences: *Vaughan v R* at [97]. See further **Application of *Pearce v The Queen* and the totality principle** below.

Aggregate sentencing and applying discounts (proposition 3)

Where a court imposes an aggregate sentence it need only explicitly state a discount, or discounts, at the stage of setting each indicative sentence: *Glare v R* [2015] NSWCCA 194 at [12]; *PG v R* [2017] NSWCCA 179 at [71], [76]. Where there are multiple offences and the pleas are entered at different times, it is an error to apply an average discount to each indicative sentence: *Bao v R* [2016] NSWCCA 16 at [44]. All decisions of the court since *JM v R* are to the effect that a discount must be applied to the starting point of each sentence: for guilty plea discounts see *PG v R* at [71], [76]; *Berryman v R* [2017] NSWCCA 297 at [29]; *Elsaj v R* [2017] NSWCCA 124 at [56]; *Ibbotson (a pseudonym) v R* [2020] NSWCCA 92 at [138]; for discounts for assistance see *TL v R* [2017] NSWCCA 308 at [102]–[103].

Application of *Pearce v The Queen* and the totality principle (propositions 1, 4 and 6)

The principles of sentencing concerning accumulation and concurrency, explained in *Pearce v The Queen* (1998) 194 CLR 610, do not apply to an aggregate sentence: *Vaughan v R* [2020] NSWCCA 3 at [91]; *Aryal v R* [2021] NSWCCA 2 at [46]. However, it is still necessary to consider, albeit intuitively, the extent to which there should be a degree of accumulation between the indicative sentences to arrive at a sentence that reflects the totality of the offending in the particular case: *Vaughan v R* at [91]; *Tuite v R* [2018] NSWCCA 175 at [91]; *Burgess v R* [2019] NSWCCA 13 at [40]; *ZA v R* [2017] NSWCCA 132 at [70], [74]; *Kliendienst v R* [2020] NSWCCA 98 at [79]–[102]; see also [8-200] **The principle of totality**. There is no actual accumulation of the indicative sentences – each offence makes an additional contribution to the totality of the criminality reflected in the aggregate sentence: *Aryal v R* at [46].

Nor is there a requirement to disclose the precise degree of accumulation between the indicative sentences since that would undermine the legislative purpose of the aggregate sentencing scheme: *Berryman v R* at [50]; *Vaughan v R* at [97]; *Noonan v R* [2021] NSWCCA 35 at [33]. Of this, RA Hulme J said in *Vaughan v R*, at [117], that:

> … a judge does not need to assess a precise degree of accumulation at all [but] simply determines the aggregate sentence by assessing what is appropriate to reflect the totality of criminality in all of the offending. Quite commonly, there are references to there being "notional accumulation" – but if such a reference is apt at all, sight should not be lost of the fact that it is truly something that is "notional".

As a result there may be less transparency than when imposing separate sentences: *Kliendiest v R* at [84]; *ZA v R* at [88]. Further, the degree of transparency achieved will vary between cases: *PW v R* [2019] NSWCCA 298 at [6]–[10]. For example, in *PW v R*, the indicative sentences provided "limited assistance" in understanding the aggregate sentence because the offences were committed in a single, brief episode of criminal conduct where moral culpability and objective seriousness overlapped.

Specifying non-parole periods (proposition 7)

Proposition 7 concerning the requirement to specify a non-parole period for indicative sentences for standard non-parole period offences no longer applies. Since 2016, s 45(1A) *Crimes (Sentencing Procedure) Act* 1999 permits a sentencing court to decline to set a non-parole period (ie impose a fixed term) for such offences.

Separately imposing a non-custodial sentence (proposition 9)

Proposition 9 was not applied in *RL v R* [2015] NSWCCA 106 at [63] where the Court of Criminal Appeal said in re-sentencing (for three of the counts) that an "indicative sentence which did not involve a full-time custodial penalty should be adopted".

Sentencing for backup and related charges

It is permissible to incorporate sentences for related summary offences transferred to the District or Supreme Court pursuant to s 166 *Criminal Procedure Act* 1986 into a statutory aggregate sentence under s 53A: *R v Price* [2016] NSWCCA 50 at [76], [80].

Aggregate sentencing and Commonwealth offences

The aggregate sentencing scheme in s 53A can also be used for Commonwealth offenders being sentenced for more than one Commonwealth offence: *DPP (Cth) v Beattie* [2017] NSWCCA 301 at [146], [210]. However, an aggregate sentence cannot be imposed for a combination of Commonwealth and State offences: *Sheu v R* [2018] NSWCCA 86 at [26].

See also [16-035] **Sentencing for multiple offences**.

[7-508] Appellate review of an aggregate sentence

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

> 10. Another benefit of the aggregate sentencing provision is that it makes it easier on appeal to impose a new aggregate sentence if one of the underlying convictions needs to be quashed …
>
> 11. The indicative sentences recorded in accordance with s 53A(2) are not themselves amenable to appeal, although they may be a guide to whether error is established in relation to the aggregate sentence …
>
> 12. Even if the indicative sentences are assessed as being excessive, that does not necessarily mean that the aggregate sentence is excessive …
>
> 13. A principle focus of determination of a ground alleging manifest inadequacy or excess will be whether the aggregate sentence reflects the totality of the criminality involved … This Court is not in a position to analyse issues of concurrence and accumulation in the same way that it can analyse traditional sentencing structures …
>
> 14. Erroneous specification by a sentencing judge of commencement dates for indicative sentences (such as there being gaps between the expiry of some indicative sentences and the commencement of subsequent sentences) are immaterial and may be ignored as being otiose …
>
> 15. A failure of a judge to specify a non-parole period in the indicative sentence for a standard non-parole period offence will not lead to an appeal being upheld. Failure to do so does not invalidate the sentence: s 54B(7). Setting non-parole periods for the indicative sentences for standard non-parole period offences would have no effect upon the aggregate sentence imposed

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

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

Sections 44(2) and 44(2B) *Crimes (Sentencing Procedure) Act 1999* provide that the non-parole period for either a single sentence or an aggregate sentence must not fall below three-quarters of the term of the sentence unless there is a finding of special circumstances. In *R v GDR* (1994) 35 NSWLR 376 at 381, a five-judge Bench said, after noting the limit of the restriction in the former s 5(2) *Sentencing Act* 1989 (the statutory predecessor of s 44(2)):

> In practice, the principles of general law to which reference has been made, and which affect *the relationship between a minimum and an additional term, may well operate to produce the result that, in many cases, the additional term will be one-third of the minimum term, for the reason that the sentencing judge considers that the period available to be spent on parole should be not less than one-quarter of the total sentence*. What was said in *Griffiths* [(1989) 167 CLR 372] about the pattern of sentencing in this State before the enactment of the legislation there referred to suggests that this will frequently be so. That does not mean, however, that sentencing judges have been deprived, by s 5, of their discretion. It is, rather, the consequence of the fact that in many cases a proper exercise of discretion will dictate that the additional term be not less than one-third of the minimum term, or one-quarter of the total sentence. In a practical sense, therefore, in many cases, the result will be an additional term which is one-third of the minimum term. This will be because the statute says it cannot be more (in the absence of special circumstances), and because general sentencing principles dictate, in the particular case, that it should not be less [emphasis added].

The language of s 44(2) constrains or fetters the sentencing discretion by providing that the balance of term must not exceed the non-parole period by one-third unless the court finds special circumstances.

Balance of term in excess of one-third

There is no corresponding rule that the balance of term must not be less than one-third of the non-parole period: *Musgrove v R* [2007] NSWCCA 21 at [27]; *DPP (NSW) v RHB* [2008] NSWCCA 236 at [17], [19]; *Wakefield v R* [2010] NSWCCA 12 at [26]. However, it is advisable for the court to explain why a ratio in excess of 75% was selected to avoid an inference that an oversight must have occurred: *Wakefield v R* at [26]; *Briggs v R* [2010] NSWCCA 250 at [34] cited in *Russell v R* [2010] NSWCCA 248 at [41]; *Etchell v R* [2010] NSWCCA 262 at [49]–[50]; *Maglovski v R* [2014] NSWCCA 238 at [28]; *Brennan v R* [2018] NSWCCA 22 at [69]. An express comment is preferable because it makes clear the judge is aware of the impact of any accumulation: *GP v R* [2017] NSWCCA 200 at [22]. This is more than simply a salutary discipline; offenders should not be left to wonder whether the term of their incarceration was affected by inadvertent oversight or whether it was fully intended: *Huang v R* [2019] NSWCCA 144 at [52]. For example, the judge's silence in *Briggs v R* left "a sense of disquiet that he may have overlooked giving appropriate focus to the statutory ratio": per Fullerton J at [34]; see also *Huang v R* at [53] and *Hardey v R* [2019] NSWCCA 310 at [34]. This is especially the case where consecutive sentences are imposed: *Dunn v R* [2007] NSWCCA 312. The reasons do not need to be lengthy. In *Brennan v R*, the judge gave "short but adequate reasons" for imposing a non-parole period greater than 75%: at [40].

Even in circumstances where there is no specific reference to the requirements of s 44(2), consideration of the reasons as a whole may indicate there was no oversight.

For example, in *Sonter v R* [2018] NSWCCA 228 at [23], the court found that although there was no specific reference to the ratio between the non-parole period and the head sentence, a number of factors identified by the judge during his reasons, including a specific reference to the need to have regard to totality, overwhelmingly pointed to a conclusion that no oversight had occurred.

Nonetheless, imposing a non-parole period greater than 75% is an adverse and exceptional outcome in NSW sentencing practice: *Brennan v R* at [72]–[90]. As a matter of procedural fairness, where a judge is considering whether to impose a non-parole period greater than 75%, the particular circumstances of the case may require the judge to invite submissions from the parties on the topic: *Brennan v R* at [96]–[97].

Section 44(2) and (2B) only require reasons to be given if a finding of special circumstances *is* made: *Rizk v R* [2020] NSWCCA 291 at [138]–[139]. However, it is also advisable to do so where such a finding is *not* made to avoid an inference the matter was not considered: *Maglovski v R* at [28]; *Calhoun (a pseudonym) v R* [2018] NSWCCA 150 at [30].

[7-512] Special circumstances generally

Parliament has not prescribed at which stage of the sentencing exercise the court must consider the issue of special circumstances. There is nothing in s 44 *Crimes (Sentencing Procedure) Act* 1999 or the case law which mandates a method or, to adopt the High Court's term in *Markarian v The Queen* (2005) 228 CLR 357 at [27], the "path" the court must take.

See ***What constitutes special circumstances?*** (at [7-514] below) as to the factors that may be relevant in a particular case. An offender's legal representative is expected to make submissions addressing factors which may warrant a finding of special circumstances and particularly what is an appropriate period of supervision on parole for the offender: *Edwards v R* [2009] NSWCCA 199 at [11]; *Jinnette v R* [2012] NSWCCA 217 at [96].

If there are circumstances that are *capable* of constituting special circumstances, the court is not obliged to vary the statutory ratio. Before a variation is made "it is necessary that the circumstances be sufficiently special": *R v Fidow* [2004] NSWCCA 172 at [22]; *Langbein v R* [2013] NSWCCA 88 at [54]. The decision is — first, one of fact, to identify the circumstances, and secondly, one of judgment — to decide whether the circumstances justify a lowering of the non-parole period below the statutory ratio: *R v Simpson* (2001) 53 NSWLR 704 at [73]; *Fitzpatrick v R* [2010] NSWCCA 26 at [36].

A finding of special circumstances is a discretionary finding of fact: *R v El-Hayek* [2004] NSWCCA 25 at [103]; *Caristo v R* [2011] NSWCCA 7 at [28].

A finding of special circumstances permits an adjustment downwards of the non-parole period, but it does not authorise an increase in the term of the sentence: *R v Tobar* [2004] NSWCCA 391 at [36]–[37]; *R v Huynh* [2005] NSWCCA 220 at [35]–[39]; *Markham v R* [2007] NSWCCA 295 at [29]. As with the statutory predecessor (s 5(2) *Sentencing Act* 1989 (rep)), ss 44(2) and 44(2A) should not be understood as statutory norms (75% or 3:1) in the sense that variation in either

direction, up or down, absent special circumstances is contrary to law: *R v GDR* (1994) 35 NSWLR 376 at 380. The extent of the adjustment is not determined by any "norm" and the court is to be guided by general sentencing principles: *Caristo v R* at [28].

In setting an effective non-parole period for more than one offence the focus should not be solely upon the percentage proportions that the non-parole periods have to the total term. In *Caristo v R*, RA Hulme J said at [42]: "The actual periods involved are equally, and probably more, important."

When a court decides to reduce the non-parole period because of a finding of special circumstances, double counting matters already taken into account in calculating the head sentence should be avoided: *R v Fidow* at [18]; *Trindall v R* [2013] NSWCCA 229 at [17]; *Langbein v R* at [54]; *Ho v R* [2013] NSWCCA 174 at [33].

The degree or "extent of any adjustment to the statutory requirement is essentially a matter within the sentencing judge's discretion": *Clarke v R* [2009] NSWCCA 49 at [13]; *R v Cramp* [2004] NSWCCA 264 at [31]) including consideration of those circumstances which concern the nature and purpose of parole: *R v GDR* at 381.

Although the desirability of an offender undergoing suitable rehabilitative treatment is capable of being a special circumstance, where special circumstances are found on this basis, it is an error for a court to refrain from adjusting the sentence based on a view that the offender would benefit from treatment while in full-time custody: *Muldrock v The Queen* (2011) 244 CLR 120 at [57]–[58]. This is because full-time custody is punitive and treatment in prison is a matter in the executive's discretion. Also, an offender may not qualify for a program in custody or it may not be available: *Muldrock v The Queen* at [57].

A court can have regard to the practical limit of 3 years on parole supervision which an offender may receive under cl 214A *Crimes (Administration of Sentences) Regulation* 2014. With regard to the operation of cl 228 *Crimes (Administration of Sentences) Regulation* 2008 (rep), which was in similar terms to cl 214A, see the discussion in: *AM v R* [2012] NSWCCA 203 at [90]; *Collier v R* [2012] NSWCCA 213 at [37]; *Jinnette v R* at [107]. However, cl 214A provides in the case of a "serious offender" (defined in s 3(1) *Crimes (Administration of Sentences) Act* 1999) that the period of supervision may be extended by, or a further period of supervision imposed of, up to 3 years at a time.

A purported failure to adjust a sentence for special circumstances raises so many matters of a discretionary character that the Court of Criminal Appeal has been reluctant to intervene. The court will only intervene if the non-parole period is manifestly inadequate or manifestly excessive: *R v Cramp* [2004] NSWCCA 264 at [31]; *R v Fidow* at [19]; *Jiang v R* [2010] NSWCCA 277 at [83]. Ultimately the non-parole period that is set is what the court concludes, in all of the circumstances, ought to be the minimum period of incarceration: *Muldrock v The Queen* at [57]; *R v Simpson* at [59].

[7-514] What constitutes special circumstances?

The full range of subjective considerations is capable of warranting a finding of special circumstances: *R v Simpson* (2001) 53 NSWLR 704 at [46], [60]. It will be comparatively rare for an issue to be incapable, as a matter of law, of ever constituting

a "special circumstance": *R v Simpson* at [60]. Findings of special circumstances have become so common that it appears likely that there can be nothing "special" about many cases in which the finding is made: *R v Fidow* [2004] NSWCCA 172 at [20].

Rehabilitation

Generally speaking, the reform of the offender will often be the purpose in finding special circumstances, but this is not the sole purpose: *R v El-Hayek* [2004] NSWCCA 25 at [105]. In *Kalache v R* [2011] NSWCCA 210 at [2], Allsop P recognised that the concept of special circumstances "bears upon an important element and purpose of the sentencing process, rehabilitation". However, the incongruity of tying s 44(2) *Crimes (Sentencing Procedure) Act* to rehabilitation was observed by Spigelman CJ in *R v Simpson* (2001) 53 NSWLR 704 at [58]:

> … the requirements of rehabilitation would be best computed in terms of a period of linear time, not in terms of a fixed percentage of a head sentence. The desirability of a longer than computed period of supervision will be an appropriate approach in many cases.

Nevertheless, an offender's good prospects of rehabilitation may warrant a finding of special circumstances: *Arnold v R* [2011] NSWCCA 150 at [37]; *RLS v R* [2012] NSWCCA 236 at [120]. It is not necessary to be satisfied rehabilitation is likely to be successful as opposed to a possibility, but merely that the offender has prospects of rehabilitation which would be assisted by a longer parole period: *Thach v R* [2018] NSWCCA 252 at [45]–[46]. However, if an offender has poor prospects of rehabilitation and shows a lack of remorse, protection of the society may assume prominence in the sentencing exercise and militate against a finding of special circumstances: *R v Windle* [2012] NSWCCA 222 at [55].

Risk of institutionalisation

The risk of institutionalisation, even in the face of entrenched and serious recidivism, may justify a finding of special circumstances: *Jackson v R* [2010] NSWCCA 162 at [24]; *Jinnette v R* [2012] NSWCCA 217 at [103]. However, the existence of the factor does not require a finding: *Dyer v R* [2011] NSWCCA 185 at [50]; *Jinnette v R* at [98]. If institutionalisation has already occurred, the focus may be on ensuring that there is a sufficient period of conditional and supervised liberty to ensure protection of the community and to minimise the chance of recidivism: *Jinnette v R* at [103].

Drug and alcohol addiction

A finding of special circumstances may be made where the offender requires substantial help to overcome drug and alcohol addiction: *Sevastopoulos v R* [2011] NSWCCA 201 at [84]–[85]; or where there is a recognition of an offender's efforts to rehabilitate himself or herself from drug addiction and a demonstrated need for continued assistance if those efforts are to be maintained: *R v Vera* [2008] NSWCCA 33 at [20].

First custodial sentence

It is doubtful whether the fact a sentence represents an offender's first time in custody may alone justify finding special circumstances: *Collier v R* [2012] NSWCCA 213 at [36]; *Singh v R* [2020] NSWCCA 353 at [79]; *R v Kaliti* [2001] NSWCCA 268 at

[12]; *R v Christoff* [2003] NSWCCA 52 at [67]; *Langbein v R* [2008] NSWCCA 38 at [112]; *Clarke v R* [2009] NSWCCA 49 at [12]. Although such a finding may be made in combination with other factors: *Leslie v R* [2009] NSWCCA 203 at [37]; *R v Little* [2013] NSWCCA 288 at [30].

Ill health, disability or mental illness

There are many examples in which ill health, mental illness or a disability are found to be circumstances which may contribute to a finding of special circumstances: *R v Sellen* (unrep, 5/12/91, NSWCCA); *R v Elzakhem* [2008] NSWCCA 31 at [68]; *Muldrock v The Queen* (2011) 244 CLR 120 at [58]; *Devaney v R* [2012] NSWCCA 285 at [92]; *Morton v R* [2014] NSWCCA 8 at [19].

Accumulation of individual sentences

There is a conventional sentencing practice of finding special circumstances in cases where sentences imposed for multiple offences are served consecutively in order to apply the totality principle: *Hejazi v R* [2009] NSWCCA 282 at [36]. Sentencing judges are required to give effect to the principle of totality and therefore should have regard to the outcome of any such accumulation: *R v Simpson* (unrep, 18/6/92, NSWCCA); *R v Close* (1992) 31 NSWLR 743 at 748–749; *R v Clarke* (unrep, 29/3/95, NSWCCA); *R v Clissold* [2002] NSWCCA 356 at 19], [21]; *Cicekdag v R* [2007] NSWCCA 218 at [49]; *R v Elzakhem* [2008] NSWCCA 31 at [68]–[69]; *Hejazi v R* at [35]. However, in *Singh v R* at [77]–[79], RA Hulme J (Johnson J agreeing) observed that the rationale for finding special circumstances identified in *Simpson v R* did not apply when an aggregate sentence was imposed.

An accumulation of sentences does not automatically give rise to a finding that special circumstances exist: *R v Cook* [1999] NSWCCA 234 at [38]. Where the court utilises the power to impose an aggregate sentence under s 53A, the issue of special circumstances is governed by s 44(2B): see "***Limit on restriction in ss 44(2) and 44(2B)***" in [7-505].

Protective custody

A court cannot find special circumstances on account of protective custody unless the offender provides evidence that his or her conditions of incarceration will be more onerous than usual: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *Langbein v R* [2008] NSWCCA 38 at [113] and cases cited therein: *Mattar v R* [2012] NSWCCA 98 at [23]–[25].

Care should be taken to avoid counting hardship of protective custody as a reason for discounting the total sentence and again as a factor establishing special circumstances: *R v S* [2000] NSWCCA 13 at [33]; *R v Lee* [2000] NSWCCA 392 at [80].

Similarly, where an offender has been given a generous discount on the head sentence for providing assistance to authorities (partly because of the resulting need to serve the sentence in protection) it is not then permissible to make a finding of special circumstances on the basis that the sentence will be served in virtual solitary confinement: *R v Capar* [2002] NSWCCA 517 at [28]–[29].

See **Hardship of custody** at [10-500] and **Hardship of custody for child sex offender** at [17-570].

Age

An offender's youth is a common ground for a finding of special circumstances: *Hudson v R* [2007] NSWCCA 302 at [6]; *MB v R* [2007] NSWCCA 245 at [23]; *R v Merrin* [2007] NSWCCA 255 at [55]; *Kennedy v R* (2008) [2008] NSWCCA 21 at [53]; *AM v R* [2012] NSWCCA 203 at [86].

Advanced age may similarly be a factor: *R v Mammone* [2006] NSWCCA 138 at [54].

Hardship to family members

Hardship to members of an offender's family is generally irrelevant and can only be taken into account in highly exceptional circumstances: *King v R* [2010] NSWCCA 202 at [18], [23], [25]. The care of young children is not normally an exceptional circumstance: *R v Murphy* [2005] NSWCCA 182 at [16]–[19].

However, in *R v Grbin* [2004] NSWCCA 220 at [33], special circumstances were found where there was evidence of the importance of the strong bond between the offender and his son, who suffered from clinical autism and other disabilities and required constant supervision. See also *R v Maslen* (unrep, 7/4/95, NSWCCA) where the child was severely disabled and *R v Hare* [2007] NSWCCA 303 where the child suffered from Asperger's Syndrome.

A finding that the offender has good prospects for rehabilitation and is a mother of a young child, may support a finding of special circumstances: *R v Bednarz* [2000] NSWCCA 533 at [13], [52] (a two-judge bench case referred to in *Harrison v R* [2006] NSWCCA 185 at [31]); *R v Gip* [2006] NSWCCA 115 at [28]–[30], [68].

Self-punishment

Special circumstances may be found where there is a degree of self-inflicted shame and guilt already suffered combined with a mental condition: *R v Dhanhoa* [2000] NSWCCA 257 at [16], [45]; *R v Koosmen* [2004] NSWCCA 359 at [34]; *R v Elkassir* [2013] NSWCCA 181 at [37]. However, the weight attributed to the factor cannot lead to the imposition of an inadequate non-parole period: *R v Elkassir* at [73]. Where the facts reveal gross moral culpability, judges should be wary of attaching too much weight to considerations of self-punishment. Genuine remorse and self-punishment do not compensate for, or balance out, gross moral culpability: *R v Koosmen* at [32].

Parity

The need in a particular case to preserve proper parity between co-offenders may itself amount to special circumstances but such an application of s 44(2) must be justified by the special requirements of a particular sentencing exercise: *Tatana v R* [2006] NSWCCA 398 at [33]; *Briouzguine v R* [2014] NSWCCA 264 at [67]. Generally disparity will not arise simply because the application of s 44 to particular offenders results in different sentences between co-offenders: *R v Do* [2005] NSWCCA 209 at [18]–[19]; *Gill v R* [2010] NSWCCA 236 at [60]–[62].

Sentencing according to past practices

Sentencing according to past practices may justify a finding of special circumstances in order to reflect the applicable non-parole period/head sentence ratio at the time: *AJB v R* [2007] NSWCCA 51 at [36]–[37]; *MJL v R* [2007] NSWCCA 261 at [42].

See **Sentencing for offences committed many years earlier** at [17-410].

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

Where a finding of special circumstances is expressed for an individual sentence or individual sentences, the ultimate sentence imposed should usually give effect to that finding unless there are express reasons for not doing so.

The *Crimes (Sentencing Procedure) Act* 1999 contains no express requirement for a judge to apply the statutory ratio to an effective or overall sentence, but s 44(2) has been found to apply in that situation and also where a sentence is accumulated on an existing sentence: *Lonsdale v R* [2020] NSWCCA 267 at [65]; *Rizk v R* [2020] NSWCCA 291; *GP v R* [2017] NSWCCA 200 at [16].

While s 44(2) does not directly require a judge to give reasons for setting a non-parole period exceeding 75% of the total or effective sentence, it is advisable to do so: *Lonsdale v R* at [31]; [65]; *GP v R* at [22]; *CM v R* [2013] NSWCCA 341 at [39]. However, this does not require the performance of a mathematical calculation to the determination of the proportion of the non-parole period to a total term where a particular sentence is accumulated on an existing sentence: *Lonsdale v R* at [32]; *Zreika v R* [2020] NSWCCA 345 at [26].

On appeal, determining whether the lack of adjustment of the statutory ratio reflected in the overall term is intentional or the result of inadvertence or miscalculation often depends on what can be gleaned of the judge's intention from the sentencing remarks: *CM v R* at [40]; *Maglis v R* at [24]. In *CM v R* there was nothing to indicate that the judge was aware of, or intended, the final result and so the ground that the judge failed to give practical effect to the finding of special circumstances in the total effective sentence was upheld: *CM v R* at [42]. In *AB v R* [2014] NSWCCA 31, even though the judge's finding of special circumstances was not reflected in the overall sentence, the final result was what the judge intended and there was no inadvertence or miscalculation: at [54], [57]. Similarly, in *Rizk v R* at [143], [146] and *Lonsdale v R* at [39], the particular sentencing judges did not err by not giving express reasons for imposing an effective non-parole period that exceeded 75%, to a modest degree.

On the other hand, the court found error in *Sabongi v R* [2015] NSWCCA 25, where the sentencing judge failed to give effect to an intention to vary the overall ratio to take account of the applicant's mental condition, the need for rehabilitation and supervision, and the accumulation of sentences. See also *Woods v R* [2020] NSWCCA 219 at [71], [73].

The focus of the inquiry should not be solely upon the percentage proportions that the non-parole and parole periods bear to the total term. The actual periods involved are equally, and probably more, important: *Woods v R* at [62]; *MD v R* [2015] NSWCCA 37 at [41]; *Caristo v R* [2011] NSWCCA 7 at [42]. Care may be required when an applicant is sentenced in NSW while serving a sentence in another State where the statutory ratio of non-parole period to sentence may vary: see, for example, *Ozan v R* [2021] NSWCCA 231.

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

[7-518] Empirical study of special circumstances

A 2013 study by the Judicial Commission examined sentencing cases finalised in the NSW District and Supreme Courts for the period 1 January 2005 to 30 June 2012:

P Poletti and H Donnelly, "Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999", *Sentencing Trends & Issues*, No 42, Judicial Commission of NSW, 2013.

An analysis of the sentencing statutes of other Australian jurisdictions revealed that NSW is one of few jurisdictions with a statutory rule which constrains a court's discretion when it sets a non-parole period. Further, the ratio set in s 44(2) and s 44(2A) *Crimes (Sentencing Procedure) Act 1999* is comparatively high.

Special circumstances were found in the vast majority of cases (91.4%) and was found more frequently for the youngest offenders (98.8% for juveniles and 96.8% for offenders aged 18–20 years) and for the oldest offenders (100% for offenders aged over 70 years and 98.0% for offenders aged 66–70 years).

A random sample of 159 judgments was examined. The most common reasons for finding special circumstances was the offender's need for a lengthy period of supervision in the community after release (66.7%), followed by the lack of a prior criminal record (35.8%). These common reasons mostly referred to the offender serving their first prison sentence. Other common reasons include good prospects of rehabilitation (29.6%), age of the offender — particularly youth (25.8%), the effect of accumulation (23.3%) and hardship of custody (10.1%). The reasons given should not be viewed in isolation as there is a clear interrelationship between the different reasons.

The study (see table 3 in the study) analysed mean ratios for the basic and aggravated forms of robbery, break and enter, sexual assault and the supply of a prohibited drug. Subject to one (explicable) exception, the authors found that the longer the sentence and the more serious the crime, the lower the frequency of finding special circumstances. This is because for longer sentences the period of supervision was considered sufficient without a finding of special circumstances. More serious offences (such as murder and aggravated sexual assault in company) recorded the lowest frequency of special circumstances, which was unsurprising given the longer duration of their sentences and the limited utility of an extended period of supervision.

[7-520] Court may decline to set non-parole period

Section s 45(1) *Crimes (Sentencing Procedure) Act 1999* provides:

> When sentencing an offender to imprisonment for an offence, or in the case of an aggregate sentence of imprisonment, for offences, a court may decline to set a non-parole period for the offence or offences if it appears to the court that it is appropriate to do so:
>
> (a) because of the nature of the offence to which the sentence, or of each of the offences to which an aggregate sentence relates, or the antecedent character of the offender, or
>
> (b) because of any other penalty previously imposed on the offender, or
>
> (c) for any other reason that the court considers sufficient.

Section 45(1A) permits a court to decline to set a non-parole period (ie, impose a fixed term) for an offence to which a standard non-parole period applies. Section 45(1A) does not apply to sentencing for an offence dealt with summarily or if the offender is under 18 years of age: s 45(1B).

Where the court declines to set a non-parole period, it must make a record of its reasons for declining to do so: s 45(2). *R v Parsons* [2002] NSWCCA 296 and

Collier v R [2012] NSWCCA 213 at [55] are examples of cases where the sentencing judge erred by not fixing a non-parole period and not giving reasons as to why he declined to do so. The discretion in s 45(1), construed literally, is simply a discretion to decline to set a non-parole period: *Collier v R* at [58]. However, the weight of authority (both in relation to s 45(1) and its statutory predecessor under s 6 *Sentencing Act* 1989) supports the view that where a fixed term is imposed it should be set at an equivalent level, or equate to, what the non-parole period would have been: *Collier v R* at [56]–[58], citing *R v Dunn* [2004] NSWCCA 346 at [161]. The question whether s 45(1) also permits a court to impose a fixed term to reduce an otherwise appropriate sentence may be a future topic for resolution: *Collier v R* at [62]; see further below.

When sentencing an offender for multiple offences and where some accumulation is appropriate (assuming the aggregate sentence provision is not utilised), it is acceptable to impose fixed terms of imprisonment for some or most of the sentences. This is because, if a sentence containing a non-parole period and a parole period were set for each offence, the parole terms of many of these sentences would be subsumed in the non-parole period or fixed term of some longer sentence(s): *R v Dunn* at [161]. The judge in *R v Burgess* [2005] NSWCCA 52 decided that parole supervision would not be of any benefit to the offenders and imposed a fixed term under s 45(1): at [45].

For further discussion see **Concurrent and consecutive sentences** at [8-200].

Indicative sentences: fixed term or term of sentence?

There is controversy as to whether or not an indicative sentence equates to a fixed term and whether a fixed term should be equated with a non-parole period. The divergent authority was summarised by N Adams J in *Waterstone v R* [2020] NSWCCA 117 at [62]–[73]. Although it did not arise in the appeal, her Honour observed that she doubted whether a fixed term should be equated with a non-parole period: at [81]–[90]; cf Johnson J at [4]ff.

In *McIntosh v R* [2015] NSWCCA 184, where the appeal concerned an aggregate sentence, the court (Basten JA, Wilson J agreeing; Hidden J dissenting on this point) held that where a sentence is indicated under s 53A(2)(b) for an offence that is not subject to a standard non-parole period, it is permissible to indicate a fixed term (or mandatory period of custody). Basten JA at [166]–[167] followed *R v Dunn*. His Honour held that there is nothing in the language of ss 44 and 45 which denies the court the power to approach the indication of a sentence under s 53A(2) in the manner described in *R v Dunn* and, unless there are compelling reasons to the contrary, *R v Dunn* should be followed: at [167].

Hidden J did not agree. In his Honour's view, the total term (or head sentence) for each offence should be indicated, not the minimum period of mandatory custody. The head sentence reflects the assessment of criminality of an offence taking into account all the relevant circumstances and it is that assessment which should be reflected in an indicative sentence: at [173], [174].

The approach taken by the court in *McIntosh v R* in relation to fixed terms and indicative sentences was the subject of comment in (2015) 22(8) *CrimLN* 127 at [3572] where it was argued that the "fixed term" indicative sentence approach begs error because it, inter alia, "may lead a court into error in not having regard to the full sentence for an offence in comparison to its maximum penalty" and prevents the

community, particularly victims, from being informed "of the court's sentencing response to an individual offence". It is to be also noted that it is permissible under s 45(1) for a court to impose an aggregate fixed term sentence.

Subsequently in *Dimian v R* [2016] NSWCCA 223 at [46] the court held that on any proper construction of s 53A(2), seen in the context of the whole Act, the "sentence that would have been imposed" must be a reference to the overall, or term, of sentence. Any suggestion that an indicative sentence is the non-parole period is inconsistent with the principles of aggregate sentencing set out in *JM v R* [2014] NSWCCA 297 at [39]: *Dimian v R* at [47]. The only circumstance where an indicative sentence might be thought to equate with a non-parole period would be where the sentencing judge expressly states that the indicative sentence was to be treated as a fixed term: *Dimian v R* at [47]. In *Dimian v R*, the court found the judge erred by imposing an aggregate sentence which exceeded the sum of the indicative sentences: at [49].

[7-530] Court not to set non-parole period for sentence of 6 months or less

Section 46 *Crimes (Sentencing Procedure) Act 1999* provides that a court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is 6 months or less. Subsection (1) does not apply if a court imposes an aggregate sentence of imprisonment in respect of 2 or more offences of more than six months, even if the individual sentences the court would have imposed would have been less than six months (as referred to in s 53A(2)(b)): s 46(2).

If the court decides to set a term of imprisonment of 6 months or less, then it must make a record of its reasons for doing so, including its reasons for deciding: that no penalty other than imprisonment is appropriate; and not to allow the offender to participate in an intervention program or other program for treatment and rehabilitation: s 5(2) *Crimes (Sentencing Procedure) Act*.

[7-540] Commencement of sentence

The law relating to commencement of sentence is set out in s 47 *Crimes (Sentencing Procedure) Act* 1999. In summary, every sentence or aggregate sentence passed takes effect from the time it is passed, unless the court otherwise directs. Thus, if the sentencer does not specify the date for commencement, it will be deemed to commence on the day on which the sentence or aggregate sentence was imposed. This section confers power to direct that a sentence may commence upon any determinate date either subsequent or prior to the time when it was imposed. Subject to a statutory provision(s) to the contrary, a sentence of imprisonment runs from the date it is imposed: *Whan v McConaghy* (1984) 153 CLR 631 at 636; *R v Hall* [2004] NSWCCA 127 at [28]; *Kaderavek v R* [2018] NSWCCA 92 at [19]. If the sentence commences *before* the date the sentence is imposed, s 47 provides no guidance except that the sentencing judge "must take into account any time for which the offender has been held in custody in relation to the offence". If the sentence commences *after* that date, there is less flexibility as a result of s 47(4) and s 47(5): *Kaderavek v R* at [19].

On the issues of:

- how to count pre-sentence custody and the necessity of backdating see [12-500] **Counting pre-sentence custody**
- forward dating sentences of imprisonment see [7-547]

- what time should be counted including offences committed whilst the offender was on parole see [12-510] **What time should be counted?**
- taking into account participation of the offender in intervention programs see [12-520] **Intervention programs**
- quasi-custody bail conditions such as the MERIT program see [12-530] **Quasi-custody bail conditions**
- having regard to the fact the offender will be serving his or her sentence in protective custody see [10-500] **Hardship of custody**.

[7-545] Rounding sentences to months

The court in *Rios v R* [2012] NSWCCA 8 raised the issue of rounding and whether a sentence should be expressed in terms of years, months and days, as opposed to just years and months. Adamson J said at [43] with reference to *Ruano v R* [2011] NSWCCA 149 at [20] that expressing a sentence with days "… ought be discouraged because it adds an unnecessary complication in the sentencing process". In appropriate cases an adjustment should be made by rounding the number of days down to a number of months: *Rios v R* at [43].

[7-547] Forward dating sentences of imprisonment

Section 47(2)(b) *Crimes (Sentencing Procedure) Act* 1999 provides that a court may direct that a sentence of imprisonment commences "on a day occurring after the day on which the sentence is imposed, but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment".

Section 47(5) provides that a direction under s 47(2)(b) may not be made in relation to a sentence of imprisonment imposed on an offender who is serving some other sentence of imprisonment by way of full-time detention if:

(a) a non-parole period has been set for that other sentence, and

(b) the non-parole period for that other sentence has expired, and

(c) the offender is still in custody under that other sentence.

Section 47(5) governs a specific scenario where the offender is still in custody under what is described as the "other sentence". It is a statutory rule as to when the second sentence must commence where the statutory criteria are met. If the criteria in s 47(5) apply, the court does not have the power to impose a sentence in the terms of s 47(2)(b) "on a day occurring after the day on which the sentence is imposed": *Thompson-Davis v R* [2013] NSWCCA 75 at [52].

Section 47(5) focuses on the expiration of the non-parole period of the "other sentence" set by the first court and does not distinguish between the scenarios where the offender is in custody, parole not having been granted, or in custody following the grant of parole and its subsequent revocation: *White v R* [2016] NSWCCA 190 at [7], [118]–[119]. Therefore, a sentence of imprisonment may not be post-dated later than

the earliest date on which the offender will become entitled or eligible to release on parole for the first sentence: *White v R* at [118]. Basten JA dissented in *White v R* at [27] on the basis that the:

> reference to the offender being "still in custody" [in s 47(5)] is better understood as referring to a continuation of one period of custody rather than the situation where the period of custody has ceased upon his release and recommenced as a result of the revocation of parole.

Where an offender is bail refused for an offence and subject to a statutory parole order pursuant to s 158 *Crimes (Administration of Sentences) Act* 1999 for a pre-existing sentence, the subject sentence should commence when the non-parole period for the pre-existing sentence expires: *Kaderavek v R* [2018] NSWCCA 92 at [17]–[22].

[7-550] Information about release date

Section 48(1) *Crimes (Sentencing Procedure) Act* 1999 provides:

> When sentencing an offender to imprisonment for an offence, or to an aggregate sentence of imprisonment for 2 or more offences, a court must specify:
>
> (a) the day on which the sentence commences or is taken to have commenced, and
>
> (b) the earliest day on which it appears (on the basis of the information currently available to the court) that the offender will become entitled to be released from custody, or eligible to be released on parole, having regard to:
>
> (i) that and any other sentence of imprisonment to which the offender is subject, and
>
> (ii) the non-parole periods (if any) for that and any other sentence of imprisonment to which the offender is subject.

The three examples given in the Note to s 48(1) are not within the terms of the statute: *R v Kay* [2000] NSWSC 716. Hulme J said at [128] (affirmed in *R v Nilsson* [2005] NSWCCA 34):

> In specifying the days on which the Prisoner will become eligible for parole and release, I have departed from the examples provided under s 48 of the *Crimes (Sentencing Procedure) Act*, which reflect a misunderstanding of either simple counting or the law's measurement of time. Absent special circumstances, the law does not take account of parts of a day. Seven days' imprisonment commencing on a Monday expires at midnight on the following Sunday.

In *Farkas v R* [2014] NSWCCA 141, there was a division of opinion as to the appropriate eligibility date of parole. Campbell J at [103] (with whom RA Hulme J agreed at [40]) amended the proposed sentencing orders of Basten JA at [2] so that the applicant's eligibility for parole fell one day later. Basten JA considered the operation of ss 47 and 48 of the Act, and stated that the parole date which should be specified is that of the day prior to the anniversary of commencement of the sentence: *Farkas v R* at [29]. His Honour held that there is an inconsistency between the examples set out in the note to s 48 (which assume that the person becomes eligible to be released on parole on the day before the anniversary of the commencement of the sentence) and the language of s 47(6) ("ends at the end of the day on which it expires"). Basten JA opined at [29] that the inconsistency should be resolved by following the approach

adopted in the note to s 48 which is consistent with the conventional approach taken in *Ingham v R* [2014] NSWCCA 123, but see *R v Nilsson* [2005] NSWCCA 34 at [24], [27]–[29]. While Campbell J or RA Hulme J altered the sentencing orders, neither expressly addressed the operation of s 48.

In *R v BA* [2014] NSWCCA 148, the court made observations concerning the appropriate date which should be recorded in a parole order. McCallum J stated that the clear effect of s 47(4) is that the Act assumes sentences begin and end at midnight, and it is therefore not inconsistent with the Act to order a person's release on the last day of the non-parole period. However, such an order could give rise to a technical difficulty in entering the terms of the order into the court's computerised record system: at [19].

[7-560] Restrictions on term of sentence

Section 49(1) *Crimes (Sentencing Procedure) Act* 1999 provides:

> (1) The term of a sentence of imprisonment (other than an aggregate sentence of imprisonment):
>
> (a) must not be more than the maximum term of imprisonment that may be imposed for the offence, and
>
> (b) must not be less than the shortest term of imprisonment (if any) that must be imposed for the offence.

Section 49(2), which relates to aggregate sentences, is discussed above at [7-505].

[7-570] Court not to make parole orders

Where a non-parole period has been specified for a sentence of 3 years or less, the court must not make an order directing the release of the offender. Section 50 *Crimes (Sentencing Procedure) Act* 1999, which previously required a court to make such an order, was repealed on 26 February 2018: *Parole Legislation Amendment Act* 2017, Sch 3.2. However, a court must still comply with s 48(1) *Crimes (Sentencing Procedure) Act* by nominating when the sentence commences and, when it appears to the court, the offender will be eligible for release: see [7-550] **Information about release date**.

Section 158 *Crimes (Administration of Sentences) Act* 1999 states that if a non-parole period has been specified for a sentence of 3 years or less, the offender is taken to be subject to a "statutory parole order", a parole order directing their release at the end of the non-parole period: s 158(1).

Whenever a court imposes a sentence of imprisonment for a term greater than 3 years, release on parole and the terms of the parole order are matters solely for the Parole Authority: *Muldrock v The Queen* (2011) 244 CLR 120 at [4]. If the court makes a parole order with conditions in circumstances where it does not have the power to do so "it has no effect": *Moss v R* [2011] NSWCCA 86 per Simpson J at [28].

Sections 126 and 158 *Crimes (Administration of Sentences) Act* are relevant. Section 158(2) provides that a statutory parole order in relation to a sentence is conditional on the offender being eligible for release on parole in accordance with s 126 *Crimes (Administration of Sentences) Act* at the end of the non-parole period of the sentence.

Section 158(3) provides that if the offender is not eligible for release at that time, they are entitled to be released on parole as soon as they become so eligible. Section 158(4) provides that:

> This section does not authorise the release on parole of an offender who is also serving a sentence of more than 3 years for which a non-parole period has been set unless the offender is entitled to be released under Division 2.

Section 126 is entitled: "Eligibility for release on parole" and s 126(1) provides that: "Offenders may be released on parole in accordance with this Part". Section 126(2) provides:

> An offender is eligible for release on parole only if:
>
> (a) the offender is subject to at least one sentence for which a non-parole period has been set, and
>
> (b) the offender has served the non-parole period of each such sentence and is not subject to any other sentence.

Mixture of Commonwealth and State offences

In the case of Commonwealth offences, Pt IB *Crimes Act* 1914 (Cth) makes exhaustive provision for fixing non-parole periods and making recognizance release orders: *Hili v The Queen* (2010) 242 CLR 520 at [22]. When a court imposes a sentence of 3 years or less (or sentences in aggregate that do not exceed 3 years) on a federal offender, the court must make a recognizance release order in respect of the instant sentence(s) and must not fix a non-parole period: s 19AC(1). The court need not comply with s 19AC(1) if satisfied such an order is not appropriate: s 19AC(4). For further guidance on sentencing, where there is a mixture of Commonwealth and State offences, see [16-050] **Fixing non-parole periods and making recognizance release orders** under "Mixture of Commonwealth and State offences".

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

Following the repeal of ss 51 and 51A *Crimes (Sentencing Procedure) Act 1999* on 26 February 2018, the court has no power to impose parole conditions, including conditions as to non-association and place restriction: Sch 3.2[2]–[3] *Parole Legislation Amendment Act* 2017.

[7-590] Warrant of commitment

As soon as practicable after sentencing an offender to imprisonment, a court must issue a warrant for the committal of the offender to a correctional centre: *Crimes (Sentencing Procedure) Act* 1999, s 62(1). The warrant must be in the approved form: *Crimes (Sentencing Procedure) Regulation* 2017, cl 7. Section 62 does not apply to imprisonment the subject of an intensive correction order: s 62(4)(b).

[7-600] Exclusions from Division

Part 4 Div 1 *Crimes (Sentencing Procedure) Act* 1999 does not apply to offenders sentenced to life (or for any other indeterminate period), or to imprisonment under the *Fines Act* 1996, the *Habitual Criminals Act* 1957, or to detention under the *Mental Health (Forensic Provisions) Act* 1990: s 54 *Crimes (Sentencing Procedure) Act*.

[The next page is 4721]

Concurrent and consecutive sentences

Part 4, Div 2 *Crimes (Sentencing Procedure) Act* 1999 (ss 55–60) contains provisions relating to the imposition of concurrent and consecutive sentences of imprisonment. It is convenient to explain here what DA Thomas first coined in his *Principles of Sentencing,* 2nd ed, 1979, Heinemann, London at p 56 as "the totality principle" (see A Ashworth, *Sentencing and Criminal Justice*, 4th ed, 2005, Cambridge University Press, New York at p 248).

[8-200] The principle of totality

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour. The High Court has quoted DA Thomas' exposition of the common law principle (below) on at least three occasions, the most recent being *Johnson v The Queen* (2004) 78 ALJR 616 at [18]:

> In *Mill* [*Mill v The Queen* (1988) 166 CLR 59 at 63] Wilson, Deane, Dawson, Toohey and Gaudron JJ adopted a statement from Thomas, *Principles of Sentencing* … at pp 56–57 [footnotes omitted]:
>
> > "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

The passage from Thomas was also quoted in *R H McL v The Queen* (2000) 203 CLR 452 at [15] and *R v Harris* [2007] NSWCCA 130 at [44]. Street CJ's description of the principle in *R v Holder* [1983] 3 NSWLR 245 is also commonly quoted, for example, in *R v MMK* [2006] NSWCCA 272 at [12]. Street CJ said at 260:

> The principle of totality is a convenient phrase, descriptive of the significant practical consideration confronting a sentencing judge when sentencing for two or more offences. Not infrequently a straightforward arithmetical addition of sentences appropriate for each individual offence considered separately will arrive at an ultimate aggregate that exceeds what is called for in the whole of the circumstances. In such a situation the sentencing judge will evaluate, in a broad sense, the overall criminality involved in all of the offences and, having done so, will determine what, if any, downward adjustment is necessary, whether by telescoping or otherwise, in the aggregate sentences in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.

Totality both constrains and sets a lower limit

The Court of Criminal Appeal in *R v MMK* [2006] NSWCCA 272 at [11] said the principle of totality was "not-unrelated" to the principle of proportionality.

The task of the court is to ensure that the overall sentence is neither too harsh nor too lenient. Just as totality is applied to avoid a crushing sentence "… it is not to be disregarded for the converse purpose of assessing whether the overall effect of the sentences is sufficient …": *R v KM* [2004] NSWCCA 65 at [55] cited with approval in *Vaovasa v R* [2007] NSWCCA 253 at [18]. The totality principle is routinely relied upon by the Crown in appeals against inadequacy of sentence. But mostly, the principle is invoked at first instance in the words of McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295 at 308, whereby:

> the Court … adjust[s] the prima facie length of the sentences downward in order to achieve an appropriate relativity between the totality of the criminality and the totality of the sentences.

Totality and public confidence in sentencing

In *R v MAK* [2006] NSWCCA 381 at [18], the court said the principle must be applied without a suggestion that a discount is given for multiple offences:

> A sentencing court must, however, take care when applying the totality principle. Public confidence in the administration of justice requires the Court to avoid any suggestion that what is in effect being offered is some kind of a discount for multiple offending: *R v Knight* (2005) 155 A Crim R 252 at [112].

R v Harris [2007] NSWCCA 130 at [46] endorsed a statement of Sully J to similar effect in *R v Wheeler* [2000] NSWCCA 34 at [36].

[8-210] Applications of the totality principle

When a court is sentencing for multiple offences, and before it imposes the sentence for any one offence, it will have considered the outcome for all offences: *R v JRD* [2007] NSWCCA 55 at [33]. This approach ensures that the effective sentence reflects the overall criminality and that the individual sentences imposed conform to any statutory limitations that exist for specific sentencing options: *R v JRD* at [31], [33].

Where a sentence for an offence was reduced at first instance because of the totality principle on the basis of a premise, such as an existing sentence that no longer exists, a correction may be necessary so the sentence adequately reflects the criminality of the remaining offences, standing alone: *Johnson v R* [2017] NSWCCA 278 at [161]–[163]; *R v Tolmie* (1994) 72 A Crim R 416 at 418; see *R v JDX* [2017] NSWCCA 9 at [90]–[96]. See also **Power to vary commencement of sentence** at [8-270].

Totality and non-custodial sentences

The totality principle applies where a court imposes more than one non-custodial sentence, or a mixture of different non-custodial sentences, or imprisonment is imposed with an additional penalty or order: *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 704; *R v Chelmsford Crown Court, ex parte Birchell* (1989) 11 Cr App R (S) 510 (fines); *Winkler v Cameron* (1981) 33 ALR 663 at 670 (fines and restitution orders); *Hunter v White* [2002] TASSC 72 at [9] (imprisonment and licence disqualification); and *EPA v Barnes* [2006] NSWCCA 246 at [50] (fines and an order for legal costs).

Totality and fines

Kirby P said in *Camilleri's Stock Feeds Pty Ltd v EPA* (1993) 32 NSWLR 683 at 704:

> The principle of totality is applicable where the penalty imposed is by way of fine: see *R v Sgroi* (1989) 40 A Crim R 197 at 203. However, it may be that the principle of

> totality may not have the same force in the case of the imposition of fines, as opposed to the imposition of imprisonment where it has a special operation: see *R v Brown* (1982) 5 A Crim R 404 at 407.

The passage was quoted with approval in *EPA v Barnes* [2006] NSWCCA 246 at [46]. Unlike terms of imprisonment, fines cannot be made "concurrent". Each fine which is imposed must be paid separately.

The court in *EPA v Barnes*, above, at [50] suggested that if the sentencer believes that the totality principle requires an adjustment to the fines which may otherwise be appropriate, the amount of each fine should be altered by the approach taken by the first instance judge in *Johnson v The Queen* (2004) 78 ALJR 616 (discussed below), of reducing individual sentences and then aggregating each to determine a total fine amount.

[8-220] Totality and sentences of imprisonment

As to the application of the totality principle where a court is considering imposing intensive correction orders see [3-630].

A court which sentences an offender to more than one sentence of full-time imprisonment can utilise s 53A *Crimes (Sentencing Procedure) Act* 1999 and apply the principle of totality implicitly. See the discussion of the requirements for aggregate sentences at [7-505] and at [7-507] under the heading *Application of Pearce v The Queen and the totality principle (propositions 1, 4 and 6)*. Alternatively the court can impose individual sentences (including a fixed terms/non-parole period and terms of sentence) with specific dates and apply the principle of totality explicitly.

The severity of a sentence of imprisonment is not purely linear

The court in *R v MAK* [2006] NSWCCA 381 at [15]–[18] identified at least two matters that are considered under the totality principle. The first is that:

> The severity of a sentence is not simply the product of a linear relationship. That is to say severity may increase at a greater rate than an increase in the length of a sentence.

The court at [16] quoted *R v Clinch* (1994) 72 A Crim R 301 at 306–307 where Malcolm CJ said "a sentence of five years is more than five times as severe as a sentence of one year". *R v MAK* and *R v Clinch* were referred to in *Gore v R; Hunter v R* [2010] NSWCCA 330 at [42]; *Cavanagh v R* [2009] NSWCCA 174 at [16]ff. However, sometimes very long sentences are required and it is not possible to determine whether inadequate weight has been given to what was said in *Clinch* until the court also reflects on other factors: *Hampton v R* [2010] NSWCCA 278 at [36]. For example, the effective non-parole period of two years was not beyond the available range in *Einfeld v R* [2010] NSWCCA 87, Latham J (RS Hulme J agreeing) at [201], Basten JA at [185]–[189] dissenting.

Imposition of a crushing sentence

The second matter, referred to by the court in *R v MAK*, above, at [17], is that the totality principle is designed to avoid a court imposing a "crushing sentence" or, as put by King CJ in *R v Rossi* (1988) 142 LSJS 451 at 453: "… where the total effect

of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect." The court in *MAK* explained the notion of a crushing sentence at [17]:

> an extremely long total sentence may be "crushing" upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release. This effect both increases the severity of the sentence to be served and also destroys such prospects as there may be of rehabilitation and reform. Of course, in many cases of multiple offending, the offender may not be entitled to the element of mercy entailed in adopting such a constraint.

An assessment of whether a particular sentence is a "*crushing sentence*" must have regard to the offences committed, the maximum penalties, standard non-parole periods (if relevant) and all objective and subjective factors and principles concerning accumulation, concurrency and totality: *Paxton v R* [2011] NSWCCA 242 at [215]. The totality principle, including any necessity to avoid imposing a "crushing sentence", is not a basis to avoid imposing a sentence that is "just and appropriate". That a sentence may be "crushing" is but one matter taken into account in determining whether a particular sentence is beyond the range of sentences properly available: *Hraichie v R* [2022] NSWCCA 155 at [73]; *Atai v R* [2020] NSWCCA 302 at [132]; *GS v R* [2016] NSWCCA 266 at [50]–[51]. An extremely lengthy sentence would not necessarily be characterised as crushing if it reflects the total criminality of the offender's conduct and would not be disturbed on appeal because the offender may feel crushed by it: *Stanton v R* [2017] NSWCCA 250 at [153]; *ZA v R* [2017] NSWCCA 132 at [76]–[85]. For young offenders a crushing sentence is one that is so long that the offender cannot conceive of enjoying a useful life after its expiration: *Holliday v R* [2013] ACTCA 31 at [61].

For a discussion on totality in the context of Commonwealth offences see *Mohamed v The Queen* [2022] VSCA 136 at [5]–[6] and **Totality principle when previous sentence to be served: ss 16B, 19AD and 19AE** in [16-050] **Fixing non-parole periods and making recognizance release orders**.

Statutory provisions for concurrent and consecutive sentences of imprisonment

Several provisions in the Act are relevant to sentencing exercises where more than one sentence of imprisonment is imposed. The provisions are technical in nature. The common law, discussed below, largely governs this area of the law.

Commencement date of sentences

Section 47(2)(a) provides that a court may direct that a sentence of imprisonment commence on a day *prior to* the day on which it is imposed. Section 47(2)(b) also provides that a court may direct that a sentence of imprisonment commence on a day occurring *after* the day on which the sentence is imposed but only if the sentence is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment. A direction "must not" be later than the day following the earliest day on which it appears to the court that the offender will become eligible to be released from custody, or will become eligible to be released on parole: s 47(4). On the issue of backdating and forward dating sentences, see [12-500] **Counting pre-sentence custody** and [7-547] **Forward dating sentences of imprisonment**, respectively.

Multiple sentences of imprisonment

Section 53 provides:

> (1) When a court imposes a sentence of imprisonment on an offender in relation to more than one offence, the court must (unless imposing an aggregate sentence of imprisonment in accordance with section 53A) comply with the requirements of this Division by imposing a separate sentence in relation to each offence.
>
> (2) The term, and any non-parole period, set under this Division in relation to a sentence of imprisonment is not revoked or varied by a later sentence of imprisonment that the same or some other court subsequently imposes in relation to another offence.

Section 55 provides that in the absence of a direction where more than one sentence of imprisonment is imposed, or where the offender is subject to another sentence of imprisonment that is yet to expire, the sentence "is to be served concurrently". Section 55 provides:

> (1) In the absence of a direction under this section, a sentence of imprisonment imposed on an offender:
>
> (a) who, when being sentenced, is subject to another sentence of imprisonment that is yet to expire, or
>
> (b) in respect of whom another sentence of imprisonment has been imposed in the same proceedings,
>
> is to be served concurrently with the other sentence of imprisonment and any further sentence of imprisonment that is yet to commence.
>
> (2) The court imposing the sentence of imprisonment may instead direct that the sentence is to be served consecutively (or partly concurrently and partly consecutively) with the other sentence of imprisonment or, if there is a further sentence of imprisonment that is yet to commence, with the further sentence of imprisonment.
>
> (3) A direction under this section has effect according to its terms.
>
> …

Rather than create a presumption in favour of concurrency, s 55 appears to be directed to ensuring that, if the judge does not specifically address the issue, the default position is that the sentences are to be served concurrently: *Yeung v R* [2018] NSWCCA 52 at [46]. Section 55(1) does not require a specific direction. A direction is implicit in fixing the relevant commencement date and any more formalistic approach is not required: *Yeung v R* at [48].

Section 55(5) provides that s 55 does not apply to a sentence of imprisonment imposed on an offender in relation to an offence involving an assault, or any other offence against the person, committed by the offender while a convicted inmate of a correctional centre, or against a juvenile justice officer committed by the offender while a person subject to control, or a sentence of imprisonment imposed on an offender in relation to an offence involving an escape from lawful custody committed by the offender while an inmate of a correctional centre (whether or not the escape was from a correctional centre).

Smart AJ identified some practical problems that arise from the language used in s 55 in *R v Killick* [2002] NSWCCA 1 at [68]–[79].

[8-230] Structuring sentences of imprisonment and totality

It has been said that express legislative provisions apart (such as s 57 escape, see below) questions of concurrence or accumulation are a discretionary matter for the sentencing judge (*R v Hammoud* [2000] NSWCCA 540 at [7]; *R v Scott* [2005] NSWCCA 152 at [31]; *LG v R* [2012] NSWCCA 249 at [24]) and that in determining appropriate sentences:

> Judges of first instance should be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime under which the sentencing is effected. *Johnson v The Queen* (2004) 78 ALJR 616 at [26].

However, the court in *R v MMK* [2006] NSWCCA 272 at [13] made clear that "the discretion is generally circumscribed by a proper application of the principle of totality". The court said at [11]:

> It is the application of the totality principle that will generally determine the extent to which a particular sentence is to be served concurrently or cumulatively with an existing sentence in accordance with statements of the High Court as to the operation of the principle in *Mill v The Queen* (1988) 166 CLR 59; *Pearce v The Queen* (1998) 194 CLR 610 and *Johnson v The Queen* (2004) 78 ALJR 616.

Statements such as those in *R v Hammoud* [2000] NSWCCA 540 at [7] to the effect that questions of concurrence or accumulation are a discretionary matter for the sentencing judge "have to be read subject to what is required in a particular case to reflect the totality of the criminality before the Court": *R v Merrin* [2007] NSWCCA 255 per Howie J at [36].

The following discussion sets out the common law position before aggregate sentences were introduced, as to which see ss 44(2A), 44(2C) and 53A discussed at [7-500]ff.

The "orthodox method" of setting sentences for each offence *before* considering the issues of concurrency or cumulation

The discussion will return to the issue of whether a sentence of imprisonment in a particular case ought to be served concurrently or made consecutive. The High Court has suggested specific approaches to setting sentences of imprisonment for multiple offences *before* issues of concurrency or cumulation are considered. In *Mill v The Queen* (1988) 166 CLR 59 the High Court suggested two approaches at 63:

> Where the [totality] principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by *making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate* in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred [emphasis added].

The High Court in *Johnson v The Queen* (2004) 78 ALJR 616 [26] said that *Mill v The Queen*:

> expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of *fixing a sentence for each offence* and aggregating them before taking the next step of determining concurrency [emphasis added].

In *Pearce v The Queen* (1998) 194 CLR 610 McHugh, Hayne and Callinan JJ said at [45]:

> A judge sentencing an offender for more than one offence must *fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence*, as well, of course, as questions of totality [emphasis added].

The court clarified in *Johnson v The Queen* at [26] that the approach suggested in *Pearce v The Queen* did not overrule the second method referred to in *Mill v The Queen* at 63 of "*lowering the individual sentences below what would otherwise be appropriate*" [emphasis added]:

> *Pearce* does not decree that a sentencing judge may never *lower each sentence and then aggregate* them for determining the time to be served. To do that, is not to do what the joint judgment in *Pearce* holds to be undesirable, that is, to have regard *only* to the total effective sentence to be imposed on an offender [emphasis added].

Since *Pearce v The Queen*, the Court of Criminal Appeal has made clear that it is impermissible to impose a sentence for one offence and then increase it in order to encompass the criminality of other offences before the Court: *R v Merrin* [2007] NSWCCA 255 at [37]. Secondly, where an offender stands for sentence for multiple offences it is a clear error "… to have regard *only* to the total effective sentence to be imposed on an offender": *Johnson v The Queen* at [26].

Brownie JA said in *R v O'Connell* [2005] NSWCCA 265 at [30] that the strict application of the approach suggested in *Pearce* may present a practical problem where individual offences, if considered individually, do not warrant a prison sentence.

Should a sentence of imprisonment be served concurrently or consecutively?

A sentence should not be concurrent "simply because of the similarity of the conduct or because it may be seen as part of the one course of criminal conduct … [t]he question to be asked is, can the sentence for one offence encompass the criminality of all the offences?": *R v Jarrold* [2010] NSWCCA 69 per Howie J at [56], cited with approval in *Franklin v R* [2013] NSWCCA 122 at [44] and *MPB v R* [2013] NSWCCA 213 at [134].

In *R v XX* [2009] NSWCCA 115 at [52], Hall J derived the following 11 propositions from the case law, principally from *Cahyadi v R* [2007] NSWCCA 1 and *Nguyen v R* [2007] NSWCCA 14:

> There is no general rule that determines whether sentences ought to be imposed concurrently or consecutively: see *Cahyadi v R* (2007) 168 A Crim R 41 per Howie J at 47. However, a number of propositions relevant to the consideration of that issue may be derived from the case law. They include the following:
>
> (1) It is well established that questions of accumulation are, subject to the application of established principle, discretionary. What is important is that, firstly, an appropriate sentence is imposed in respect of each offence; and, secondly, that the total sentence imposed properly reflects the totality of the criminality: *R v Wilson* [2005] NSWCCA 219 at [38] per Simpson, Barr and Latham JJ agreeing.
>
> (2) In *R v Weldon* (2002) 136 A Crim R 55, Ipp JA at [48] stated that it is "*not infrequent that, where the offences arise out of one criminal enterprise, concurrent sentences*

will be imposed" but his Honour observed that "*this is not an inflexible rule*" and "*[t]he practice should not be followed where wholly concurrent sentences would fail to take account of differences in conduct*".

(3) The question as to whether sentences in respect of two or more offences committed in the course of a single episode or a criminal enterprise or on a particular day should be concurrent or at least partly accumulated is to be determined by the principle of totality and the relevant factors to be taken into account in the application of that principle. See observations in this respect of Howie J in *Nguyen v R* [2007] NSWCCA 14 at [12].

(4) In applying the principle of totality, the question to be posed is whether the sentence for one offence can comprehend and reflect the criminality of the other offence. See generally *R v MMK* (2006) 164 A Crim R 481 at [11] and [13], *Cahyadi* at [12] and [27] and *Vaovasa v R* (2007) 174 A Crim R 116.

(5) If the sentence for one offence can comprehend and reflect the criminality of the other, then the sentences ought to be concurrent, otherwise there is a risk that the combined sentences will exceed that which is warranted to reflect the totality of the two offences: *Cayhadi* per Howie J at [27].

(6) If not, the sentence should be at least partially cumulative otherwise there is a risk that the total sentence will fail to reflect the total criminality of the two offences. This is so regardless of whether the two offences represent two discrete acts of criminality or can be regarded as part of a single episode of criminality: *Cayhadi* per Howie J at [27].

(7) Whether the sentence for one offence can comprehend and reflect the criminality of the other calls for the identification and an evaluation of relevant factors pertaining to the offences. These will include the nature and seriousness of each offence.

(8) In cases involving assault with violence where the offences involve two or more attacks of considerable violence and are distinct and separate (eg, see *R v Dunn* (2004) 144 A Crim R 180 at [50]) or in cases where there are separate victims of the attacks as in *Wilson*, the closeness in time and proximity of the two offences will often not be determinative factors. See also *R v KM* [2004] NSWCCA 65. In *Wilson*, having regard to the purposes of sentencing set out in s 3A of the *Crimes (Sentencing Procedure) Act*, Simpson J observed at [38] that "*... to fail to accumulate, at least partially, may well be seen as a failure to acknowledge the harm done to those individual victims* …"

…

(9) Where two offences committed during the course of a single episode are of a completely different nature and each individually involved significant or extreme gravity, it is likely that some accumulation will be necessary to address the criminality of the two: *Nguyen* per Howie J at [13] .

(10) Possession of two different kinds of drugs may not be regarded as one episode of criminality in a case of "*deemed*" supply: *Luu v R* [2008] NSWCCA 285 at [32].

(11) The fact that the evidence of two offences (eg, documentary evidence or the presence of drugs) are located by police at or in the one place is not a relevant factor in favour of concurrent sentences … (*Cahaydi* at [26]).

Iskov v R [2011] NSWCCA 241 at [87]–[91] is an example of an application of *Cahyadi v R*. It was held that even though three offences had been committed against the same victim within a period of a few hours, the judge was required to make each sentence partly cumulative on the preceding sentence or sentences because the criminality in each offence could not be comprehended within the other offences.

Multiple victims and discrete offending usually require partly consecutive sentences

The following cases for dangerous driving, sexual assault, assault and wounding, break, enter and robbery are cited as examples. The cases hold that the fact that there is more than one victim will generally require an increase in the otherwise appropriate sentence than where only one victim was involved: *Vaovasa v R* [2007] NSWCCA 253 at [16]. Similarly a prudent measure of cumulation is necessary where the criminal conduct is capable of being described as discrete offending.

Dangerous driving cases

In *R v Janceski* [2005] NSWCCA 288; (2005) 44 MVR 328, Hunt AJA at [23] explained the approach of sentencing for a single action aggravated by multiple victims:

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

Further driving cases where the issue has been discussed include: *R v Skrill* [2002] NSWCCA 484 at [75]; *R v Plumb* [2003] NSWCCA 359 at [12] and cases listed at [19]; *Richards v R* [2006] NSWCCA 262. In the latter case it was said at [78]: "… failure to accumulate those sentences, at least partially, appears to have been a failure to acknowledge the harm done to the individual victims". See also [18-400] **Totality** in **Dangerous driving and navigation**.

Sexual assault

Generally, relevant considerations include the number of victims and whether the offences committed against each occurred on separate occasions: *Van der Baan v R* [2012] NSWCCA 5 at [117]. Where sexual offences arise out of one event a court is required to identify a sentence appropriate for each separate act and some degree of accumulation is sometimes necessary to address additional criminality: *Franklin v R* [2013] NSWCCA 122 at [44]–[45]. It is open for a court to make each victim's sentence wholly cumulative upon the non-parole period of another victim where the offences are committed on separate victims over an extended period: *Magnuson v R* [2013] NSWCCA 50 at [142]. It was an error in *Nguyen v R* [2007] NSWCCA 14 at [13] for the court to impose wholly concurrent sentences for the offences of armed robbery and sexual intercourse without consent in circumstances of aggravation which arose from the same incident. Similarly in *R v Gorman* [2002] NSWCCA 516 at [9], the judge erred by imposing wholly concurrent sentences for sexual offences arising from the same incident. Characterising the offences as "one episode of criminality" misapplied *Pearce v The Queen* and failed to have regard to the specific circumstances of each individual offence.

Further sexual assault cases where a judge has erred by imposing wholly concurrent sentences for discrete offending include *R v Smith* [2006] NSWCCA 353 at [17] and [23]; *R v TWP* [2006] NSWCCA 141 at [25]–[27]; *R v BWS* [2007] NSWCCA 59 at [16]–[17].

Where a court is required to sentence according to past (the late 1970s to early 1980s practices) it must be borne in mind that "the approach to questions of concurrence

and cumulation was more lax, before the handing down of *Pearce v The Queen*": *Magnuson v R* per Button J at [143]. This does not apply to child sexual offences. Section 25AA *Crimes (Sentencing Procedure) Act* 1999, which came into force on 31 August 2018, requires a court sentencing for such an offence to sentence the offender in accordance with sentencing patterns and practice at the time of sentencing, not at the time of the offence.

Assault and wounding offences

The judge in *R v Dunn* [2004] NSWCCA 41 erred by imposing concurrent sentences for two offences involving wounding committed in the course of a single extended criminal episode. Adams J expressed the view at [50]:

> There is a distinct difference between assaulting one victim and assaulting two. Each was intentionally injured with the knife. The learned sentencing judge did not articulate his reasons for making the sentences wholly concurrent.

The judge erred in *R v Nguyen* [2013] NSWCCA 195 by imposing wholly concurrent sentences for both a wounding with intent to cause grievous bodily harm offence under s 33(1)(a) *Crimes Act* 1900 and manslaughter. Although there was short period of time between the offences, they were distinct offences caused by different bullets resulting in very different consequences: *R v Nguyen* at [81]. The nature and seriousness of the wounding offence was such that the sentence for manslaughter could not sufficiently comprehend and reflect the criminality involved in the wounding offence: *R v Nguyen* at [83].

Robbery

Where there are multiple counts it is incumbent on the court to consider the question of totality: *R v Kelly* [2010] NSWCCA 259. Imposing fixed terms for all but the most serious charge is "inappropriate in the context of serious offences such as robbery": *R v Kelly* at [55]. The judge's erroneous global approach caused her to underestimate the seriousness of the first (home invasion) offence: *R v Kelly* at [56]. In *Vaovasa v R* [2007] NSWCCA 253 at [19] the judge erred by imposing wholly concurrent sentences for three robbery in company offences upon the basis that the offences were committed against three victims and were part of one course of criminality of short duration.

Break, enter and steal

Totality will rarely, if ever, justify wholly concurrent sentences for a series of break enter offences: *R v Merrin* [2007] NSWCCA 255 at [38] citing *R v Harris* [2007] NSWCCA 130 at [38]–[42]. The judge in *Harris* erred by imposing wholly concurrent sentences for a "series of [break enter] offences". The court held at [45] that the limiting or constraining function of the principle of totality:

> will rarely if ever go so far as to justify wholly concurrent sentences for all of a series of offences such as those here. Subject to those limits, in general, sentences significantly cumulative should be imposed for separate serious offences of which those here are all examples.

Earlier at [40] the court said:

> Making sentences wholly concurrent means that the second and subsequent effectively constitute no punishment and sends a clear message to those members of the criminal

> community who chose to live by breaking and entering and stealing or the like that once they have committed one or a few offences, they can continue offending with virtual impunity so far as sentences are concerned.

The court acknowledged the circumstances where wholly concurrent sentences may be justified for break enter offences at [43]:

> Of course at times there will be good reason for complete concurrency. One is where some offences are little more than incidents of, or incidental to, others.

Fraud offences

In *R v Hawkins* [2013] NSWCCA 208 at [23]–[24], it was held that the individual sentences for the charges of defraud the Commonwealth and obtain financial advantage by deception may have been appropriate, however the concurrency of the sentences had the effect that the respondent received no punishment for six of the offences.

Offences in contravention of apprehended domestic violence orders

An offence committed in breach of an apprehended domestic violence order (ADVO), and an offence of breaching an ADVO, involves separate and distinct criminality. There is no duplicity in imposing distinct sentences for what are distinct offences: *Suksa-Ngacharoen v R* [2018] NSWCCA 142 at [131]. Conduct involving deliberate disobedience of a court order must be treated as serious, and should ordinarily be separately punished from any offence occurring at the same time: *Suksa-Ngacharoen v R* at [132].

Totality and existing sentences of imprisonment

The totality principle has been applied where an offender is serving an existing sentence and is sentenced by the second court a period after the first offence: *Mill v The Queen* (1988) 166 CLR 59 at 66; *Choi v R* [2007] NSWCCA 150 at [157]. The court in *Mill* at 66 said that in a case where the offences were committed in a short period across State borders the proper approach:

> was to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time.

The principle is applied not just to the non-parole period but to the head sentence: *Mill* at 67.

If the criminality of offences previously committed is great there will be very little room left for a further penalty to be imposed: *R v MMK* [2006] NSWCCA 272 at [14].

Offences committed under both state and federal law

Section 16B *Crimes Act* 1914 (Cth) gives statutory expression to the principle where an offender is sentenced for Commonwealth offences: *Postiglione v The Queen* (1997) 189 CLR 295 at 308. Section 16B provides that the court is to have regard to:

> (a) any sentence already imposed on the person by the court or another court for any other federal offence or for any State or Territory offence, being a sentence that the person has not served; and
>
> (b) any sentence that the person is liable to serve because of the revocation of a parole order made, or licence granted, under this Part or under a law of a State or Territory.

Separate indictments

There are no special rules in relation to totality which apply where a judge sentences an offender for charges on more than one indictment: *R v Finnie* [2002] NSWCCA 533 at [57]–[58]. Concurrent sentences should not have been imposed in *R v Finnie* because the separate indictments were referable to different and separate episodes of criminal activity and involved different modus operandi and different victims.

Totality and overlapping charges

An offender should not be punished twice for common elements between offences. In *Pearce v The Queen* (1998) 194 CLR 610, McHugh, Hayne and Callinan JJ said at [40]:

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.

The court said at [41] it "… need not decide whether this result is properly to be characterised as good sentencing practice or as a positive rule of law".

The principle was explained in *Nahlous v R* [2010] NSWCCA 58 at [17]:

> a person can by the one act commit two offences and, where the two offences address different aspects of the criminal conduct, there is nothing wrong with prosecuting the two offences or, subject to the principle of totality, with imposing separate sentences for the two offences.

In *Pearce v The Queen*, the overlapping charges were maliciously inflict grievous bodily harm with intent to do grievous bodily harm and break and enter a dwelling house and while therein inflict grievous bodily harm. The court concluded at [49]: " … the individual sentences imposed on counts 9 and 10 were flawed because they doubly punished the appellant for a single act, namely, the infliction of grievous bodily harm".

The double punishment principle referred to in *Pearce v The Queen* was applied in *R v Hilton* [2005] NSWCCA 317 where the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) *Crimes Act* and eight counts of using premises for child prostitution under s 91F(1). The court held that he was doubly punished for his conduct.

The practice or rule is obviously not applicable where there is a specific statutory provision which prevents the Crown charging a person with two offences with different ingredients for the same conduct or where it would be oppressive to charge for the second offence. Section 25A(5) *Drug Misuse and Trafficking Act* 1985 provides that a person who has been convicted of an offence under s 25A (ongoing supply) is not liable to be convicted of an offence under s 25 (supply) on the same or substantially the same facts: *Tran v R* [2007] NSWCCA 140 at [12]. In *Nahlous v R* [2010] NSWCCA 58 at [17], the court held it was oppressive to charge for both the sale of the illegal decoders and also the receipt of the money as a result of the sale. The sale offence encompassed the criminality of possessing the proceeds of the sale. On the other hand, receiving

stolen property (even where the stolen property happens to be drugs) is quite different from the act of criminality in possessing a drug for the purpose of sale: *Hinchcliffe v R* [2010] NSWCCA 306 at [27].

[8-240] Sentences for offences involving assault by convicted inmate

Section 56 sets out specific provisions for sentences of imprisonment imposed on an offender in relation to "an offence involving an assault, or any other offence against the person, committed by the offender while a convicted inmate of a correctional centre" (s 56(1)(a)) or "an offence involving an assault, or any other offence against the person, against a juvenile justice officer committed by the offender while a person subject to control" (s 56(1)(b)). The sentence of imprisonment "is to be served consecutively" (s 56(2)) or the court "may instead direct that the sentence is to be served concurrently (or partly concurrently and partly consecutively) with the other sentence of imprisonment and any further sentence of imprisonment that is yet to commence": s 56(3). Such a direction may not be made for an offence involving an assault against a correctional officer or a juvenile justice officer unless the court is of the opinion that there are special circumstances justifying such a direction: s 56(3A).

If the court makes an order under s 56(3), that the second sentence is to be served concurrently or partly consecutively, the reasons for doing so have to be exposed: *R v Hoskins* [2004] NSWCCA 236 at [31]. In that case the effective sentence did not adequately reflect the seriousness of the crime and insufficient weight was given to general deterrence: *R v Hoskins* at [62]–[63] citing *R v Fyffe* [2002] NSWSC 751. See also *R v Windle* [2012] NSWCCA 222 at [56]. In *Banks v R* [2018] NSWCCA 41, the judge erred by wholly accumulating a sentence for recklessly wounding an inmate, on lengthy sentences already being served, resulting in an overall non-parole period of 14½ years that was 92% of the overall head sentence. It was in both the community and the applicant's interests that a longer period than 15 months of supervision on parole be available: at [32]–[34].

Section 56 does not apply when an offender has been released on parole but remains in custody and bail refused for subsequent offences — such an offender is not a "convicted inmate of a correctional centre": *Hraichie v R* [2022] NSWCCA 155 at [132]–[133], [136], [145] (note the offender was on parole by virtue of s 50 (rep) of the *Crimes (Sentencing Procedure) Act* which then required a court which had sentenced an offender to 3 years imprisonment or less to make a parole order directing their release at the end of the non-parole period).

Although s 56 only applies to "convicted inmates", the policy objectives behind it have been applied in *R v Jeremiah* [2016] NSWCCA 241 where an offender committed an assault whilst on remand; in *Tammer-Spence v R* [2021] NSWCCA 90 (see [42], [45]–[46]), where the offender poured boiling water on his cell mate while serving the balance of parole for a sentence for armed robbery; and in *Hraichie v R* [2022] NSWCCA 155 (see at [148]) where the offender committed offences of aggravated kidnapping and assaulting an inmate while bail refused for other offences.

[8-250] Sentences for offences involving escape by inmate

Section 57 sets out specific provisions for sentences of imprisonment imposed on an offender in relation to an offence involving an escape from lawful custody committed

by the offender while an inmate of a correctional centre. Part 6A *Crimes Act* 1900 sets out offences relating to escape from lawful custody. Section 310D provides for an offence for an inmate who escapes or attempts to escape from lawful custody. Where the court is sentencing an offender for an offence involving escape from lawful custody, the court must set the sentence for "non-escape" offences first so that "escape" offences will be cumulative on them. Section 57(1A) provides:

> A sentence of imprisonment to which this section applies must be imposed after any other sentence of imprisonment that is imposed in the same proceedings.

Section 57(2) provides that where an offender is an "inmate of a correctional centre" and commits an offence "involving escape", the sentence is to be served consecutively. See for example *R v Mathieson* [2002] NSWCCA 97 at [30]. The statutory requirement in s 57 was not mentioned or put into effect in *Jinnette v R* [2012] NSWCCA 217 at [90]–[96].

In *R v Pham* [2005] NSWCCA 94, quoted with approved in *Jinnette v R*, Wood CJ at CL, with whom Hislop and Johnson JJ agreed, said at [16]–[19]:

> The offence of escape has been regarded by the courts as a serious offence, which potentially jeopardises the future of minimum security facilities and threatens the continued provision to prisoners of beneficial and humanitarian custodial arrangements and opportunities. It may lead to additional restrictions being placed upon their access to external medical treatment, and it may also impede the progress of rehabilitation for offenders with favourable prospects, if conditions of detention are strengthened, in order to prevent escapes.
>
> These considerations were noted, for example, in *R v Thomson* NSWCCA 21 May 1986 where, in a case decided before enactment of the *Sentencing Act* 1989, Street CJ observed that the ordinary sentence for an unremarkable escape "could be expected to approximate two years" (at a time when the maximum penalty for the offence was imprisonment for seven years); and also in *R v Mathieson* [2002] NSWCCA 97 at [27].
>
> Where the offender has remained at large for a very lengthy period or has used the opportunity of being at large to commit further offences, as was the case here, then the overall objective seriousness of his criminality is potentially increased: *R v Plummer* [2000] NSWCCA 363 at [34] and *R v Josef Regina* [2000] NSWCCA 100. The elements of both personal and general deterrence are also important, it being essential that prisoners understand that any offence of escape or attempted escape will result in a meaningful overall increase in their detention: *R v Butler* [2000] NSWCCA 525 at [18] and *R v Smith* [2004] NSWCCA 69. That this is so is also demonstrated by the fact that the maximum penalty prescribed for the offence has been increased from imprisonment for 7 years to imprisonment for 10 years.
>
> It is also for that reason that the legislature enacted, by way of s 57(2) of the *Crimes (Sentencing Procedure) Act* 1999, a requirement for sentences for escape to be served consecutively upon any existing sentence that has yet to expire, or upon any other sentence that is imposed in the same proceedings.

R v Pham was complicated in so far as it involved a consideration of s 57(3), as well as s 47. The respondent escaped during the parole period of an existing sentence and was at large for a considerable period of time. The court held that there were two distinct purposes apparent from these provisions: the first was to ensure that the offence of escape attracted an actual and meaningful accumulation of sentence; the second was to avoid the existence of a possible hiatus in custody, which would arise if the

offender was later released to parole for the existing sentence before the date fixed for commencement of the fresh sentence. It held that the commencement date of the new sentence was discretionary and governed by s 47 of the Act. The sentence was within the appropriate range but the starting date required adjustment in order to reflect an adequate period of additional punishment.

Section 254 *Crimes (Administration of Sentences) Act* 1999 supplements the operation of Pt 6A *Crimes Act* 1900, in that the section allows for sentences to be extended where an offender is unlawfully absent from custody. However, the section does not operate to prevent a person from being proceeded against and convicted of any offence arising out of an escape: s 254(4).

[8-260] Limitation on consecutive sentences imposed by Local Courts

Sections 267(2) and 268(2) *Criminal Procedure Act* 1986 provide that the maximum term of imprisonment that the Local Court may impose for an offence is, subject to the relevant section, 2 years or the maximum term of imprisonment provided by law for the offence, whichever is the shorter term. The former section applies to Table 1 offences and the latter to Table 2 offences.

Section 58 *Crimes (Sentencing Procedure) Act* 1999 sets numerical limitations on consecutive sentences imposed by the Local Court. Section 58 is a very technical provision and close attention must be given to the language of the section. Its language is a consequence of the troubled history which plagued its predecessor (s 444 *Crimes Act* 1900): see *R v Clayton* (1997) 42 NSWLR 268. It provides:

> **58 Limitation on consecutive sentences imposed by Local Courts**
>
> (1) A Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.
>
> (2) Any period for which an existing sentence has been extended under this or any other Act is to be disregarded for the purposes of this section.
>
> (3) This section does not apply if:
>
> (a) the new sentence relates to:
>
> (i) an offence involving an escape from lawful custody, or
>
> (ii) an offence involving an assault or other offence against the person, being an offence committed (while the offender was a convicted inmate) against a correctional officer or (while the offender was a person subject to control) against a juvenile justice officer, and
>
> (b) either:
>
> (i) the existing sentence (or, if more than one, any of them) was imposed by a court other than a Local Court or the Children's Court, or
>
> (ii) the existing sentence (or, if more than one, each of them) was imposed by a Local Court or the Children's Court and the date on which the new sentence would end is not more than 5 years and 6 months after the date on which the existing sentence (or, if more than one, the first of them) began.

(4) In this section:

"existing sentence" means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).

"sentence of imprisonment" includes an order referred to in section 33(1)(g) of the *Children (Criminal Proceedings) Act* 1987.

Section 58 empowers the Local Court to accumulate sentences up to five years within the prescribed limits outlined above. The operation of s 58 was considered in *R v Perrin* [2022] NSWCCA 170 where Wright J (Ward P and Harrison J agreeing) held that:

1. If there is no existing sentence, s 58 is not engaged: [80], [81].
2. Whether a sentence is "existing" or "unexpired" for the purposes of ss 58(1) and 58(4) is determined on the date the new sentence is imposed: [46], [66], [80]; *Stoneham v Director of Public Prosecutions (NSW)* [2021] NSWSC 735 at [33].
3. The prohibition or limitation in s 58(1) relates directly to imposing a new sentence to be served consecutively or partly concurrently and partly consecutively with an existing sentence only if the expiry date of the new sentence is more than 5 years after the existing sentence commenced: [46], [71].
4. The practical effect of s 58 is to constrain to a greater or lesser extent the length of the new sentence: [71]–[77].

Accordingly, when the new sentence is imposed, the Local Court must determine:

- whether there is an "existing sentence", being an "unexpired sentence" that also includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence "is being served" wholly or partly consecutively; and
- whether the date on which the new sentence would end is more than 5 years after the date on which that "existing sentence" began: *R v Perrin* at [46].

Section 58 and aggregate sentences

Section 58 only applies to the imposition of a sentence which is to be served consecutively. As for aggregate sentences: see **Aggregate sentences** at [7-505].

Section 53B permits the Local Court to impose an aggregate sentence of up to five years. It does not alter the jurisdictional limit of two years for individual offences referred to above.

[8-270] Power to vary commencement of sentence

Section 59 provides:

59 Court may vary commencement of sentence on quashing or varying other sentence

(1) A court that quashes or varies a sentence of imprisonment imposed on a person (on appeal or otherwise) may vary the date of commencement of any other sentence that has been imposed on that person by that or any other court.

(2) If a person is subject to two or more sentences, this section applies to each of them.

(3) A court may vary a sentence under this section on its own initiative or on the application of a party to the proceedings on the quashing or variation of the other sentence.

(4) An appeal does not lie merely because the date of commencement of a sentence is varied under this section.

(5) The term of a sentence, or the non-parole period of a sentence, cannot be varied under this section.

The provision is designed to remedy a difficulty where the quashing of a sentence following a successful appeal, usually in the District Court or the Court of Criminal Appeal, leaves the appellant with a further sentence of imprisonment to commence on a specified date in the future. It was regarded as being both impractical and unjust to return a person to custody on a future date. Section 59 was amended by the *Crimes Legislation Amendment Act* 2003 to remove a reference to "consecutive" and enable the section to be applied to concurrent sentences and partially consecutive sentences: *Allan v R (No 2)* [2011] NSWCCA 27 at [13]. The power in s 59 is not limited to the scenario where the quashing or varying of a sentence will result in a hiatus for a further sentence of imprisonment which commences on a date in the future: *Allan v R (No 2)* at [18]. A court may vary the date of commencement of any other sentence that has been imposed on that person by any other court if by quashing the sentence(s) there is no change in an offender's release date: *Allan v R (No 2)* at [19].

[8-280] Application of Division to interstate sentences of imprisonment

Part 4 Div 2 *Crimes (Sentencing Procedure) Act* 1999 applies to unexpired sentences passed outside NSW, or to be served within NSW, in the same way as it applies to unexpired sentences passed within NSW: s 60.

[The next page is 4841]

Parity

[10-800] Summary of relevant considerations

- The parity principle is based on the concept that like cases should be treated alike and different cases differently: *Green v The Queen* (2011) 244 CLR 462; *Lowe v The Queen* (1984) 154 CLR 606. See [10-801], [10-805].
- Ordinarily, related offenders should be sentenced at the same time by the same judge. The parties, particularly the prosecution, should take steps to ensure this occurs. This enables overall consideration of the relationship between the objective and subjective features of the offenders. See [10-801].
- The parity principle is not confined to offenders charged with the same offence. It extends to those engaged in the same criminal enterprise and may apply where the offenders are not co-offenders as such. See [10-810].
- In circumstances where co-offenders are sentenced by different judges, a judge is not bound by the findings made by another judge in respect of another co-offender. Differences of outcome when different judges sentence co-offenders may be explicable because of the evidence presented in each case. See [10-801].
- Where one offender is sentenced in the Children's Court and the other in an adult jurisdiction, it is necessary to recognise the very different sentencing regimes and apply the special principles identified in *R v Boney* [2001] NSWCCA 432. See [10-820].
- Whether or not a severity appeal is allowed, depends on whether the discrepancy is such as to warrant the conclusion that the degree of disparity is unjustified. See [10-805], [10-840].
- Generally, the Crown cannot rely on the parity principle in an appeal against sentence. See [10-850].

[10-801] Introduction

The parity principle is an aspect of the systemic objectives of consistency and equality before the law – the treatment of like cases alike, and different cases differently: *Green v The Queen* (2011) 244 CLR 462 at [28]. The avoidance of unjustifiable disparity between the sentences imposed upon offenders involved in the same criminal conduct or a common criminal enterprise is a matter that is "required or permitted to be taken into account by the court" under s 21A(1): *Green v The Queen* at [19]. The principle is applied at first instance and on appeal (see below). An assertion by an offender of unjustified disparity can be a separate ground of appeal: *Green v The Queen* at [32].

Sentencing courts, prosecutorial bodies and defence counsel should take steps to ensure related offenders are sentenced by the same sentencing judge, preferably at the same time: *Dwayhi v R* [2011] NSWCCA 67 at [44]–[45]. As a matter of practice, it is in the highest degree desirable that co-offenders be sentenced by one judge: *Postiglione v The Queen* (1997) 189 CLR 295. If this occurs, the judge is then in a position to consider the interrelationship between the objective and subjective

features of the offenders in an overarching way: *Usher v R* [2016] NSWCCA 276 at [73].The desirability of this practice has been repeatedly emphasised on the basis that it serves the public interest in consistent and transparent sentencing of related offenders: *Dwayhi v R* at [33]–[43], [46]; *Ng v R* [2011] NSWCCA 227 at [77]–[78]; *Adams v R* [2018] NSWCCA 139 at [81]; *R v Lembke* [2020] NSWCCA 293 at [55]. Many of the parity problems that arise on appeal could be avoided if co-offenders were sentenced at the same time by the same judge.

If co-offenders are not sentenced by the same judge, questions may arise as to whether the second judge is bound by the findings of fact made by the first judge. Where sentenced by different judges, any discrepancy between the offenders' sentences must be judged by reference to the specific evidence, submissions and findings made in relation to each — different sentences may be explicable on that basis: *PG v R* [2017] NSWCCA 179 at [24], [48]; *Piao v R* [2019] NSWCCA 154 at [3]–[6]; [45]-[46]; *Tran v R (Cth)* [2020] NSWCCA 310 at [37]; see also *Rae v R* [2011] NSWCCA 211 at [54]. In *Baquiran v R* [2014] NSWCCA 221, the court held that although the parity principle applied, the second judge was not bound by the findings made by another judge in different sentencing proceedings: at [27].

[10-805] A justifiable sense of grievance

The decision of *Lowe v The Queen* (1984) 154 CLR 606 is cited as the principal source of the parity principle. Dawson J, with whom Wilson J agreed, summarised the parity principle as follows at 623:

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or his involvement in the offence are different then different sentences may be called for but justice should be even-handed and it has come to be recognised both here and in England that any difference between the sentences imposed upon co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of a grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done.

See also Gibbs CJ at 609, Brennan J at 617 and Mason J at 610. There is also an exposition of the principle by Dawson and Gaudron JJ in *Postiglione v The Queen* (1997) 189 CLR 295 at 301. In *Green v The Queen* (2011) 244 CLR 462, the High Court considered the application of the parity principle in sentence appeals (see further below).

Inconsistency in the sentencing of co-offenders gives rise to a justifiable sense of grievance. Thus, in *Lowe v The Queen*, Mason J at 610 (as he then was) said:

> Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.

The test of unjustifiable disparity is an objective one: *Hiron v R* [2018] NSWCCA 10 at [50]; *Green v The Queen* at [31].

[10-810] Co-offenders convicted of different charges

Formal identity of charges against the offenders whose sentences are compared is not a necessary condition of the application of the principle of parity: *Green v The Queen* (2011) 244 CLR 462 at [30]. Put simply, the parity principle is not confined to sentences imposed upon co-offenders who have committed the same crime; it can also be applied to sentences imposed upon persons who are co-offenders by virtue of having been engaged in the same criminal enterprise, regardless of the charges that have been actually laid against them: *Green v The Queen* at [30]; *Jimmy v R* (2010) 77 NSWLR 540 at [136], [246]; *Turnbull v The Chief Executive of the Office of Environment and Heritage* [2018] NSWCCA 229 at [23]. The High Court held in *Green v The Queen* that the Court of Criminal Appeal had erred by discounting the sentence imposed upon Taylor who was convicted of a lesser offence "as a comparator of any significance": *Green v The Queen* at [75].

The High Court acknowledged the statement in *Jimmy v R*, of Campbell JA at [203] which sets out "some of the limits" of the principle of parity. Howie J at [246] and Rothman J at [252] agreed. Campbell JA said at [203] [case references excluded]:

> There are significant limitations, however, on reducing a sentence on the basis of that of a co-offender who has committed a different crime. At least some of the limits on the use of the parity principle in such a case are:
>
> 1. It cannot overcome those differences in sentence that arise from a prosecutorial decision about whether to charge a person at all, or with what crime to charge them … [In this regard, *R v Kerr* [2003] NSWCCA 234 should no longer be followed: [117], [130], per Campbell JA; [247] per Howie J, [267] per Rothman J.]
> 2. If it is used to compare the sentences of participants in the same criminal enterprise who have been charged with different crimes, there can be significant practical difficulties. Those practical difficulties become greater the greater the difference between the crimes charged becomes, and can become so great that in the circumstances of a particular case a judge cannot apply it, or cannot see that there is any justifiable sense of grievance arising from the discrepancy …
> 3. It cannot overcome differences in sentence that arise from one of the co-offenders having been given a sentence that is unjustifiably low …
> 4. There are particular difficulties in an applicant succeeding in a disparity argument where the disparity is said to arise by comparison with the sentence imposed on a co-offender who has been charged with an offence that is less serious than that of the applicant … However *Nguyen* stands as one example where that result arose.

The majority in *Green v The Queen* acknowledged, at [30], the practical difficulties that can arise where there are great differences between co-offenders in the offences charged. In such cases, including where the offenders are charged with offences carrying different maximum penalties, the relevant comparison is more broad and impressionistic than might otherwise be the case: *Dayment v R* [2018] NSWCCA 132 at [65].

In *Gaggioli v R* [2014] NSWCCA 246, a co-offender pleaded guilty to a lesser charge with a lower maximum penalty. The court held that prosecutorial discretion is unreviewable and there could be no justifiable sense of grievance caused by the different approach taken by the prosecution regarding the two offenders.

In *Dunn v R* [2018] NSWCCA 108, the parity principle did not apply where the offender was sentenced for an offence but his co-offenders had the same offence taken

into account on a Form 1. No relevant comparison can be made between a sentence imposed for an offence and an unspecified increase in a sentence resulting from the charge being taken into account on a Form 1: *Dunn v R* at [16].

The parity principle will apply where co-offenders are charged with a different number of offences and where an aggregate sentence has been imposed on one offender but not another. However, in such cases, a primary consideration in applying the parity principle will be the indicative sentence for the equivalent offence: *R v Clarke* [2013] NSWCCA 260 at [68]; *Bridge v R* [2020] NSWCCA 233 at [45]–[46].

The application of the parity principle can depend on findings of facts about the role of individual offenders in a crime. It is often appropriate to differentiate between the relative culpability amongst co-offenders by reference to the conduct of each in the joint criminal enterprise: *R v JW* (2010) 77 NSWLR 7. However, there are limits to which this can occur with respect to the objective seriousness of the offence, because of the existence of the common purpose to commit the offence: *R v Wright* [2009] NSWCCA 3 applied. And in assigning roles to the specific participants, the sentencing judge should not lose sight of the fact that they were all participants in the crime: *R v JW* at [213]. Subjective features of individual offenders will result in differences — sometime significant — in the sentences imposed between offenders: *R v JW* at [166]. However, there are always differences in the objective and subjective elements in cases involving multiple offenders. Consideration should be given to whether the sentence imposed on a co-offender is reasonably justified given those differences: *Miles v R* [2017] NSWCCA 266 at [9].

See generally, A Dyer and H Donnelly, "Sentencing in complicity cases — Part 1: Joint criminal enterprise", Sentencing Trends and Issues, No 38, Judicial Commission of NSW, 2009.

[10-820] Juvenile and adult co-offenders

Where one offender is sentenced in the Children's Court and the other in an adult's jurisdiction, it is proper for the court to recognise that the sentencing takes place in very different regimes: *R v Ho* (unrep, 28/2/97, NSWCCA). In *R v Colgan* [1999] NSWCCA 292, Spigelman CJ, after referring to *R v Govinden* [1999] NSWCCA 118, held at [15] that, although parity considerations do not arise when comparing a person sentenced in the Children's Court with adults:

> … that does not mean that the sentence imposed on a person in the Children's Court, which would otherwise give rise to issues of parity, is irrelevant. This is so for the reason that an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of the regimes.

In *R v Wong* [2003] NSWCCA 247, Kirby J said at [35]:

> The principles relating to parity, where the comparison is with a young offender, have been gathered by Wood CJ at CL in *R v Boney* [2001] NSWCCA 432. A number of propositions can be stated:
>
> - First, in fashioning a sentence for an adult involved in the same crime, it is relevant to have regard to a sentence imposed by the Children's Court upon a co-offender.
> - Second, the worth of that comparison, however, will be limited given the different sentencing objectives and other considerations in the Children's Court.

- Third, in determining whether there is a justifiable sense of grievance, it must be recognised that a stage can be reached where the inadequacy of the sentence imposed upon a co-offender is such that any sense of grievance engendered by it cannot be regarded as legitimate (*R v Diamond* (NSW, CCA, 18.2.93, per Hunt CJ at CL).
- Fourth, at an appellant level, where there is a justifiable sense of grievance in the adult offender, that does not oblige the court to intervene. It has a discretion to intervene. It should not intervene where to do so would produce a sentence which does not reflect the objective gravity of the crime.

See further **Subjective factors commonly relevant to robbery** at [20-300].

[10-830] Parity and totality

In *Postiglione v The Queen* (1997) 189 CLR 295, the High Court considered the relationship between the principles of parity and totality. Dawson and Gaudron JJ pointed out that disparity is not simply the imposition of different sentences for the same offence but a question of disproportion between them. Parity is a matter to be determined by having regard to the circumstances of the co-offenders and their respective degrees of culpability. Different criminal histories and custodial patterns may "justify a real difference in the time each will serve in prison" and "like must be compared with like" when applying the parity principle: at 878. Justice Kirby said that the parity and totality principles are in the nature of checks required out of recognition that the task of sentencing is not mechanical. The sentence may require adjustment because it is out of step with the parity principle or it may offend the totality principle because it is not "just and appropriate", as in the case of a "crushing" sentence. Any adjustments to sentence, his Honour observed "involve subtle considerations which defy precision either of description or implementation": at 901.

The analysis of Dawson and Gaudron JJ does not apply when one offender receives the benefit of the application of the totality principle because of committing multiple offences while another is only sentenced for the common offence: *Kelly v R* [2017] NSWCCA 256 at [32]. What ultimately must be considered is all the components of the sentence imposed on the co-offender including the facts and circumstances of the related and unrelated offences: at [40].

In the Court of Criminal Appeal decision consequent upon *Postiglione*, Hunt CJ at CL said the principle in *Lowe v The Queen* (1984) 154 CLR 606 remains unaffected by the High Court's decision: *R v Postiglione* (1997) 98 A Crim R 134.

For the totality principle, see **Application of totality principle** at [8-210].

[10-840] Severity appeals and parity

The plurality in *Green v The Queen* (2011) 244 CLR 462 at [31]–[32] explained how the parity principle should be applied in severity appeals as follows:

> The sense of grievance necessary to attract appellate intervention [in a severity appeal] with respect to disparate sentences is to be assessed by objective criteria. The application of the parity principle does not involve a judgment about the feelings of the person complaining of disparity. The court will refuse to intervene where disparity is justified by differences between co-offenders such as age, background, criminal history, general character and the part each has played in the relevant criminal conduct or enterprise.

> A court of criminal appeal deciding an appeal against the severity of a sentence on the ground of unjustified disparity will have regard to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders. Where there is a marked disparity between sentences giving rise to the appearance of injustice, it is not a necessary condition of a court of criminal appeal's discretion to intervene that the sentence under appeal is otherwise excessive.

The test for establishing disparity has been described as whether the asserted disparity is "gross, marked or glaring" (see such examples as *Tan v R* [2014] NSWCCA 96 at [39] and *Wan v R* [2017] NSWCCA 261 at [48]). In *Cameron v R* [2017] NSWCCA 229 at [83]–[90], Hamill J observed the use of that epithet did not reflect the test which is whether the principles of equal justice have been misapplied. That approach was endorsed in *Miles v R* [2017] NSWCCA 266 at [9], [37]–[40] and *Daw v R* [2017] NSWCCA 327 at [19]–[20]; [62]. Using such descriptors is intended to ensure the principle applies when the discrepancy in sentences is *not reasonably explained* by the degree of difference between co-offenders and their offending: *Miles v R* at [40]; *Wan v R* at [42]; *DS v R* [2014] NSWCCA 267 at [39]. The principle is not to be applied in an unduly technical way: *Miles v R* at [38]; *Cameron v R* at [82].

However, no objection can be taken to the words "gross" or "glaring", if they are used to emphasise that in circumstances where the same judge sentenced both offenders and took the question of parity into account, an appellate court should be cautious to intervene; when considering whether there is a marked disparity to justify an objective sense of grievance, what is being reviewed are qualitative and discretionary judgments: *Borg v R* [2019] NSWCCA 129 at [88], [89] (Bathurst CJ; Hamill and N Adams JJ agreeing). It is not a further or additional requirement on appeal that the disparity be gross or glaring: at [90]. Whether an appellant has established that there is an unjustifiable disparity between their sentence and a co-offender's is a question of substance rather than form: *Kadwell v R* [2021] NSWCCA 42 at [13].

A blunt way to describe the question for the appellate court is: was the differentiation made by the judge one that was open in the exercise of discretion: *Lloyd v R* [2017] NSWCCA 303 at [97].

The discretion to reduce a sentence to a less than adequate level would not require an appellate court to reduce the sentence to a level which would be, as Street CJ put it in *R v Draper* (unrep, 12/12/86, NSWCCA), "an affront to the proper administration of justice": *Green v The Queen* at [33].

[10-850] Crown appeals and parity

The application of the parity principle in Crown appeals is different than when it is applied in severity appeals: *Green v The Queen* (2011) 244 CLR 462 at [34]–[36]. The purpose of Crown Appeals — of laying down principles for the governance and guidance of courts — is a limiting principle: *Green v The Queen* at [34]–[36]. If disparity is apprehended the residual discretion to dismiss a Crown Appeal is enlivened. The High Court framed the approach as follows in *Green v The Queen* at [37]:

> … a powerful consideration against allowing a Crown appeal would be the resultant creation of unjustifiable disparity between any new sentence and an unchallenged sentence previously imposed upon a co-offender. The question would then arise: would

> the purpose of Crown appeals under s 5D be served by allowing the appeal? If the result of doing so would be a sentence "adequate" on its face, but infected by an anomalous disparity which is an artifact of the Crown's selective invocation of the Court's jurisdiction, the extent of the guidance afforded to lower courts may be questionable.

The High Court in *Green v The Queen* cited the following passage of Howie J in *R v Borkowski* [2009] NSWCCA 102 at [70] with approval:

> … the purpose of a Crown appeal is not simply to increase an erroneous sentence imposed upon a particular individual. It has a wider purpose, being to achieve consistency in sentencing and the establishment of sentencing principles. That purpose can be achieved to a very significant extent by a statement of this Court that the sentences imposed upon the respondent were wrong and why they were wrong.

If the Court of Criminal Appeal concludes the inadequacy of the sentence appealed from is so marked that it amounts to "an affront to the administration of justice" which risks undermining public confidence in the criminal justice system, the court is justified in interfering with the sentence notwithstanding the resultant disparity with an unchallenged sentence imposed on a co-offender: *Green v The Queen* at [42] citing *R v Harris* [2007] NSWCCA 130 at [83], [86].

In *Green v The Queen*, the High Court held that the Court of Criminal Appeal erred in failing to give adequate weight "to the purpose of Crown appeals and the importance of the parity principle": *Green v The Queen* at [4]. The court also erred in taking into account its opinion that the sentence imposed upon a co-offender was manifestly inadequate. The sentence had not been raised by a Crown appeal and had not been the subject of argument by the parties at the hearing of the appeal: *Green v The Queen* at [76].

Generally, the Crown cannot rely on the parity principle in an appeal against sentence to argue that a sentence should be increased: *R v Gu* [2006] NSWCCA 104; *R v Weismantel* [2016] NSWCCA 204 at [9]; *R v Lembke* [2020] NSWCCA 293 at [56]–[59]. Although the Crown may argue a sentence imposed on a co-offender indicates the marked inadequacy of the sentence imposed on a respondent to the appeal, if approached in that way the Crown must persuade the court of the similarity of the facts on which the respondent and other co-offenders were sentenced, their comparable roles in the offences, and why the sentence imposed is, by reference to those features, inadequate: *R v Lembke* at [60]–[61].

[The next page is 5711]

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]–[33].

In the Second Reading Speech to the Justice Legislation Amendment (Committals and Guilty Pleas) Bill, the Attorney General said Pt 3, Div 1A was introduced to replace "the existing common law sentence discount for the utilitarian value of a guilty plea" for offences dealt with on indictment: NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 October 2017, p 12. It is apparent from the language of ss 25A(2) and 25D(1) that the scheme is mandatory: *Gurin v R* [2022] NSWCCA 193 at [22].

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

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]. To ensure that an unrepresented accused understands the charges and unequivocally plead to those charges, the court must state the substance of each offence to them and take separate pleas for each: at [59].

An "accused person" is defined to include a "legal practitioner representing an accused person": s 3. Where an accused is legally represented, the practitioner can enter a plea.

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

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

[11-505] Setting aside a guilty plea

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) 121 A Crim R 472 at 478 [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.

The provisions limit the discretion of a sentencing judge with respect to the quantum of the discount for a guilty plea after an offender has been committed for trial. A maximum discount of 25% is only available if the plea was entered in the Local Court.

The scheme does not apply to:

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

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

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

Mandatory discounts

Section 25D establishes inflexible temporal limits governing the degree of discount available at specified procedural intervals in the committal and trial process, and imposes graduated discounts based on the timing of the entry or indication of a guilty plea: *Gurin v R* [2022] NSWCCA 193 at [24], [26].

Section 25D(1) requires a sentencing court to apply a discount for the utilitarian value of a guilty plea, in accordance with the balance of the section, if the offender pleaded guilty before being sentenced. It is clear from the language of s 25D(1) that such discounts are made solely "for the utilitarian value of a guilty plea": *Doyle v R* [2022] NSWCCA 81 at [18]. Remorse (s 21A(3)(i) *Crimes (Sentencing Procedure Act)*) and/or a willingness to facilitate the administration of justice (s 22A *Crimes (Sentencing Procedure Act)*) are conceptually distinct and must be considered separately: *Doyle v R* at [16]–[19].

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

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

The "first day of the trial of an offender" is defined in s 25C(1) as:

> the first day fixed for the trial of the offender or, if that day is vacated, the next day fixed for the trial that is not vacated.

The word "vacated" means adjourned before the trial commenced: *Gurin v R* at [27], [29]. The adjournment resets the clock, providing the offender with another opportunity to enter a guilty plea 14 days before the next day fixed for trial, but once the trial commences the opportunity for a 10% reduction is lost: at [29].

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

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

Section 25D(4) forecloses the availability of large sentencing discounts when there are earlier opportunities for both parties to offer and negotiate a guilty plea. It would otherwise be inimical to the principle objective of the early appropriate guilty plea scheme to allow for the maximum discount to be available: *R v Doudar* [2020] NSWSC 1262 at [63]. "Substantially the same" in s 25D(4)(a) should be given its natural and ordinary meaning: 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): at [339]. His Honour said, at [338], that accepting any other interpretation would:

> …bring about a result which … could not possibly have been intended by the Parliament when enacting the scheme. Specifically … it could not possibly have been the Parliament's intention, in enacting s 25E, to bring about a result whereby an offender was deprived of the benefit of a significant discount on [their] sentence as the result of both parties to the proceedings simply overlooking a requirement to record the undisputed fact of a previous offer to plead guilty. That is particularly so in circumstances where the clear intention of the Parliament, reflected in s 75(1)(b), was that any offer to plead guilty to (inter alia) a different offence be recorded in the case conference certificate.

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

Not allowing or reducing the discount

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

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

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

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

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] at (ii); *R v Gallagher* (1991) 23 NSWLR 220 at 228.

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

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

[The next page is 5851]

Victims and victim impact statements

Note: Different statutory provisions apply to victim impact statements (VIS) depending on whether the particular proceedings commenced before or on and from 27 May 2019.

[12-790] Introduction

Chief Justice Spigelman, in his "Address to Parole Authorities Conference 2006" (2006) 8(1) *TJR* 11, noted the historical importance of a crime being regarded as a breach of the "King's Peace" and an offence against the whole community. The victim was a witness and played "virtually no role in criminal proceedings". However, the role of victims in criminal proceedings has significantly evolved.

In *Munda v Western Australia* (2013) 249 CLR 600, the High Court, at [54], referred to the role of the criminal law as including:

> the long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence. Further, one of the historical functions of the criminal law has been to discourage victims and their friends and families from resorting to self-help, and the consequent escalation of violent vendettas between members of the community.

In his Honour's article, "Civil or criminal — what is the difference?" (2006) 8(1) *TJR* 1 at 7, former Chief Justice Gleeson observed that:

> One of the most notable changes in the administration of criminal justice in recent years has been a growing awareness of a need to take account of the impact of offences on victims; in some jurisdictions provision is made for evidence of victim impact to play a formal role in sentencing proceedings.

[12-800] Common law

The common law requires sentencers to have regard to the effect of the crime on the victim: *Porter v R* [2008] NSWCCA 145 at [54], Gleeson CJ, Gummow, Hayne and Callinan JJ in *Siganto v The Queen* (1998) 194 CLR 656 at [29] referred to:

> the undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law.

A sentencer is entitled to consider all the conduct of the offender, such as damage, harm or loss occasioned to the victim, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383 at 389. The common law rule is that a court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen: *Josefski v R* [2010] NSWCCA 41 at [3]–[4], [38]–[39]. The offender takes the victim as they find them.

[12-810] Sections 3A(g), 21A and the common law

Section 3A(g) *Crimes (Sentencing Procedure) Act* 1999 provides that one of the purposes for which a court may impose a sentence on an offender is "to recognise the harm done to the victim of the crime and the community".

The application of s 3A(g) and s 21A(2)(g) ("the injury, emotional harm, loss or damage caused by the offence was substantial") in a given case are limited by the common law rule cited in *Josefski v R* [2010] NSWCCA 41 at [38] (see above, at [12-800]). Neither s 3A nor s 21A was intended to alter the common law principles of sentencing: *Muldrock v The Queen* (2011) 244 CLR 120 at [15], [18], [20].

As to the use of victim impact statements (VIS) of third parties see **Victim impact statements of family victims** at [12-838] below.

In addition to s 3A(g), s 21A refers to victims in several contexts: see **Section 21A factors** at [11-000]ff. The factors listed in s 21A(2) and (3) were not intended to operate as an exhaustive code and the text of the section itself makes it clear that existing statutory and common law factors may still be taken into account in determining a sentence, even though they are not listed: *Green v The Queen* (2011) 244 CLR 462 at [19].

[12-820] The statutory scheme for victim impact statements

Definitions and applications

Part 3, Div 2 *Crimes (Sentencing Procedure) Act* 1999 contains provisions regulating the preparation and receipt of victim impact statements (VIS). The Division was substantially amended by the *Crimes Legislation Amendment (Victims) Act* 2018, which commenced on 27 May 2019 and applies to proceedings commenced on or after that date. The discussion below draws distinctions between the current and former legislative regimes as appropriate. Any reference to a former or repealed provision is to one which was in force as at 26 May 2019.

The requirements for the content of a "victim impact statement" prepared by a primary victim or a family victim are summarised as follows:

Statement by	Proceedings commenced before 27 May 2019	Proceedings commenced on or after 27 May 2019
Primary victim	Particulars of any personal harm suffered by victim as a direct result of offence: former s 26	Particulars of: (a) any personal harm (b) any emotional suffering or distress (c) any harm to relationships with other persons (d) any economic loss or harm that arises from any matter referred to in (a)–(c) suffered by primary victim or by members of primary victim's immediate family, as a direct result of offence: ss 26, 28(1)
Family victim	Particulars of impact of primary victim's death on members of their immediate family: former s 26	Particulars of impact of primary victim's death on family victim and other members of primary victim's immediate family: ss 26, 28(2)

The statutory scheme applies to the following offences being dealt with on indictment in the Supreme or District Courts or summarily in the District Court (s 27(2)):

(a) offences resulting in the death of, or actual physical bodily harm to, any person, or

(b) offences involving actual or threatened violence, or

(c) offences attracting a higher maximum penalty (if the offence results in the death of, or actual physical bodily harm to, any person) than may be imposed if the offence does not have that result, or

(d) prescribed sexual offences (see s 3 *Criminal Procedure Act* 1986), or

(e) (when proceedings commenced on and from 27 May 2019) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act* 1900.

The scheme applies to the following offences when dealt with in the Local Court (s 27(4), former s 27(3)):

(a) offences resulting in the death of any person, or

(b) an offence where a higher maximum penalty may be imposed if the offence results in the death of any person than if it does not, or

(c) indictable offences dealt with summarily in the Local Court pursuant to Table 1 of Sch 1 *Criminal Procedure Act* resulting in actual physical bodily harm, or involving an act of actual or threatened violence, or

(d) prescribed sexual offences referred to in Table 1 of Sch 1 *Criminal Procedure Act*, or

(e) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act*.

The scheme only applies to the following offences when dealt with in the Children's Court (s 27(4A)):

(a) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act*, or

(b) an offence that is not one referred to in Table 2 of Sch 1, *Criminal Procedure Act* and the offence

  (i) results in the death of, or actual physical bodily harm to, any person, or

  (ii) involves an act of actual or threatened violence, or

  (iii) is one for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result, or

  (iv) is a prescribed sexual offence.

For proceedings commenced on or after 27 May 2019, victims of the above offences may make a VIS if the offence is dealt with on a Form 1: s 27(6).

Consideration of victim impact statements

Proceedings commenced at any time

It is not mandatory for a victim to prepare a VIS: s 29(4) (former s 29(1)). If the victim/s to whom the statement relates objects, the statement may not be received or considered by a court: s 30C(2) (former s 29(2)).

The absence of a VIS does not give rise to any inference an offence had little or no impact on a victim: s 30E(5) (former s 29(3)). (See also **The relevance of the attitude of the victim — vengeance or forgiveness** below at [12-850]).

Nor does the absence of a VIS by a family victim give rise to an inference an offence had little or no impact on the primary victim's immediate family: s 30E(6) (former s 29(4)).

Proceedings commenced from 27 May 2019

When a VIS has been tendered, the court *must* consider it at any after time after conviction, but before sentence, and may make any comment on the statement considered appropriate: s 30E(1). Section 30E is intended to ensure the same requirements to receive, consider and comment on a VIS apply to statements from both primary victims and family victims: Second Reading Speech, Crimes Legislation Amendment (Victims) Bill 2018, NSW, Legislative Assembly, *Debates*, 24 October 2018, p 74.

The prosecution may provide a copy of a VIS to an offender's Australian legal practitioner (s 30G(1) who may copy, disseminate or transmit images of it to the extent reasonably necessary to provide it to another practitioner for legitimate purposes related to the proceedings: s 30G(2).) Offenders cannot retain, copy, disseminate or transmit images of the VIS: s 30G(5).

Proceedings commenced before 27 May 2019

A VIS may be received and considered by the court at any time after conviction, but before an offender is sentenced: former s 28(1). If the primary victim dies as a direct result of the offence the relevant court must receive, acknowledge and appropriately comment on a VIS given by a family victim: former s 28(3).

Former s 28(5) provided that the court may make a VIS available to the prosecutor, offender or to any other person it considers appropriate, subject to certain conditions (including that the offender could not retain a copy).

Form and requirements of victim impact statements

A VIS must be in writing and comply with any other requirements prescribed by the regulations: s 29(1) (former s 30(1)). These include that it be legible (either typed or handwritten), on A4 size paper, and (except with the court's leave) no longer than 20 pages including annexures: cl 10 *Crimes (Sentencing Procedure) Regulation* 2017.

A specific form was previously prescribed, however, the note to cl 10 currently states:

> **Note.** Victims Services provides information about victim impact statements, including the suggested form of such a statement, on its website at https://www.victimsservices.justice.nsw.gov.au/Documents/guide_victim-impact-statements.pdf, accessed 22 June 2021.

A VIS may include photographs, drawings and other images: s 29(2) (former s 30(1A)). Other requirements and restrictions relating to content are prescribed in cl 11 *Crimes (Sentencing Procedure) Regulation*.

If a primary victim is incapable of providing information for, or objecting to, the tender of a VIS, a representative may do so on their behalf: s 30(1) (former s 30(2)).

A victim to whom the statement relates, or their representative, is entitled to read out the whole or any part of the statement to the court: ss 30(2), 30D(1) (former s 30A(1)).

Special provisions related to reading victim impact statements

The following table summarises the provisions related to reading a VIS in court depending on when the proceedings commenced.

	Proceedings commenced before 27 May 2019	**Proceedings commenced on or after 27 May 2019**
Persons entitled to read out VIS in closed court	Victims in proceedings for prescribed sexual offences (unless victim consents or court satisfied that special reasons for statement being read in open court): former s 30A(3A)	Victims in proceedings for prescribed sexual offences (unless victim consents or court satisfied that special reasons for statement being read in open court): s 30I Any other victim, with the court's leave: s 30K(1)
Persons entitled to read out VIS via CCTV	Victims entitled to give evidence via CCTV during trial: former ss 30A(3), (4)	Victims entitled to give evidence via CCTV during trial: s 30J Any other victim, with the court's leave: s 30K(1)
Persons entitled to support person when reading out VIS	Victims in proceedings for prescribed sexual offences: former s 30A(3C)	Any victim: s 30H

Reading out victim impact statements in closed courts and via CCTV

In proceedings that commenced from 27 May 2019, when determining whether victims of offences that are not prescribed sexual offences should be given leave to read their VIS in closed court or via CCTV, the court must consider:

- whether it is reasonably practicable to exclude the public
- whether special reasons in the interests of justice require the statement to be read in open court, and
- any other relevant matter: s 30K(2).

The principle of open justice does not of itself constitute special reasons for requiring the statement to be read in open court: s 30K(3).

In determining whether to grant leave to read the VIS via CCTV the court must also consider whether the necessary facilities are available, or could reasonably be made available, and any other matter the court considers relevant: s 30K(4).

Entitlement to support persons

In proceedings commencing from 27 May 2019, any victim to whom a VIS relates is entitled to have a support person of their choice present near them, and within their sight, when the VIS is read out: s 30H(1). For proceedings that commenced before then, this *only* applies to victims of prescribed sexual offences: former s 30A(3C).

A support person includes a parent, guardian, friend, relative or person assisting the victim in a professional capacity who can be present whether the statement is read out in open court, closed court or via CCTV: s 30H(2)–(3) (former s 30A(3C)).

Non-compliance with statutory scheme

In proceedings commenced before 27 May 2019, a VIS may only be received and considered if it complies with the prescribed statutory requirements: former s 30(3).

However, the sentencing judge in *McCartney v R* [2009] NSWCCA 244 at [18]–[21] was entitled to have regard to an undated document inaccurately entitled "Witness Impact Statement" despite the fact it did not comply with the requirements of the regulations (see now cl 11 *Crimes (Sentencing Procedure) Regulation* 2017).

In proceedings that commence from 27 May 2019, a court must not consider or take into account a VIS unless it was prepared by the victim to whom it relates and is tendered by the prosecutor: s 30F(1). Further, a court must not consider or take into account any material not specifically authorised to be included by Pt 3, Div 2: s 30F(2). This is said to give courts greater discretion to receive a VIS that does not strictly comply with the Act, while still ensuring fairness to the offender: Second Reading Speech, Crimes Legislation Amendment (Victims) Bill 2018, NSW, Legislative Assembly, *Debates*, 24 October 2018, p 74.

[12-825] The statutory scheme does not cover the field

When the statutory scheme does not apply to particular offences, statements by victims may still be considered relevant and admissible to the sentencing process: *Porter v R* [2008] NSWCCA 145 at [53]. In that case, statements by victims of the offences of break, enter and steal and maliciously damage property by fire, were tendered without objection. The court held that the material was admissible whether as a VIS or in another form. Justice Johnson stated at [53] that:

> The fact that the statements were entitled "victim impact statements", and were prepared on forms which were not appropriate technically to the offences, does not mean that the content of the statements was inadmissible. This is especially so as no objection was taken to the material tendered. It is not uncommon for material concerning loss and harm to victims of burglary and arson offences to be included in statements taken by police from victims, or in statements of facts used on sentence.

See also *Miller v R* [2014] NSWCCA 34 at [155]–[156] where the court said evidence of harm occasioned to a victim by an offence has always been relevant and admissible whether or not given by way of VIS or under former s 28.

[12-830] Evidentiary status and use of victim impact statements at sentence

In proceedings that commenced from 27 May 2019, a court *must* consider a VIS when tendered and *may* make any comment on it that the court considers appropriate: s 30E(1). In proceedings commenced before then, a court has a discretion to receive and consider a VIS "if it considers it appropriate to do so": former s 28.

In relation to the latter, Basten JA in *R v Thomas* [2007] NSWCCA 269 stated at [36] that the "Act does not provide how an impact statement is to be taken into account" later observing, at [37] that it was "unfortunate" the Act gave "no greater guidance as to the appropriate use of [such statements] especially where untested, for the purposes of determining sentence".

The weight to be given to the statement is a matter for the court. In *R v Thomas*, Basten JA stated at [37] "… it will often be appropriate to give weight to a victim impact statement where the conduct of the offender is otherwise established beyond reasonable doubt and the statement is restricted to subsequent effects on the victim".

The court observed in *SBF v R* [2009] NSWCCA 231 at [88] that there was no statutory or other restriction on the extent to which a sentencing judge may set out the contents of a VIS.

Cross-examination and a victim impact statement

Former s 30A, which is in the same terms as s 30D, was found not to envisage that the author of a VIS would be cross-examined: *R v Wilson* [2005] NSWCCA 219 at [27]–[28]. The position might be different if the author is an expert who gives an opinion concerning the harm suffered by the victim, that is, a "qualified person" within the meaning of cl 8(3) *Crimes (Sentencing Procedure) Regulation* 2010 (rep): *Muggleton v R* [2015] NSWCCA 62 at [44]; cl 9(4) *Crimes (Sentencing Procedure) Regulation* 2017, which is in identical terms to cl 9(3)(rep).

Using a victim impact statement to establish aggravating factors

Aggravating factors under s 21A(2) *Crimes (Sentencing Procedure) Act* 1999 must be proved beyond reasonable doubt: *R v Tuala* [2015] NSWCCA 8 at [77]; *Culbert v R* [2021] NSWCCA 38 at [113]. Although a degree of caution is necessary before doing so, a VIS may be used to identify and establish that a victim has suffered substantial harm under s 21A(2)(g): see, for example, *Culbert v R* [2021] NSWCCA 38 at [119]–[120] To be "substantial" the harm must be shown to be greater or more deleterious than may ordinarily be expected for the offence in question: *R v Youkhana* [2004] NSWCCA 412 at [26]; *R v Tuala* at [64].

The case for accepting a VIS as evidence of substantial harm is strengthened where no objection is taken to the VIS, no question raised as to the weight to be attributed to it and no attempt made to limit its use: *R v Tuala* at [77] (after reference to several cases); *Culbert v R* at [116], [118]. A VIS can be used to establish whether the emotional harm suffered by the victim amounts to "substantial emotional harm" within the meaning of s 21A(2)(g) where no submissions were made on sentence that the use of, or evidentiary weight given to, the VIS should be limited: *Aguirre v R* [2010] NSWCCA 115 at [77]; *Muggleton v R* [2015] NSWCCA 62 at [43]; *Culbert v R* at [120].

Given that a VIS is admissible under s 28 it may be unfair to take a lack of objection to its admission into account but this does not prevent the defence putting arguments as to the weight that should be attributed to it: *R v Tuala* at [78].

There is little difficulty with accepting the contents of a VIS where it confirms other evidence or attests to harm of the kind that could reasonably be expected to arise from the offence in question: *R v Tuala* at [79]; see for example *Bajouri v R* [2016] NSWCCA 20 at [33]–[39].

Considerable caution must be exercised before a VIS can be used to establish an aggravating factor where any of the following arise (*R v Tuala* at [77], [80]–[81]):

1. the facts to which the VIS attests are in question
2. the victim's credibility is in question (as was the case in *R v Tuala*)
3. the harm asserted goes well beyond that which may be expected (see eg *RP v R* [2013] NSWCCA 192), or
4. the contents of the statement are the only evidence of harm.

In *R v Tuala*, the VIS could not be used to prove beyond reasonable doubt that the injury, loss and damage caused by the offences was more substantial than could

ordinarily be expected of three offences of discharging a firearm with intent to cause grievous bodily harm under s 33A(1)(a) *Crimes Act* 1900. Substantial physical injury was proved at trial and taken into account by the judge: *R v Tuala* at [84]. The judge's considerable doubt regarding the victim's credibility could be used to assess the victim's claim of financial loss and ongoing disability: *R v Tuala* at [83]. The VIS could not be used to extend the assessment of emotional harm and financial loss beyond that which could ordinarily be expected or that which was proved by other evidence: *R v Tuala* at [84].

In *RO v R* [2013] NSWCCA 162, it was held there was no evidence to establish the complainant "suffered significant psychological damage as a result of the [sexual] offences" or an aggravating factor under s 21A(2)(g) that "substantial" harm had been caused. Given her family life and drug abuse, the cause of the complainant's psychological damage was multifactorial and, in the absence of medical evidence to distinguish the effects of the offences, the finding made by the judge was not open: at [90], [91]. However, the judge was entitled to find that some psychological damage was caused but could not, on the evidence before him, make a qualitative or quantitative assessment of the extent of the harm: at [92].

Although courts are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences (see further below) care must be taken to avoid double counting by adding the aggravating feature of substantial emotional harm in s 21A(2)(g): *Stewart v R* [2012] NSWCCA 183 at [61].

[12-832] Victim impact statements and harm caused by sexual assault

Harm caused to the victim as a consequence of the crime is not necessarily a matter in aggravation. It may simply be an ingredient of the crime admitted by a guilty plea or a finding of guilt following a trial. Nor is harm to the victim necessarily a matter that the Crown must specifically identify and prove beyond reasonable doubt in every case. The Crown may call the victim if there is a factual dispute but the statutory scheme makes clear that a court can make findings about harm caused by the crime that do not depend upon whether the victim is a willing participant in sentencing proceedings.

Where it is asserted the offences caused injury, loss or damage beyond that ordinarily expected of the offence charged, that must be proved beyond reasonable doubt: *R v Youkhana* [2004] NSWCCA 412 at [26]; *R v Tuala* [2015] NSWCCA 8 at [57].

However, the deleterious effect on a child of sexual abuse *per se* is not a matter the Crown is required to prove beyond reasonable doubt. It can be inferred: *Culbert v R* at [113]. The position as to harm caused by the sexual abuse of a child was summarised in *R v Gavel* [2014] NSWCCA 56 at [110]:

> This Court has observed that child sex offences have profound and deleterious effects upon victims for many years, if not the whole of their lives: *R v CMB* [2014] NSWCCA 5 at [92]. Sexual abuse of children will inevitably give rise to psychological damage: *SW v R* [2013] NSWCCA 255 at [52]. In *R v G* [2008] UKHL 37; [2009] 1 AC 92, Baroness Hale of Richmond (at [49]) referred to the "long term and serious harm, both physical and psychological, which premature sexual activity can do". The absolute prohibition on sexual activity with a child is intended to protect children from the physical and psychological harm taken to be caused by premature sexual activity: *Clarkson v R* [2011] VSCA 157; 32 VR 361 at 364[3], 368–372 [26]–[39].

The high maximum penalty and standard non-parole period for some sexual offences such as s 66A(2) *Crimes Act* 1900 reflects the harm caused by this kind of offending: *R v Gavel* at [111]. Basten JA in *R v Nelson* [2016] NSWCCA 130 at [17]–[22] reviewed the case law and said:

> There may be a risk in overstating the principle in that not every abused child will be profoundly harmed [The Hon P McClellan and A Doyle, "Legislative facts and section 144 — a contemporary problem?" (2016) 12(4) TJR 421 at 447]. However, the sentencing judge should be prepared to have regard to a victim impact statement which may either confirm or contradict the presumption.

Ultimately the question is one of the weight to be given to the content of the statement. The judge erred in *RP v R* [2013] NSWCCA 192 at [27] by attributing excessive weight to a VIS. The judge "uncritically accepted" the victim impact statement, finding "the victim has suffered profoundly as a result of what happened to her and has experienced psychological problems throughout her entire life as a result of it" quoted at [26]. While the victim undoubtedly suffered harm the statement went well beyond what might be regarded as the type of harm expected from the circumstances of the offending: *RP v R* at [29]. Unlike the case of *Ollis v R* [2011] NSWCCA 155, the defence had submitted that reduced weight should be attributed to the statement. See also *EG v R* [2015] NSWCCA 21 and *RL v R* [2015] NSWCCA 106.

The judge in *R v Nelson* omitted any reference to the VIS which confirmed the psychological research and the common experience of the courts. In the absence of any challenge to the VIS, it should have been accepted and relied upon to support the presumptive position that the offending had caused the victim significant harm: at [22].

In *AC v R* [2016] NSWCCA 107, the Crown tendered an unsigned and undated document from the victim entitled "victim impact statement". The victim did not disclose that she had suffered any harm as a result of the sexual assaults but expressed support for the applicant and asked he be returned to her (at [43]). The court held that, as a VIS is defined in (former) s 26 as "a statement containing particulars of … any personal harm suffered by the victim as a direct result of the offence", the statement in question did not meet the statutory definition. A court is only entitled to receive and consider a VIS under the Act if it is given in compliance with it: at [45]; former s 30(3).

Further, the statement could not be used to provide evidence that the offence was mitigated under s 21A(3)(a), because "the injury, emotional harm, loss or damage caused by the offence was not substantial": *AC v R* at [47], [54]. While evidence may be called from a victim as to the matters specified in s 21A(3)(a), it is a matter for the court whether it is accepted and what weight it is attributed: *AC v R* at [49]. The statement in question came from a child who was the victim of extraordinary sexual abuse which exposed her to risks of physical and psychological injury — some of which materialised: *AC v R* at [50], [67].

[12-836] Victim impact statements and De Simoni

If a VIS is received and considered by the court it should refer only to the impact on the victim of the offence before the court: *R v H* [2005] NSWCCA 282 at [56] (for proceedings that commenced on/after 27 May 2019, this may include the impact of Form 1 offences: s 27(6)). Details of the conduct of the offender contained in a VIS

which would denote a more serious offence cannot be taken into account, even where no objection is taken to the material, as this would breach the principle contained in *The Queen v De Simoni* (1981) 147 CLR 383. See also **De Simoni principle** at [1-500].

Chief Justice Gleeson cautioned in *R v Bakewell* (unrep, 27/6/1996, NSWCCA) that:

> particular care may need to be exercised where a sentencing judge is invited by the Crown to receive a victim impact statement, and take that victim impact statement into account for the purpose of the sentencing process. As the facts of the present case illustrate, the victim impact statement may well be based upon an account of the facts which includes circumstances of aggravation of the kind referred to in *De Simoni*.
>
> When that occurs, it will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial.

The court cited this comment with approval in *FV v R* [2006] NSWCCA 237, where a VIS (admitted without objection) was inconsistent with the agreed statement of facts. The sentencing judge did not err in considering the statement, as he repeatedly made it clear that the offence for which the applicant was being sentenced was the one which he had been charged with: *FV v R* at [42].

In *R v H* at [57], the Crown's tender of a brief to support the VIS was "misconceived". It risked breaching the *De Simoni* principle. Although the victim impact statement itself was not objected to, the sentencing judge erred in making findings of fact on some of the supporting material provided by the Crown which went outside the agreed facts. The judge is not bound by the facts as the parties have agreed to them (*Chow v DPP (NSW)* (1992) 28 NSWLR 593 at 606), but according to *R v H* at [59]:

> the requirements of procedural fairness commend that when a judge intends to go outside the agreed statement of facts … he or she should inform the parties of that intention in order to give them an opportunity to deal with it: *R v Uzabeaga* (2000) 119 A Crim R 452 at 458–459, [34]–[38].

Offences not charged

In *PWB v R* [2011] NSWCCA 84, RS Hulme J, with whom Harrison J agreed, found at [52]–[54] that the sentencing judge erred in her use of the victim impact statements. The statement referred to alleged offences other than those charged. It was only the impact of the charged offence that the judge was entitled to take into account.

[12-838] Victim impact statements of family victims

The impact of offences on family members of victims can be taken into account under s 30E(3) (formerly s 28(4)) as an aspect of s 3A(g) *Crimes (Sentencing Procedure) Act* 1999 only on the application of the prosecution and if the court considers it appropriate (for proceedings that commenced before 27 May 2019, see former s 28(4)). A "family victim" is defined in s 26.

The text in s 30E(3) (former s 28(4)) — "an aspect of harm done to the community" — refers to s 3A(g). Harm done to the deceased's family is an aspect of harm done to the community and it is appropriate to take that harm into account in determining the sentence: *Sumpton v R* [2016] NSWCCA 162 at [153]–[155] citing *R v Halloun*

[2014] NSWSC 1705 at [46]; *R v Do (No 4)* [2015] NSWSC 512 at [50]; *R v Pluis* [2015] NSWSC 320 at [102]–[104]. In *R v Halloun*, McCallum J observed at [46] with reference to the former s 28(4):

> I would construe [this] provision as an important mechanism for ensuring that the evidence of family victims is placed before the court to give texture to the undoubted proposition that every unlawful taking of a human life harms the community in some way. In that way, the provision serves the purposes of sentencing stated in s 3A of the Act, one of which is to recognise the harm done to the victim of the crime and the community.

Section 30E(4) (former s 28(4A)) does not affect the application of the law of evidence in sentence proceedings: s 30E(4).

The absence of a VIS given by a family victim does not give rise to an inference an offence had little or no impact on the members of the primary victim's immediate family: s 30E(6).

Scope of "impact" on immediate family

Section 28(2) (former s 26) *Crimes (Sentencing Procedure) Act* defines a VIS to mean, in the case of a family victim, a statement containing particulars of the impact of the primary victim's death on the family victim and other members of the primary victim's immediate family.

"Immediate family" is defined broadly in s 26 to include the victim's spouse or de facto partner, a person to whom the victim is engaged to be married, a parent, grandparent, step-parent, child, grandchild, step-child, sibling, half-sibling or step-sibling. For proceedings that commenced on or after 27 May 2019, the definition extends to step-grandchildren, aunts, uncles, nieces and nephews, persons who are close family or kin according to Indigenous kinship systems, or other persons the prosecutor is satisfied is a member of extended or culturally recognised family, or who the victim considered to be family.

Of the term "impact" (see now s 28(2); former s 26), Johnson J said in *R v Turnbull (No 24)* [2016] NSWSC 830 at [8] that it should not be construed narrowly:

> The impact of the death of a person on the members of that person's immediate family extends to the influence or effect of the death. It is not confined to the immediate impact. It is not confined to immediate issues of grief, but to the devastation that can be caused to the family of a murder victim. It can extend, in my view, to the thought processes of the victims which, at times, may involve strong feelings with respect to the perpetrator, and what (in their view) may have motivated the perpetrator. To exclude matters of that sort, in my view, would narrowly and artificially confine the very process by which victim impact statements are made.

Scope of the concept of "harm"

There is a broader issue as to whether s 3A(g) alters the common law. The High Court said in *Muldrock v The Queen* (2011) 244 CLR 120 at [20] that the purposes of sentencing listed in s 3A were "familiar" and that there is "nothing in the Sentencing Act to indicate that the court is to depart from the principles explained in *Veen v The Queen (No 2)* [(1988) 164 CLR 465 at 476] in applying them". It was held in *Josefski v R* [2010] NSWCCA 41 at [4], [38]–[39] that s 3A(g) was not intended

to alter the law that existed and, further, when s 3A(g) is applied, it is limited by the common law rule that a court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen.

[12-839] Victim impact statements when offenders are forensic patients

Part 3, Div 2, Subdiv 5 *Crimes (Sentencing Procedure) Act* 1999, applies to proceedings which commenced from 27 May 2019, and permits a court to receive a VIS when there has been a special verdict of act proven but not criminally responsible or a verdict after a special hearing that a person has committed an offence: s 30L(1). The VIS must be prepared by the victim to whom it relates and tendered by the prosecution: s 30L(5). In such circumstances the court:

- must acknowledge receipt of the VIS: s 30L(2)
- may take it into account when considering what conditions to impose on the release of the accused: s 30L(3)
- must not consider a VIS when determining the limiting term to be imposed: s 30L(4).

A court may seek submissions by the designated carer or principal care provider: s 30M. Submissions may be written or oral: cl 12E *Crimes (Sentencing Procedure) Regulation* 2017.

A VIS under s 30L(1) or submissions under s 30M may refer to, pursuant to cll 11A(2), 12E *Crimes (Sentencing Procedure) Regulation*:

- the risk the offender's release would pose to the victim
- conditions that should be imposed on the offender's release and
- any other matter the victim/designated carer or principal care provider thinks should be considered in deciding the offender's conditions of release.

A victim may request that a court not disclose a VIS received under s 30L to the accused or that the statement not be read out to the court: s 30N(1). The court must agree unless it considers it is not in the interests of justice: s 30N(2). The court is not prevented from disclosing a VIS to the accused's legal representative, if it is in the interests of justice to do so, provided it is not disclosed to any other person: s 30N(3). If the court makes a decision resulting in the accused becoming a forensic patient, it must give a copy of the VIS to the Mental Health Review Tribunal as soon as practicable: s 30N(4); cl 12C.

Clause 12D relates to the consideration and disclosure of a VIS by the Tribunal.

[12-840] Robbery offences

Chief Justice Spigelman considered the impact upon victims of armed robbery in *R v Henry* (1999) 46 NSWLR 346 at [94]–[99]. See further **Robbery** at [20-250].

[12-850] The relevance of the attitude of the victim — vengeance or forgiveness

In *R v Palu* [2002] NSWCCA 381 Howie J, with whom Levine and Hidden JJ agreed, said at [37]:

> The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness: *R v Glen* (NSWCCA, unreported, 19 December 1994). Sentencing

> proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution. In particular, crimes of violence committed in public are an affront to the peace and good order of the community and require deterrent sentences: *Henderson* (NSWCCA, unreported, 5 November 1997). Matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.

Justice Johnson said with reference to authority in *R v Burton* [2008] NSWCCA 128 at [102]: "The victim's attitude towards sentencing of the Respondent ought to have played no part on sentence".

Domestic violence

In *R v Glen* (unrep, 19/12/94, NSWCCA), Simpson J stressed the importance, particularly in domestic violence cases, of general deterrence. Her Honour emphasised that:

> It must not be forgotten, that, if it is to be accorded weight by the courts, forgiveness by the victim also operates contrary to the interests of other victims. Until it is recognised that domestic violence will be treated with severe penalties regardless of a later softening of attitude by the victim, no progress is likely to be made in its abolition or reduction. Put simply, the importance of general deterrence in such cases overrides any minor relevance that evidence of forgiveness might have.
>
> For too long the community in general and the agencies of law enforcement in particular, have turned their backs upon the helpless victims of domestic violence. Acceptance of the victim's word that he/she forgives the offender, casts too great a burden of responsibility upon one individual already in a vulnerable position. Neither the community, the law enforcement agencies, nor the courts can be permitted to abdicate their responsibility in this fashion. Protection of the particular victim in the particular case is a step towards protection of other victims in other cases.

R v Glen was quoted at length and with approval in *R v Burton* [2008] NSWCCA 128 at [103]. Justice Johnson affirmed the need for "… caution where a victim of a domestic violence offence expresses forgiveness and urges imposition of a lenient sentence for the offender" at [105].

In *R v Newman* [2004] NSWCCA 102, Howie J, citing *R v Bradford* (unrep, 6/5/88, NSWCCA), noted at [83]:

> that there may be the comparatively rare cases where forgiveness of the accused by the victim may be a relevant fact. Most cases, where this issue has been considered, have been in the context of domestic violence.

In *R v Kershaw* [2005] NSWCCA 56, Bryson JA said at [24]:

> In cases involving domestic violence it happens from time to time that a complainant is shown to have a forgiving and optimistic attitude about violence in the relationship which it is difficult for others to understand or share. The sentencing process is not and of course should not be in the hands of complainants, and the merciful or relenting attitude of a complainant does not reduce the gravity of the offence and does not have much effect on the interest of justice in imposing an appropriate sentence.

In *Shaw v R* [2008] NSWCCA 58, the court at [27] held that the judge did not err in being cautious about giving any weight to those aspects of the victim's statutory

declaration where she addressed her own responsibility for the deterioration in the relationship, her desire to withdraw her statement to police and her desire for her family to be reunited. This was an approach open to his Honour since it is the experience of sentencing courts that victims of domestic violence may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them.

See also discussion of *AC v R* [2016] NSWCCA 107 at [12-832].

Attitude of victim's relatives

In *R v Dawes* [2004] NSWCCA 363, a case where a mother, suffering a major depressive illness, killed her autistic son, Dunford J noted at [30]:

> In his Victim Impact Statement read to the District Court, the respondent's husband referred to what a good mother she had been to Jason over the years, he asked for leniency for her and said that he could see no gain to the community or personal satisfaction in her being sent to prison. It would appear that his Honour took his attitude into account when sentencing the respondent, and in so far as he did so, he was in error, as the attitude of the victim: *R v Palu* (2002) 134 A Crim R 174 at [37], or in the case of homicide, the victim's family: *R v Previtera* (1997) 94 A Crim R 76, is not relevant to the proper exercise of the sentencing discretion for the reasons explained in those cases. For the same reasons, the apparent change of attitude of the respondent's husband is not a matter which this court can take into account in considering the appeal: see also *R v Newman* [2004] NSWCCA 102 at [79] to [86] and cases there cited.

The forgiveness of the offender by the victim's relatives should not be a factor taken into account in determining the sentence to be imposed: *R v Begbie* [2001] NSWCCA 206 per Sully J at [57]–[59]. The victim's attitude cannot over-reach the need for strong denunciation and general deterrence in a case involving serious objective circumstances: per Mason P at [43].

[12-860] Statutory scheme for directions to pay compensation

The *Victims Rights and Support Act* 2013 provides for compensation by a court for injury and loss for an "aggrieved person". The object of a compensation direction is to compensate a victim, reflecting a civil liability which is distinct from an offender's criminal liability: *Upadhyaya v R* [2017] NSWCCA 162 at [9]. The relevant parts of the Act are extracted below.

Compensation for injury

Part 6, Div 2 sets out a statutory scheme for compensation for injury.

Section 93 Definition

"*aggrieved person*", in relation to an offence:

(a) other than an offence in respect of the death of a person — means a person who has sustained injury through or by reason of:

  (i) an offence for which the offender has been convicted, or

  (ii) an offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act* 1999) when sentence was passed on the offender for that offence, or

(b) in respect of the death of a person — means a member of the immediate family of the person.

Section 94 Directions for compensation for injury

(1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a sum not exceeding $50,000 be paid out of the property of the offender to any:

(a) aggrieved person, or

(b) aggrieved persons in such proportions as may be specified in the direction,

by way of compensation for any injury sustained through, or by reason of, the offence or any other offence taken into account (under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act* 1999) when sentence was passed on the offender for that offence.

(2) A direction for compensation may be given by a court on its own initiative or on application made to it by or on behalf of an aggrieved person.

Section 99 Factors to be taken into consideration

In determining whether or not to give a direction for compensation and in determining the sum to be paid under such a direction, the court must have regard to the following:

(a) any behaviour (including past criminal activity), condition, attitude or disposition of the aggrieved person which directly or indirectly contributed to the injury or loss sustained by the aggrieved person,

(b) any amount which has been paid to the aggrieved person or which the aggrieved person is entitled to be paid by way of damages awarded in civil proceedings in respect of substantially the same facts as those on which the offender was convicted,

(c) such other matters as it considers relevant.

Other important sections include:

- s 95: Restrictions on court's power to give directions for compensation for injury
- s 100: Payment of sum directed
- s 101: Enforcement of directions for compensation.

Compensation for loss

Part 6, Div 3 sets out a statutory scheme for compensation for loss:

- s 96: Definitions
- s 97: Directions for compensation for loss
- s 98: Restrictions on court's power to give directions for compensation for loss.

Part 6, Div 4 sets out some general matters:

- s 99: Factors to be taken into consideration
- s 100: Payment of sum directed
- s 101: Enforcement of directions for compensation
- s 102: Effect of directions for compensation on subsequent civil proceedings
- s 103: Directions for compensation not appealable on certain grounds.

Section 97(1) provides:

> (1) A court that convicts a person of an offence may (on the conviction or at any time afterwards), by notice given to the offender, direct that a specified sum be paid out of the property of the offender to any:
>
> (a) aggrieved person, or
>
> (b) aggrieved persons in such proportions as may be specified in the direction,
>
> by way of compensation for any loss sustained through, or by reason of, the offence or, if applicable, any further offence that the court has taken into account under Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act* 1999 in imposing a penalty for an offence for which the offender has been convicted.

[12-863] Directions to pay compensation — further considerations

In *Connor v R* [2005] NSWCCA 431 at [41]–[42], Studdert J, McClellan CJ at CL and James J agreeing, outlined the following "relevant considerations" in applying the provisions in s 77B (repealed; see s 97):

> (i) the purpose of the statutory scheme is to compensate victims;
>
> (ii) where co-offenders engaged in a joint enterprise cause damage to a victim's property, each has a liability as a tort feasor for the whole of the damage suffered. A tort feasor liable in respect of that damage may, however, recover contribution from any other tort feasor liable in respect of the same damage: see *Law Reform (Miscellaneous Provisions) Act* 1946, s 5(1)(c). See also *R v Van Hoang* (2002) 135 A Crim R 244 and the judgment of Smart AJ at [38];
>
> (iii) the asserted impecuniosity of an offender against whom a direction is sought pursuant to s 77B of the *Victims Act* ought not ordinarily be regarded as a reason for declining to make a direction under the section. An offender's impecuniosity may be temporary. His financial position may change through rehabilitation and hard work or by good fortune. Asserted impecuniosity may, in any event, be later demonstrated to be false;
>
> (iv) s 77D(a) and (b) direct attention to important considerations on an application under s 77B.
>
> In the present case, of course, the applicant's criminal conduct directly contributed to the losses sustained by the parties for whose benefit the sentencing judge made the direction under consideration.
>
> It is proper, of course, for a judge entertaining an application under s 77B to have regard to all the circumstances of the case.

A causal nexus between the loss and the crime must exist before an order can be made: *R v Skaf* [2001] NSWCCA 199 at [35] cited in *R v Wills* [2013] NSWDC 1 at [10].

[12-865] A direction to pay compensation not a mitigating factor

A direction to pay compensation under s 97(1) *Victims Rights and Support Act* 2013 is not a mitigating factor at sentence: *Upadhyaya v R* [2017] NSWCCA 162 at [9], [68]. Section 97(1) requires a "specified sum be paid out of the property of the offender … by way of compensation *for any loss sustained through or by reason of the offence*" [emphasis added]: *Upadhyaya v R* at [65]. The making of such a direction reflects a civil liability, as distinct from an offender's criminal liability: *Upadhyaya v R*

at [9]. It is clearly in the nature of a claw-back or disgorgement of the "ill-gotten gains" the offender derived from the offence and therefore by definition cannot operate in mitigation: *Upadhyaya v R* at [65]–[66]. It does not matter that directions under s 97(1) do not fall within the ambit of s 24B(2) *Crimes (Sentencing Procedure) Act* 1999 — the provision which prohibits a court taking into account as a mitigating factor orders imposed under "confiscation or forfeiture legislation". It would be a peculiar result if a court were precluded from having regard to orders made under confiscation or forfeiture legislation when imposing sentence, but were required to have regard to orders reflecting an offender's civil liability: *Upadhyaya v R* at [14].

Compensation can be appealed

Section 2(1)(f) *Criminal Appeal Act* 1912 defines "sentence" to include "any direction for compensation made by the court of trial in respect of a person under section 94 (Directions for compensation for injury) or 97 (Directions for compensation for loss) of the *Victims Rights and Support Act* 2013".

Section 9 *Criminal Appeal Act* gives the court power to annul or vary any order for the restitution of property or payment of compensation. The power to do so exists even if the conviction(s) for the offence(s) is not quashed on appeal: s 9(5).

Although s 9(5) *Criminal Appeal Act* refers to the repealed *Victims Compensation Act* 1996, the reference extends to the *Victims Rights and Support Act* as a re-enacted Act: s 68(3)(a) *Interpretation Act* 1987.

Restrictions on power to make compensation directions

Section 98 *Victims Rights and Support Act* 2013 provides a court may not give a direction for compensation: (a) for economic loss for which financial support is payable under this Act or compensation is payable under Pt 6, Div 2, or (b) for an amount in excess of the maximum amount that, in its civil jurisdiction, the court is empowered to award in proceedings for the recovery of a debt.

The maximum compensation order that the District Court can direct an offender to pay is $750,000: s 98(b) *Victims Rights and Support Act*; *Upadhyaya v R* at [4]. In *Upadhyaya v R*, the maximum amount was directed. It has been said that fairness and justice require that the maximum apply to the total compensation awarded for all offences where the court is sentencing for a number of offences as part of a course of conduct: *R v Wills* [2013] NSWDC 1 at [7].

Voluntary compensation as evidence of remorse

The significance of the voluntary payment of compensation was considered by the court in *R v Burgess* [2005] NSWCCA 52. The appellants were convicted of maliciously damaging property by painting the words "No War" on one of the white-tiled sails of the Opera House. The sentencing judge ordered that the appellants pay compensation of $111,000. They had already paid compensation of $40,000. Adams J said at [49]:

> It is, I think, undoubted that compensation that has been paid by an offender is often cogent evidence of remorse and, where it is accompanied by actual hardship in the sense of a real cost, is appropriately reflected in some amelioration of penalty, to a greater or lesser extent. In this case it appears that Dr Saunders has undertaken the greater burden of payment that has not been covered by contributions from supporters, since Mr

> Burgess has, it appears, little means. Of course, the compensation payments cannot be regarded, in the somewhat unusual circumstances of this case, as evidence of remorse. His Honour said that he took into account, as a favourable subjective feature of both cases, the payment and offer of compensation.

In *Nash v Silver City Drilling (NSW) Pty Ltd* [2017] NSWCCA 96, the appellate court accepted the sentencing judge's finding that the offending company's payments to the victim over and above the statutory rate paid by its workers compensation insurer was evidence of remorse: *Nash v Silver City Drilling* at [26], [61].

See also **Restitution** at [10-540], **Fraud offences in NSW** at [19-930]ff and *Remorse demonstrated by making reparation of loss under s 21A(3)(i)* in **Mitigating factors** at [20-000].

[12-867] Victims support levies

Part 7 *Victims Rights and Support Act* 2013 sets out a statutory scheme for the payment of a victims support levy. Part 7 applies to all offences dealt with by the Local, District and Supreme Courts other than any offences of a class prescribed by the regulations. Part 7 does not apply to the following classes of offences: (a) offences relating to engaging in offensive conduct, (b) offences relating to the use of offensive language, (c) offences relating to travelling on public transport without paying the fare or without a ticket, (d) offences relating to the parking, standing or waiting of a vehicle: s 105(2) *Victims Rights and Support Act* 2013.

A person who is convicted of an offence to which the Part applies is, by virtue of the conviction, liable to pay to the State a levy: s 106(1). Conviction for the purposes of s 106 does not include an order made under s 10(1)(a) *Crimes (Sentencing Procedure) Act* in relation to an offence that is not punishable by imprisonment: s 105(4) *Victims Rights and Support Act* 2013.

The amount of the levy is calculated under s 107 (CPI adjustments of victims support levy). The Minister publishes a notice on the NSW legislation website of the amounts that are to apply for the purposes of s 106 for a particular financial year: s 107(3).

For the 2020–21 financial year, the levy under s 106(1)(a) for a person convicted on indictment or pursuant to a committal for sentence is $188 and, under s 106(1)(b), the levy for a person convicted otherwise is $85: cl 2, Table, Victims Rights and Support (Victims Support Levy) Notice 2020.

A levy is in addition to, and does not form part of, any pecuniary penalty or order for payment of compensation imposed in respect of the same offence: s 106(2). A person who is under the age of 18 years is not liable to pay such a levy if the court directs that the person is exempt from liability to pay the levy: s 106(3). If a compensation levy has been imposed on a person and they appeal, the appeal stays the liability of the person to pay the levy: s 108(1).

[12-869] Corporation as victim

It is not a mitigating factor that the victim is a large corporation. It may be more accurate to say that, in that circumstance, it is not an aggravating factor that the victim was some individual who suffered great personal hardship as a result of the offences: *R v Machtas* (unrep, 7/8/92, NSWCCA).

[12-870] Federal offences

Section 16A(2)(ea) *Crimes Act* 1914 (Cth) requires a court to take into account any victim impact statement for any individual who is a victim of the offence and has suffered harm as a result of it. The term "victim" should be construed broadly and may include a person recruited and manipulated by an offender to commit an offence: *Kabir v R* [2020] NSWCCA 139 at [61]–[62]. In that case, the court concluded it was open to find an unwitting friend used by the offender to facilitate the commission of tax fraud was a victim: at [65].

"Victim impact statement" is defined as an oral or written statement describing the impact of the offence on an individual victim, including details of the harm suffered: s 16AAAA(1). "Harm" is broadly defined in s 16(1) to include physical, psychological and emotional suffering, economic and other loss, and damage. The statement must be made by the individual victim or, if the court gives leave, a member of their family (defined in s 16A(4)), or a person appointed by the court: s 16AAAA(1)(a). The statement must describe the impact of the offence on the victim, including harm suffered as a result of the offence: s 16AAAA(1)(b). Where the statement is written, it must be given to the offender or their representative a reasonable time before the sentencing hearing: s 16AAAA(1)(c).

Section 16AB is headed "Matters relating to victim impact statements". It provides:

- only one VIS may be made per victim, unless the court grants leave: s 16AB(2)
- no implication is to be drawn from the absence of a VIS for a victim: s 16AB(3)
- all or part of a VIS for a victim may be read to the court by or on behalf of the victim: s 16AB(4)
- a VIS is not to be read to the court, or otherwise taken into account, to the extent that:
  - it expresses an opinion about an appropriate sentence
  - it is offensive, threatening, intimidating or harassing, or
  - admitting it into evidence would otherwise not be in the interests of justice: s 16AB(5)
- the person convicted of the offence may only test the facts in a victim impact statement:
  - by way of cross-examining the maker of the statement, and
  - if the court gives leave to do so: s 16AB(6)
- the protections for vulnerable witnesses in Pt IAD will be available for the reading of, or cross-examination about, the VIS: s 16AB(7).

The offender who took her child out of the jurisdiction against a Family Court order was not permitted to cross-examine the child's father on his VIS in *B v R* [2015] NSWCCA 103. It was held there was no denial of natural justice where the scope of cross-examination bore the hallmarks of cross-examination for collateral purposes, namely, to establish the father had committed criminal offences against his son: *B v R* at [206]. Section 16AB(6) did not apply to the proceedings.

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Particular offences

para

Dangerous driving and navigation

Detain for advantage/kidnapping

Drug Misuse and Trafficking Act 1985 (NSW) offences

Fraud offences in NSW

Offences against justice/in public office

Robbery

Car-jacking and car rebirthing offences

Sexual assault

Murder

Manslaughter and infanticide

Assault, wounding and related offences

Firearms and prohibited weapons offences

Damage by fire and related offences

Domestic violence offences

COMMONWEALTH

Commonwealth drug offences

Money laundering

Conspiracy

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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]. Of the relationship between these offences, Howie J in *R v Borkowski* [2009] NSWCCA 102 said, at [58] that:

> [I]n cases of motor manslaughter, in my opinion, the sentence to be imposed must also take into account the fact that there is a structure of offences dealing with the occasioning of death through driving and that manslaughter stands at the very pinnacle of that structure as the most serious offence. In particular the sentence must take into account that there is a less serious offence of causing death by driving under s 52A(2) of the *Crimes Act* that carries a maximum penalty of imprisonment for 14 years.

Examples of cases include: *Director of Public Prosecutions v Abdulrahman* [2021] NSWCCA 114 (a particularly serious example); *Smith v R* [2020] NSWCCA 181 at [49]–[78], *Day v R* [2014] NSWCCA 333 at [17]–[28], *Spark v R* [2012] NSWCCA 140 at [48] and *Bombardieri v R* [2010] NSWCCA 161 at [41]–[55]. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving, as it did, one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton

JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

[18-360] Grievous bodily harm

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. In determining a disqualification period for these offences (pursuant to s 205(2) or (3)), the court must consider whether or not to vary the automatic disqualification period: *Pearce v R* [2022] NSWCCA 68 at [56]–[57].

Where an offender's licence has been suspended for an offence, s 206B requires a court to take into account the period of suspension when deciding the period of disqualification. Section 206B is only engaged when a court orders a period of disqualification, not where an automatic period takes effect: *Pearce v R* at [55]. Where an order is made varying a licence disqualification period, s 206B(4) requires the period of suspension to be counted towards any disqualification period: *Pearce v R* at [55].

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

[18-415] Failure to stop and assist

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]

Robbery

[20-200] The essence of robbery

The *Crimes Act* 1900 does not contain a definition of robbery. The common law definition is used to inform the meaning of the term where it is used in offences created in Pt 4, Div 2 of the Act: *R v Delk* (1999) 46 NSWLR 340 at [14]–[26]. In *R v Foster* (1995) 78 A Crim R 517 at 522, robbery was defined in the following terms:

> The essence of a robbery is that violence is done or threatened to the person of the owner or custodian who stands between the offender and the property stolen, in order to overcome that person's resistance and so to oblige him to part with the property; in other words, the victim must be compelled by force or fear to submit to the theft: *Smith v Desmond* [1965] AC 960 at 985–987, 997–998; (1965) 49 Cr App R 246 at 260–263, 275–276. It is not sufficient that the threat of violence is made after the property has been taken; both elements of the offence must coincide: *Emery* (1975) 11 SASR 169 at 173.

It is not necessary that the offender applies force. It is enough that the offender by his or her conduct (which may involve an express or implied threat) puts the victim in fear of violence: *R v King* (2004) 59 NSWLR 515 at [52], [114] and [126].

[20-210] The statutory scheme

Part 4, Div 2 *Crimes Act* 1900 ("the Act") sets out five sections under the heading "Robbery": robbery or stealing from the person (s 94); same in circumstances of aggravation (s 95); robbery with wounding (s 96); robbery etc or stopping a mail, being armed or in company (s 97); and robbery with arms etc and wounding (s 98). The related offence of demanding property with intent to steal is contained in s 99, Pt 4, Div 3 of the Act.

The provisions in Pt 4, Div 2 of the Act "establish a series of offences, in ascending degrees of seriousness, and with ascending orders of maximum penalty, depending on the circumstances of the case": *R v Brown* (1989) 17 NSWLR 472 at 473. For this reason, the principle enunciated in *The Queen v De Simoni* (1981) 147 CLR 383 by Gibbs J at 389 that "a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence" has particular relevance to robbery offences.

The application of the *De Simoni* principle is dealt with in the discussion of each of the offences under ss 94–99 below.

It was said over twenty years ago that a robbery, whether with or without arms, is to be regarded "in virtually all circumstances as an offence of the utmost gravity, which must carry a custodial sentence": *R v Murray* (unrep, 11/9/86, NSWCCA) per Lee J; *R v Valentini* (1989) 46 A Crim R 23 at 26. This approach was affirmed in the guideline judgment of *R v Henry* (1999) 46 NSWLR 346. It applies to armed robbery sentences and has sentencing implications for other robbery offences in s 97(1) and elsewhere in the Act: see *The R v Henry Guideline judgment* in **Robbery etc or stopping mail, being armed or in company: s 97(1)** at [20-250].

Section 98 is included in the Table of Standard non-parole period offences in s 54D of the *Crimes (Sentencing Procedure) Act* 1999 (NSW): see **Standard non-parole period** in [20-270] below.

A study by the Judicial Commission of robbery sentences in the six-year period since *R v Henry* found that the most common robbery offence was an offence under s 97(1), which accounted for 60.2% of all robbery offences in the higher courts. The majority of offenders sentenced for offences under s 97 received a full-time custodial sentence: 88.7% in the case of armed robbery and assault with intent to rob whilst armed, and 76.3% in the case of robbery in company and assault with intent to rob in company. See further, L Barnes and P Poletti, *Sentencing Robbery Offenders since the Henry Guideline Judgment*, Research Monograph 30, Judicial Commission of NSW, 2007, pp 47 and 51.

[20-220] Robbery or assault with intent to rob or stealing from the person: s 94

Section 94 provides:

> Whosoever:
>
> (a) robs or assaults with intent to rob any person, or
>
> (b) steals any chattel, money, or valuable security from the person of another,
>
> shall, except where a greater punishment is provided by this Act, be liable to imprisonment for fourteen years.

Stealing from the person is robbery without the element of violence or threat of violence: *R v Delk* (1999) 46 NSWLR 340 at [30]. A common form of this offence is bag snatching: see, for example, *R v White* (unrep, 29/5/98, NSWCCA).

Summary disposal of the offences of robbery and stealing from the person

Robbery and stealing from the person offences under s 94(a) and (b) respectively may be dealt with summarily. Robbery, and stealing from the person where the value of the property, matter or thing stolen exceeds $5,000, are Table 1 offences and subject to a maximum penalty of 2 years' imprisonment or a fine of 100 penalty units: ss 267(2), (3) *Criminal Procedure Act* 1986. Steal from the person, where the value does not exceed $5,000, is a Table 2 offence and subject to a maximum penalty of 2 years' imprisonment or a fine of 50 penalty units, or both. Where the value does not exceed $2,000 the maximum penalty that the Local Court may impose is a penalty of 2 years' imprisonment or 20 penalty units, or both: s 268(1A), (2)(b) *Criminal Procedure Act*.

The jurisdictional maximum set by the *Criminal Procedure Act* does not supplant the maximum penalty for the offence. Nor is the jurisdictional maximum necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see also [10-005] **Cases that attract the maximum**): *R v Doan* (2000) 50 NSWLR 115 at [35].

The fact that stealing from the person can be dealt with in the Local Court is not automatically a matter in mitigation if the offender is dealt with on indictment in the District Court. The offender's case must come within the exceptional circumstances outlined in *Zreika v R* (2012) 223 A Crim R 460 at [107]–[109].

See further **Possibility of summary disposal** at [10-080].

In *Trindall* [2005] NSWCCA 446, the applicant pleaded guilty to two offences of steal from the person. The judge erred in not referring to the maximum penalties in the Local Court. However, given the circumstances of the case, including the fact that the offences were committed while the applicant was on parole, and aggravating circumstances surrounding the second steal from person offence, this error did not warrant appellate intervention: at [40].

Bag snatching

Bag snatching offences are often dealt with under s 94 because the offender steals the bag unbeknown to the victim. It has been consistently held that general deterrence should play a significant part in the sentencing process for such offences, because of the comparative ease with which they can be committed: *R v Ranse* (unrep, 8/8/94, NSWCCA).

In *R v Ranse*, Gleeson CJ said of bag snatching offences:

> One of the primary purposes of the system of criminal justice is to keep the peace. In this connection the idea of peace embraces the freedom of ordinary citizens to walk the streets and to go about their daily affairs without fear of physical violence. It also embraces respect for the property of others.
>
> Offences of the kind committed by the present respondent are not trivial instances of disrespect for private property. They are serious breaches of the peace. They are direct attacks upon the security of person and property which the law exists to protect.

R v Ranse was quoted with approval in *R v Maloukis* [2002] NSWCCA 155 at [15] and *R v Marinos* [2003] NSWCCA 136 at [17].

It was said more than 10 years ago that a bag snatching offence will attract a full-time custodial sentence when violence is involved, unless there are exceptional circumstances: *R v Taylor* [2000] NSWCCA 442 per Wood CJ at CL at [48]. This is necessary to reflect the element of general deterrence which has a particular significance for a bag snatching offence given its prevalence and the fact the victims are most often the aged and infirm: at [48].

The De Simoni principle and s 94

The courts have grappled with the *De Simoni* principle as it applies to offences contained with s 94. The applicant in *R v Young* [2003] NSWCCA 276 had originally been charged with robbery but the Crown accepted a plea to stealing from the person in full satisfaction of the charges. The judge referred to the charge as "robbery" and took into account the fact that the applicant had a knife and frightened his victims. This was an error for it "blurred the distinction between the two offences, and [gave] rise to a reasonable apprehension that the sentencing exercise was not focussed upon the elements of the alternative charge to which the applicant had pleaded guilty": at [10].

However, in *Edwards v R* [2009] NSWCCA 199 at [40], it was asserted that the judge breached the *De Simoni* principle by finding that it "was an offence where violence was offered during the stealing". The finding was based on the action of the applicant of squeezing the victim's hand. The applicant submitted it was available for a robbery offence but not for an offence of stealing from the person. Johnson J at [41] rejected the submission on the basis that both robbery and stealing from a person have the same maximum penalty and that the latter offence "usually involves a personal confrontation and the potential for personal conflict and force or fear, particularly if the victim

endeavours to stop the theft: *R v Delk* (1999) 46 NSWLR 340 at 343 [15]. Stealing from the person is a variant of robbery rather than a variant of larceny: *R v Delk* at 345 [29]. Not every offence of stealing from the person is less serious than robbery, with such an assessment depending upon the particular facts of the case: *R v Hua* [2002] NSWCCA 384 at [19]".

The court held that nothing said in *R v Young* [2003] NSWCCA 276 or *R v Hooper* [2004] NSWCCA 10 required a contrary conclusion that the *De Simoni* principle had been breached: [41].

It is a breach of the *De Simoni* principle if a judge takes into account circumstances of aggravation that would have warranted a conviction for any of the offences found in s 97: see **Robbery etc or stopping mail, being armed or in company: s 97(1)** at [20-250]. For example, the fact that the offender was armed: *R v Grainger* (unrep, 3/8/94, NSWCCA); or for example, that the offence was committed in company: *Rend v R* (2006) 160 A Crim R 178 at [103]; *Iese v R* [2005] NSWCCA 418 at [18].

[20-230] Robbery in circumstances of aggravation: s 95

Section 95 provides:

> (1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.

Section 95(2) sets out three circumstances of aggravation.

When the circumstance of aggravation relied upon is the use of corporal violence, the nature and extent of the violence will be relevant to the seriousness of the offence: *R v Atonio* (2005) 154 A Crim R 183 at [29]. Sentences must reflect the distinction between using force and inflicting actual injuries "lest it be thought that there is no point in limiting the violence used to commit crimes": *Gray v R* [2007] NSWCCA 366 at [28] per Adams J.

Many of the characteristics considered in the *R v Henry* armed robbery guideline judgment (quoted below at [20-250]) are common to offences contrary to s 95. The court in *Azzi v R* [2008] NSWCCA 169 at [37] accepted that the guideline is a "relevant reference point". However, because *R v Henry* considers the circumstance where a weapon is used, the use of the armed robbery guideline must be approached with caution when sentencing for an offence contrary to s 95: *R v Tortell* [2007] NSWCCA 313 at [14]. Even when all of the characteristics set out at [162] of the guideline judgment in *R v Henry* are satisfied (apart from the characteristic that the offender was armed), a sentencing judge is not permitted to adopt as a starting point, or as a prima facie sentence, a sentence of four to five years. Nor can the judge oscillate around the four to five year figure by enquiring whether any circumstances are present which would justify a heavier or a lighter sentence: *R v Yates* [2002] NSWCCA 520 at [366].

It is permissible to take into account as an aggravating factor the fact that the offence was committed in company for a s 95 offence. This is because the offence of robbery in company contrary to s 97 carries the same maximum penalty as an offence pursuant to s 95: *Moore v R* [2005] NSWCCA 407 at [33].

Where the s 95 robbery offence is based on conduct consisting of the threat of violence, it is permissible to apply s 21A(2)(b) and take into account any actual

violence without double counting: *Hamze v R* [2006] NSWCCA 36 at [26]. The statements in *R v Mauai* [2005] NSWCCA 207 at [13]–[16] concerning the application of s 21A(2)(b) to offences under s 95 should be read in light of *Hamze v R*.

It was an error in *Kukovec v R* [2014] NSWCCA 308 where the Crown charged an offence of aid and abet aggravated (corporal violence) robbery, for the judge to take into consideration the aggravating factor "in company" under s 21A(2)(e) *Crimes (Sentencing Procedure) Act* 1999 as it breached the suffix to s 21A(2) (the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence). It was an element of the offence when the offender was a principal in the second degree, that the offence was committed in company.

In *McDonald v R* [2015] NSWCCA 280, the court held that the sentencing judge was entitled to take into account actual use of violence as an aggravating factor under s 21A(2)(b) where the offender had been convicted of aggravated robbery where the circumstance of aggravation was deprivation of liberty.

[20-240] Robbery in circumstances of aggravation with wounding: s 96

Section 96 provides:

> Whosoever commits any offence under s 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

All offences under s 96 involving the infliction of grievous bodily harm are serious, but those resulting in permanent disability are necessarily more so: *R v MS2* (2005) 158 A Crim R 93 at [13]. This must be reflected in the severity of the sentence.

A sentencing judge is entitled to take into account the *R v Henry* guideline judgment as a means to assess the seriousness of an offence under s 96: *R v Thomas* [2007] NSWCCA 269 at [22], [91].

[20-250] Robbery etc or stopping mail, being armed or in company: s 97(1)

Section 97(1) provides:

> (1) Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person,
>
> robs, or assaults with intent to rob, any person, or
>
> stops any mail, or vehicle, railway train, or person conveying a mail, with intent to rob, or search the same,
>
> shall be liable to imprisonment for 20 years.

An "offensive weapon" is defined in s 4(1) of the Act as either a dangerous weapon, any thing made or adapted for offensive purposes, or any thing that, "in the circumstances, is used, or intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm".

Armed robbery

In *R v Henry* (1999) 46 NSWLR 346 Spigelman CJ stated at [99]:

> Armed robbery is not simply a crime against property. It is a crime against persons. Furthermore, the fear engendered by the perpetrator of this crime, together with the continued adverse effects on its victims, establish armed robbery to be a serious crime which requires condign punishment.

Full time custody unless exceptional circumstances

An offender convicted of armed robbery should expect to receive a full-time custodial sentence, save in the "most exceptional circumstances": *R v Roberts* (1994) 73 A Crim R 306 at 308. In *R v Henry*, Spigelman CJ at [113] applied the *Roberts* principle with the phrase "most exceptional circumstances" in favour of the phrase "wholly exceptional and unusual circumstances" employed in *R v Crotty* (unrep, 29/2/94, NSWCCA) at 5. However, a number of subsequent cases refer to *R v Henry* as authority for the principle that merely "exceptional circumstances" (as opposed to "most exceptional circumstances") are required: see, for example, *Legge v R* [2007] NSWCCA 244 at [44]. The court in *R v Henry* described the test as being "most exceptional circumstances" at one point in its judgment ([113]) and later being "exceptional circumstances": see, for example, [210] and [270]. The differences between these expressions may not be material.

Youth by itself is not an exceptional circumstance: *R v Tran* [1999] NSWCCA 109 at [18]. Nor necessarily is the attempt or achievement of rehabilitation: *R v Tran*, above, at [18]. The provision of assistance to authorities may qualify as an exceptional circumstance but the case would need to be compelling and the assistance to authorities substantial; what constitutes exceptional circumstances will depend upon the particular case: *R v Tran* at [21]. Cases of note since the guideline where exceptional circumstances have been found include: *R v Govinden* (1999) 106 A Crim R 314 at [35]; *R v Metcalf* [2000] NSWCCA 277 at [36]; *R v Blackman* [2001] NSWCCA 121 at [45]; *R v Parsons* [2002] NSWCCA 296 at [70]; *R v Nair* [2003] NSWCCA 368 at [17]; and *R v Gadsden* [2005] NSWCCA 453 at [36].

See also **Table 1** at [20-310] for details of Crown appeals to the CCA since 1999 where a non-custodial sentence was imposed at first instance for a s 97(1) offence.

The R v Henry Guideline judgment

The guideline judgment of *R v Henry* (1999) 46 NSWLR 346 is directed at the offence of armed robbery pursuant to s 97(1) of the Act. The rationale and impetus for the guideline judgment was "the inconsistency in sentencing practice and systematic excessive leniency in the level of sentences" for s 97(1) offences: per Spigelman CJ at [110]. In particular, the judgment expressed concern regarding the prevalence of first instance judges finding exceptional circumstances warranting the imposition of a non-custodial sentence.

Spigelman CJ promulgated the following guideline at [162]:

> **A Guideline for New South Wales**
>
> It appears from the cases that come to this Court, including the present proceedings, that there is a category of case which is sufficiently common for purposes of determining a guideline:
>
> (i) Young offender with no or little criminal history
>
> (ii) Weapon like a knife, capable of killing or inflicting serious injury
>
> (iii) Limited degree of planning
>
> (iv) Limited, if any, actual violence but a real threat thereof
>
> (v) Victim in a vulnerable position such as a shopkeeper or taxi driver

(vi) Small amount taken

(vii) Plea of guilty, the significance of which is limited by a strong Crown case.

Whilst it is possible to determine a starting point in a case of this kind, i.e. a sentence of X years imprisonment, I do not believe that the Court should do so. Rather, I propose the Court should identify a narrow sentencing range within which this Court would expect sentences in such cases to fall.

There are two principal reasons why a sentencing range is appropriate for this offence:

(i) The seven characteristics identified above do not represent the full range of factors relevant to the sentencing exercise.

(ii) Many of the seven identified characteristics contain within themselves an inherent variability, eg different kinds of knives or weapons in (ii); extent of "limited actual violence" in (iv); degree of vulnerability in (v); amount in (vi).

In my opinion sentences for an offence of the character identified above should generally fall between four and five years for the full term. I have arrived at this figure after drawing on the collective knowledge of the other four members of the Court with respect to sentence ranges. I have also reviewed the sentences which this Court has imposed on occasions when it has intervened, including in Crown appeals where the principle of double jeopardy applies. The proposed range is broadly consistent with this body of prior decisions in this Court.

…

Aggravating and mitigating factors will justify a sentence below or above the range, as this Court's prior decisions indicate. The narrow range is a starting point.

In addition to factors which may arise in any case eg youth, offender's criminal record, cooperation with authorities, guilty plea in the absence of a strong case, rehabilitation efforts, offence committed whilst on bail etc, a number of circumstances are particular to the offence of armed robbery. These include:

(i) Nature of the weapon

(ii) Vulnerability of the victim

(iii) Position on a scale of impulsiveness/planning

(iv) Intensity of threat, or actual use, of force

(v) Number of offenders

(vi) Amount taken

(vii) Effect on victim(s).

Spigelman CJ has since clarified that the guilty plea component (number (vii)) at [162] refers to a late plea of guilty for the purposes of the application of the guideline promulgated in *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [161]. Therefore, where there is an early plea, all other things being equal, the sentence should be lower than the suggested range: *R v Thomson and Houlton* per Spigelman CJ at [161]. For dealing with a late guilty plea, see *R v Thomas* [2007] NSWCCA 269 at [26].

Spigelman CJ said in *Legge v R* [2007] NSWCCA 244 at [59]: "a guideline is not a tramline." It is not the case exceptional circumstances must be demonstrated before a sentence of less than the guideline promulgated in *R v Henry* may be imposed: at [44]. Such an approach impermissibly confines the exercise of sentencing discretion. It is

also inconsistent with the nature of guideline as a check, a guide or an indicator or as a sounding board: *Legge v R* at [59]. *R v Henry* [2007] NSWCCA 90 and *R v II* [2008] NSWSC 325 are other recent applications of the *R v Henry* guideline judgment.

The Guideline judgment and s 21A Crimes (Sentencing Procedure) Act 1999

In "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43, Howie J expressed the opinion that s 21A(2), which sets out various aggravating matters, has limited operation where there is a guideline judgment for an offence:

> The guideline judgments are offence specific. The facts relevant to a determination of whether or not the guideline applies will generally merely be specific aspects of the aggravating and mitigating factors in s 21A. There will be few, if any, aggravating or mitigating features to take into account once the specific offence-related matters have been considered.

In the armed robbery case of *R v Street* [2005] NSWCCA 139, the sentencing judge first considered the guideline judgment in *R v Henry* which referred to factors, the absence or presence of which indicated that the guideline judgment was applicable, and then by way of separate analysis took into account the specific factors referred to in s 21A, albeit in a collective and non-specific way as has been described. This approach "exacerbated the risk of aggravating factors being double counted": Hoeben J at [35].

See also **Armed robbery and s 21A** at [20-260] below.

The De Simoni Principle and s 97(1)

It is not an error for the judge, when sentencing for an offence of armed robbery, to take into account the actual bodily harm suffered by the victim: *Liao v R* [2007] NSWCCA 132 at [8]–[12]. Section 95 (which provides for a specific offence of robbery in circumstances where an offender uses corporal violence) carries the same maximum penalty as s 97(1): at [12].

Robbery in company and the guideline

The *R v Henry* guideline judgment is equally applicable to an offence of robbery in company, which has the same maximum penalty as an offence of armed robbery and which can be seen as broadly equivalent: *R v Murchie* (1999) 108 A Crim R 482 at [20]; *R v Lesi* [2005] NSWCCA 63 at [31]; *R v II* [2008] NSWSC 325 at [24].

The seven considerations enumerated by the Chief Justice in [162] of *R v Henry* apply "mutatis mutandis" to the s 97 offence of assault in company and with intent to rob: *R v Stanley* [2003] NSWCCA 233 at [14].

See also **Joint criminal enterprise** and **Parity** at [20-290] below.

[20-260] Robbery armed with a dangerous weapon: s 97(2)

Section 97(2) provides:

> **Aggravated offence**
>
> A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) when armed with a dangerous weapon. A person convicted of an offence under this subsection is liable to imprisonment for 25 years.

A "dangerous weapon" is defined in s 4(1) of the Act as either a firearm within the meaning of the *Firearms Act* 1996, a prohibited weapon within the meaning of the *Weapons Prohibition Act* 1998, or a spear gun.

A sentencing judge is entitled to take into account the *R v Henry* guideline judgment as a means to assess the seriousness of an offence under s 97(2): *R v Hamied* [2007] NSWCCA 151 at [11]–[13]; *R v Franks* [2005] NSWCCA 196 at [32].

Armed robbery offences escalate in seriousness according to how weapons are used. Maxwell J said in *R v Readman* (1990) 47 A Crim R 181 at 185:

> [T]his Court indicated in *Regina v Dicker*, 3 July 1980 that robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target.

This principle was applied in *R v Campbell* [2000] NSWCCA 157 at [24].

It is not a breach of the *De Simoni* principle, when sentencing for a s 97(2) offence, to take into account as a circumstance of aggravation the fact that the victim was wounded. In *R v Hooper* [2004] NSWCCA 10, James J said at [38] that robbery with wounding under s 98 is not a more serious offence than an offence under s 97(2). Both offences have the same statutory maximum penalty: at [35]. The elements of ss 97(2) and 98 are not the same, nor do the elements of a s 98 offence wholly encompass the elements of a s 97(2) offence. A wounding under s 98 may not necessarily involve a serious injury. It may be any injury involving the breaking of the skin: at [36].

Armed robbery and s 21A

Note: For a general discussion of s 21A factors see **Section 21A Factors "in addition to" any Act or Rule of Law** at [11-000] above. The cases below are confined to the application of the section to armed robbery.

Section 21A(2)(b) – the offence involved the actual or threatened use of violence

In *Hamze v R* [2006] NSWCCA 36 at [26] and *R v Dougan* (2006) 160 A Crim R 135 at [30], it was held that the threatened use of violence is a necessary element of armed robbery, but that actual use of violence as referred to in s 21A(2)(b) is not necessarily an element. The nature and extent of the threat (as opposed to the bare fact of the threat) can be taken into account via s 21A(2)(b) to assess the seriousness of the crime: *R v Way* (2004) 60 NSWLR 168 at [106]–[107]. Thus, in *Dougan*, the court held at [29] that it would have been permissible for the judge to have assessed the precise circumstances in which violence was threatened as a factor which increased the seriousness of the offence. Similarly in *Hamze v R* at [29], it would have been permissible for the judge to have regard to "the nature of the threatened use of violence in considering the seriousness of the offence". However in both cases the sentencing judge erred by failing to make clear precisely how s 21A(2)(b) was applied to the facts of the case.

In *Dougan*, considering the "nature and extent" of the threatened use of violence, the judge would have been entitled to have regard to the fact that the offence involved the actual pointing of a pistol at the victim's neck. This was indicative of a heightened level of threat and a very specific use of the weapon, which increased the seriousness of the offence: at [29]. But it is not entirely clear whether the CCA will persist with the distinction drawn in *Dougan*. Bell J said in *Fairbairn v R* (2006) 165 A Crim R 434 at [31]:

> The Judge was satisfied that the applicant's offences were aggravated by factors (b), (c) and (m). The threatened use of violence and the threatened use of the knife were

> each elements of the offences and it was not open to the Judge to regard them as factors that aggravated the offence: *R v Ibrahimi* [2005] NSWCCA 153 at [17]–[18]; *R v Street* [2005] NSWCCA 139 at [32]; *R v House* [2005] NSWCCA 88 at [8]–[9]; *R v Suaalii* [2005] NSWCCA 206 at [12]–[15]; *R v McNamara* [2005] NSWCCA 195 at [31].

The appellant in that case had pleaded guilty to assault with intent to rob whilst armed with an offensive weapon (knife).

Section 21A(2)(c) – the offence involved the actual or threatened use of a weapon

In *R v Dougan* (2006) A Crim R 135, the judge was entitled to take into account that the offence involved actual or threatened use of a pistol, as an aggravating factor in sentencing for the offence of assault with intent to rob while armed with a dangerous weapon. This is because "actual or threatened *use* of a weapon" is not an element of the offence under s 97(2) of the *Crimes Act*. The requirement that the offence was committed "while armed with a dangerous weapon" means possession of a weapon available for immediate use (*R v Farrar* (1983) 78 FLR 10), *not* its actual or threatened use: at [32]. Hoeben J said at [32]:

> robbery when armed with a dangerous weapon may be made out even if the offender does not threaten to use or use the weapon. The victim may submit to the theft by fear as a result of the knowledge that the offender is armed with a dangerous weapon.

The fact that the applicant pointed the pistol at the victim's neck was an additional aggravating factor.

In *Huynh v R* [2006] NSWCCA 224, the judge was entitled to take into account the firing of a gun as an aggravating factor pursuant to s 21A(2)(c) in sentencing for an offence under s 97(2). Hidden J said at [18]:

> True it is that the threatened use of violence, if not the infliction of it, is an element of robbery. The presentation of a weapon is an element of armed robbery, and the expression "use" of a weapon could embrace the presentation of it. Clearly, however, by the phrase she used her Honour was referring compendiously to the firing of the gun by Pham. That act could be described as the use of the weapon, and as an act of actual violence carrying with it the threat of further violence. The firing of the gun, of course, was not an element of the offence.

Mere possession of a weapon cannot be taken into account as a factor aggravating an armed robbery offence: *R v House* [2005] NSWCCA 88. The judge erred there by treating mere possession by the applicant of a tyre lever and socket wrench as a factor to which additional regard could be given per s 21A(2): at [8].

Section 21A(2)(e) – the offence was committed in company

It may be double counting for a judge sentencing for an offence under s 97(2) to take into account as an aggravating factor the fact that the offence was committed in company for the purposes of s 21A(2)(e). In *Hamze v R* [2006] NSWCCA 36 Giles JA said at [37]:

> Section 97(2) builds upon s 97(1), and incorporates the commission of an offence under s 97(1). The two limbs in s 97(1) can also be cumulative, and the applicant was charged with an offence with the two elements … It would be an error in this case to take into account that the robbery was [committed] in company. It would still be open to a sentencing judge, in assessing the seriousness of an offence, to conclude that the

> company of a number of men rather than a few increased the seriousness; this would depend on the facts (see *R v Way* [(2004) 60 NSWLR 168]). But I am unable to conclude that the judge took this approach … In my opinion, there was error in this respect.

Section 21A(2)(g) – the injury, emotional harm, loss or damage caused by the offence is substantial

It is double counting for a judge to take into account as an aggravating feature pursuant to s 21A(2)(g), the effects of a crime upon a victim of an armed robbery where the effects are those that would be expected to result from the commission of that type of offence. In *R v Solomon* (2005) 153 A Crim R 32, Howie J stated at [19] that: "… the court assumes, without evidence, that the victim of a robbery would be affected both physically and psychologically from the commission of the offence …". Therefore "something more is required" to aggravate the offence.

Similarly in *R v Youkhana* [2004] NSWCCA 412, Hidden J stated at [26] that before a judge could find substantial emotional harm within the meaning of s 21A(2)(g), the evidence "would need to disclose an emotional response significantly deleterious than that which any ordinary person would have when subjected to an armed robbery". In *Moore v R* [2005] NSWCCA 407, involving an offence of armed robbery and another of aggravated robbery, the court held (at [29]–[30]) there was insufficient evidence to support a finding that the emotional harm caused by the offences to the victims (a taxi driver and pizza deliverer) was substantial.

Section 21A(2)(l) – the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)

Vulnerable victims in robbery cases are discussed at [20-290].

Section 21A(3)(a) – the injury, emotional harm, loss or damage caused by the offence was not substantial

This mitigating factor in s 21A(3)(a) is the converse of the aggravating factor set out under s 21A(2)(g), dealt with above.

In the armed robbery case of *Bichar v R* [2006] NSWCCA 1, when considering the mitigating factors under s 21A(3)(a), the sentencing judge concluded "so far as the long term is concerned" the injury and emotional harm caused by the offence was not substantial. The CCA held that there was simply no evidence on the subject and the judge erred in assuming that there was no lasting impact upon the victim. Howie J said at [22] that, as was explained in *R v Solomon* (2005) 153 A Crim R 32, the court assumes that the effect upon a victim of an armed robbery is substantial and this is taken into account in the penalty to be imposed. Had there been evidence of a long-lasting effect on the victim, this might have been a matter of aggravation.

[20-270] Robbery with arms and wounding: s 98

Section 98 provides:

> Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

Robbery with wounding in company will usually constitute a serious offence, and will be more serious if it extends over a longer period, involves a more serious degree of bodily harm or results in a greater loss of property: *Krishna v DPP* [2007] NSWCCA 318 at [37].

Standard non-parole period

Where a s 98 offence was committed on or after 1 February 2003, the offence carries a standard non-parole period of seven years. In *R v Henry* [2007] NSWCCA 90 at [26], Howie J stated:

> the offence under s 98 had a standard non-parole period of 7 years but a maximum penalty of 25 years. This Court has remarked about the problems that are posed for a sentencing court by a standard non-parole period that is out of proportion to the maximum penalty and the difficulty in determining the rationale of parliament in specifying a standard non-parole period that is well above or well below half the maximum penalty: see *Marshall* [*v R* [2007] NSWCCA 24] at [34].

A list of the appeal cases and summaries for offences which carry a standard non-parole period is accessible via "SNPP Appeals" on the JIRS website.

Effect of the standard non-parole period on the relevance of the R v Henry guideline judgment

Simpson J stated in *R v Tobar* (2004) 150 A Crim R 104 at [55] that, in relation to the offence of armed robbery with wounding, the introduction of the standard non-parole period "must be taken to have excluded, or at least significantly reduced, the application of the guideline judgment in *R v Henry*".

In *R v Henry* [2007] NSWCCA 90, Howie J stated that the *R v Henry* guideline judgment of 1999 has a reduced role to play in determining a sentence for a s 98 offence even without the standard non-parole provisions, because there is a higher maximum penalty for such offences by reason of the fact that there has been a wounding: at [34]. If a court imposes a sentence for a s 98 offence that is less than that proposed in the armed robbery *R v Henry* guideline, that fact alone should cause the court to consider whether the sentence is justified, given that s 98 has a higher maximum penalty than s 97(1): at [34].

His Honour said at [35]:

> I do not see anything inconsistent between the *Henry* guideline and the standard non-parole period for the s 98 offence. The *Henry* guideline looks to the total sentence and it is dealing with the normal case for an offence under s 97. Therefore, it is considering an offence in the midrange of seriousness where the maximum penalty is imprisonment for 20 years. The sentence suggested in the guideline, however, is the end result of the application of the relevant s 21A matters to an offence objectively of midrange seriousness. So it takes into account the young age of the offender and the lack of serious record. It also takes into account a late plea. Bearing those matters in mind, it still represents a guide to the sentencing for related offences, such as an offence under s 98 even though that offence carries a standard non-parole period. It is another reference point but one indicating a range of sentences that would not normally be appropriate for a s 98 offence.

In short, the relevance of the *R v Henry* guideline is that it states a range that is below the range appropriate for a s 98 offence: *R v PB* [2008] NSWCCA 109 at [25].

Section 98 offences and s 21A

It is an error for a sentencing judge, when sentencing for an offence of assault with intent to rob in company with wounding, to take into account as an aggravating factor the actual or threatened use of violence. This factor is implicit in the assault element of the offence: *R v LLM* [2005] NSWCCA 302 at [38].

The applicant in *McArthur v R* [2006] NSWCCA 200 pleaded guilty to one count of robbery armed with an offensive weapon with which he inflicted grievous bodily harm upon the victim. The victim suffered a fractured skull which required surgery. Other effects included broken teeth, sinus difficulties, eye discomfort, nightmares, sleep deprivation and a loss of confidence about going out at night. The applicant submitted that the sentencing judge erred in taking into account as an aggravating factor the fact that the emotional harm was substantial (s 21A(2)(g)), arguing that this was an element of the offence. Grove J rejected the submission. He said at [13] that "[b]y definition, grievous bodily harm is really serious physical injury" and that emotional harm is not necessarily an element of grievous bodily harm.

[20-280] Demanding property with intent to steal: s 99

Section 99 provides:

> (1) Whosoever, with menaces, or by force, demands any property from any person, with intent to steal the same, shall be liable to imprisonment for ten years.
>
> (2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in the company of another person or persons. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.
>
> (3) It is immaterial whether any such menace is of violence or injury by the offender or by any other person.

Demanding property with intent to steal is a Table 1 offence and is to be dealt with summarily unless an election is made for trial on indictment: s 260 of the *Criminal Procedure Act* 1986. The maximum penalty which can be imposed by the Local Court is two years' imprisonment: s 267(2).

The jurisdictional maximum set by the *Criminal Procedure Act* 1986 does not supplant the maximum penalty for the offence. The jurisdictional maximum is not necessarily to be reserved for a worst category case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; *R v Doan* (2000) 50 NSWLR 115 at [35]. See also **Cases that attract the maximum** at [10-005]).

The significance of the loss of a chance to be dealt with in the Local Court will vary from case to case and if the offender's criminality was too serious for the matter to be dealt with in the Local Court it will have little effect: *R v El Masri* [2005] NSWCCA 167 at [29]. In *R v Cage* [2006] NSWCCA 304, the respondent pleaded guilty to two offences under s 99. The court held that the sentencing judge had placed undue emphasis on the fact that the offences could theoretically have been disposed of summarily. Although capable of summary disposition, the offences were the result of very generous concessions made by the prosecution for the purposes of securing the pleas of guilty: at [32].

The *R v Henry* guideline judgment is not applicable when sentencing an offender pursuant to s 99(1): *R v Smith* (2004) 144 A Crim R 577 at [15]. The court held that it was "unnecessary and unhelpful" for the sentencing judge to have referred to the

guideline judgment in such a case, and that: "[t]he guidelines laid down in the Court of Criminal Appeal in *R v Henry* are not to be extended outside the range of cases in circumstances to which it was directed": at [13].

It is a breach of the *De Simoni* principle for a sentencing judge to take into account a circumstance that elevates a s 99 offence to one of robbery. Thus in *R v Smith*, it was held that in sentencing for an offence of demanding money with menaces, the sentencing judge should not have mentioned in his remarks the fact that the applicant took $200 from the person of the victim: at [16].

[20-290] Objective factors relevant to all robbery offences

Joint criminal enterprise

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime: *R v Cotter* [2003] NSWCCA 273 at [87]. If the agreed crime is committed by one or other or all of the parties to the joint criminal enterprise, all parties are equally guilty of the crime regardless of the part played by each in its commission: at [88]. It is inappropriate to attempt to assess with any degree of precision the role which each played in the consummation of the criminal enterprise: *R v Hoschke* [2001] NSWCCA 317 at [18].

This does not automatically mean that every participant in a joint enterprise shares the same degree of objective criminality. There may be a proper basis for differentiation, for example, if one offender stands out as the obvious ring-leader, or is the person who elects to carry out the threat of violence by using the weapon to injure the victim. However where the robbery proceeds according to plan, without violence beyond that contemplated and threatened by the presence of the weapon, each participant shares equal responsibility: *R v Goundar* (2001) 127 A Crim R 331 at [30]–[34].

In *R v Alameddine* [2004] NSWCCA 286, the applicant had pleaded guilty to one count of robbery in company while armed with a dangerous weapon under s 97(2). The applicant submitted that he was less objectively culpable than the other offenders involved in the robbery, as he had not entered the premises or personally participated in the violence. Wood CJ at CL at [52] stated:

> While there is a difference between the circumstances which are sufficient to render a person criminally liable for conduct that comes within joint [criminal] enterprise principles, and that which establish the extent of such offender's culpability, inevitably this becomes a question of degree.

The court ultimately held at [59]–[61] that even if the applicant did not enter the premises, he was "centrally involved". He was the co-ordinator of what occurred at the scene and therefore his culpability was equally as great as the others who were there: *R v Hoschke* applied.

In *R v Fepuleai* [2007] NSWCCA 325, the applicant had pleaded guilty to one count of assault with intent to rob whilst armed with a dangerous weapon under s 97(2). The offence was committed in the company of four co-offenders. Latham J said at [21]:

> It is rare that precise quantifications can be made as to the extent to which each offender in a joint criminal enterprise contributes to the planning and execution of an offence …

> [I]t matters not whether the respondent was involved in the planning of the offence to a substantial extent or not. The fact that he was a party to such a criminal enterprise is the essence of his liability.

It is also relevant when sentencing a person who is not the principal offender and whose criminal liability is founded upon the doctrine of joint criminal enterprise or common purpose: *R v Donovan* [2003] NSWCCA 324 at [26].

Aiders, abettors and principals in the second degree

It is not always the case that an aider and abettor will be less culpable than a principal offender. "A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case": *GAS v The Queen* (2004) 217 CLR 198 at [23]; *R v Swan* [2006] NSWCCA 47 at [72].

In *R v Anderson* [2002] NSWCCA 485, the appellant drove the car involved in a robbery and pleaded guilty to robbery in company as a principal in the second degree. Hidden J at [28] found that the appellant's role was "very much less" than her co-offenders.

The *R v Henry* guideline judgment is relevant to sentencing for an offence of aiding and abetting an armed robbery: *R v Goundar*, above, at [37]–[38].

Sections 345 and 346 of the Act clarify that an abettor or accessory to the commission of an offence is liable to the same penalty as the person who commits the principal offence.

Parity

In the armed robbery case of *Lowe v The Queen* (1984) 154 CLR 606 Dawson J, with whom Wilson J agreed, said of the principle of parity at 623:

> There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. … [However] any difference between the sentences imposed on co-offenders for the same offence ought not to be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier sentence or to give the appearance that justice has not been done.

Matters such as the age, background, criminal history and general character of the offender and the part which he or she played in the commission of the offence may result in different sentences for offenders involved in the same robbery: *Lowe v The Queen*, above, at 609.

The parity principle may still apply even when co-offenders have been convicted of robbery offences with different maximum penalties: *R v Rend* (2006) 160 A Crim R 178.

See also **Parity** at [10-800] above.

Multiple counts/totality

Where a court sentences an offender for more than one offence, or sentences an offender serving an existing sentence, the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour: *Johnson v The Queen* (2004) 78 ALJR 616 at [18], citing *Mill v The Queen* (1988) 166 CLR 59 at 63.

Multiplicity of offences calls for a total sentence well in excess of the guideline promulgated in *R v Henry* in relation to one offence. As the offending continues, each succeeding offence calls for a greater punishment than the earlier offence, to reflect the need for specific deterrence: *R v Smith* [2007] NSWCCA 100 at [66].

In *Vaovasa v R* (2007) 174 A Crim R 116 at [19], the judge failed to properly apply the principle of totality by imposing wholly concurrent sentences for three robbery in company offences upon the basis that the offences, committed against three victims, were part of one course of criminality of short duration.

See also **Concurrent and Consecutive Sentences** at [8-200].

Form 1 offences

Where a Form 1 includes serious offences, they must be taken into account at sentence. This involves taking into account the totality of the offender's criminality. However, the penalty imposed should be significantly less than that which would have been imposed had the Form 1 offence(s) been prosecuted separately: *R v Bavadra* (2000) 115 A Crim R 152 at [31]; *R v Harris* (2001) 125 A Crim R 27 at [27]; *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* (2002) 56 NSWLR 146 (Form 1 guideline judgment) per Spigelman CJ at [66].

The judge erred in *TS v R* [2007] NSWCCA 194 by failing to impose a longer sentence for the principal offence by reason of the offences on the Form 1, than that imposed for the other offences. Imposing identical sentences for all of the offences breached the principles set out in *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002*: at [24].

See also **Taking Further Offences into Account (Form 1 Offences)** at [13-200].

Use of weapons

The objective seriousness of a robbery will be affected by whether a weapon or weapons are used, and if so, the nature of the weapons and the manner in which they are used: *R v Jenkins* [1999] NSWCCA 110 at [5]; *R v Anaki* [2006] NSWCCA 414 at [38]; *R v Readman* (1990) 47 A Crim R 181 at 185.

Firearms

> Robberies can be viewed in escalating seriousness of carrying a firearm, of a firearm being loaded, of the loaded firearm being discharged, and of discharge being deliberately aimed at a victim or important target: *R v Readman* (1990) 47 A Crim R 181 at 185.

A loaded shotgun is much more dangerous than a knife and much more capable of causing death or grievous bodily harm. Even if not loaded, a shotgun is prone to cause panic and fear in victims: *R v Campbell* [2000] NSWCCA 157 at [22].

The fact that the firearm may not have been loaded means that the offence was not as serious as it may have been but is still a very serious offence: *R v Mangan* [1999] NSWCCA 194 at [13].

It can be inferred from the fact that a firearm was found to be loaded when the accused was arrested a short time after the robbery that the firearm was loaded at the time of the robbery: *R v Taha* (2000) 120 A Crim R 161 at [32].

While a replica pistol used in the course of a robbery may not pose a physical risk to victims or members of the public and in this respect is a less serious factor than a

weapon such as a loaded gun or a knife, a sentence for a robbery involving a replica pistol should recognise that the use of the weapon was designed to strike fear into victims: *R v Majstrovic* [2000] NSWCCA 420 at [9]–[10].

Syringes

The use of a syringe apparently filled with blood is a particularly serious factor because of the terror and revulsion it causes in victims: *R v Fernando* [2002] NSWCCA 28 at [17]. The use of a blood-filled syringe is more serious than the use of a knife or the category of weapon envisaged in the *R v Henry* guideline judgment: *R v Kyrogolu* [1999] NSWCCA 106 at [88]; *Rumble v R* [2006] NSWCCA 211 at [40]. Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA).

Knives

Those who use knives when perpetrating criminal offences must expect to receive a significant measure of criminal punishment: *R v House* [2005] NSWCCA 88 at [18] quoting *R v Underhill* (unrep, 9/5/1986, NSWCCA).

The degree of seriousness involved in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27]. The fact that the type of knife used is a Swiss army knife does not make the offence less serious, since such a weapon can inflict a serious or mortal wound: *R v Randell* [2004] NSWCCA 337 at [32]

Victims

As noted above, armed robbery is not simply a crime against property. It is a crime against persons. "[T]he fear engendered by the perpetrator of this crime, together with the continued adverse effects on its victims, establish armed robbery to be a serious crime which requires condign punishment": *R v Henry* (1999) 46 NSWLR 346 per Spigelman CJ at [99]. The actual impact of an offence on victims will vary from case to case and cause variations in the sentences imposed: *R v Henry* at [95]. The devastating psychological damage that can result from the trauma of being the victim of an armed robbery offence is a matter that should be given due weight in the sentencing process: *R v Broxam* (unrep, 28/9/95, NSWCCA) at 3; *R v Sotheren* [2001] NSWCCA 425 at [44]–[46].

When a person is charged with, and convicted of, assault with intent to rob, the sentence should take into account the effect of the assault on the victim: *R v Hall* (unrep, 28/9/95, NSWCCA). When robbery is committed under the threat of a knife, an offender's assurance to a victim that he or she will not hurt the victim will not alleviate the seriousness of the offence: *R v Speeding* (2001) 121 A Crim R 426 per Giles JA at [24].

Vulnerable victims

One of the characteristics of the category of cases to which the *R v Henry* guideline judgment applies is that the victim was in a vulnerable position, such as a shopkeeper or taxi driver: *R v Henry* at [162]. In relation to taxi drivers, see also *R v Sotheren*, above, at [27] and *R v Matthews* [2007] NSWCCA 294 at [27]. The seriousness of robbery offences involving other types of vulnerable victims has also been recognised.

For example, service station attendants (*R v Goundar* (2001) 127 A Crim R 331 at [36], citing *R v Thwaites* (unrep, 6/10/93)), motel receptionists (*R v Sharma* (2002) 54 NSWLR 300 at [75]) and operators of small retail shops (*R v Fernando* [2002] NSWCCA 28 at [62]). Section 21A(2)(l) lists the fact that the victim was vulnerable as an aggravating factor. In addition to taxi drivers and service station attendants, s 21A(2)(l) gives as examples of vulnerable victims bus drivers and other public transport workers, and bank tellers.

The examples of vulnerable victims given in s 21A(2)(l) do not comprise an exclusive list and the CCA has declined to decide the precise scope of vulnerability for the purposes of the section. In *R v Ibrahimi* [2005] NSWCCA 153, a robbery in company case, Latham J said at [19] that s 21A(2)(l) is not limited to a vulnerability that depends upon either the personal attributes of the victim or arising out of the victim's occupation. The judge had not erred in taking into account as a factor aggravating the offence that the robbery victims were young men relying upon public transport late in the evening. Even if such victims did not fall within the s 21A(2)(l) definition of "vulnerable", the factor could be taken into account in light of s 21A(1), which allows other matters required or permitted to be taken into account under any Act or rule of law to be considered: at [20]–[24].

In *R v Atonio* (2005) 154 A Crim R 183, a case involving an offence of aggravated assault with intent to rob, the victim was "on the railway station in circumstances where it [wa]s difficult … to escape, with the drop onto the railway tracks on each side." Hislop J declined to rule upon the issue of whether these circumstances meant that the victim was vulnerable pursuant to s 21A(2)(l), stating at [32]:

> The matters which caused his Honour to categorise the victim as vulnerable were objective factors which affected the relative seriousness of the offence, and which his Honour was entitled to take into account pursuant to s 21A(1)(c) if those matters were not appropriately categorised as within s 21A(2)(l). Accordingly, it is unnecessary and unproductive to seek to determine the precise meaning and extent of the word "vulnerable" in s 21A(2)(l).

See also s 21A, subsections (2)(a), (cb), (eb), (g), (h), (ib), (k), (l) and (m), which list other aggravating factors relating to victims that are to be taken into account, and s 21A, subsections (3)(a) and (c), which list mitigating factors relating to victims to be taken into account.

[20-300] Subjective factors commonly relevant to robbery

Drug addiction

See **Drug addiction** at [10-485].

Mental health and intellectual functioning

The sentencing principles to be applied in respect of an offender who suffers from a mental disorder or severe intellectual disability are discussed at [10-460].

Youth

Youth is a recognised mitigating factor and, generally, the younger an offender, the greater the weight that should be given to the element of youth: *R v Hearne* (2001) 124

A Crim R 451 at [27]. The rehabilitation of youthful offenders will for the most part take precedence over deterrence and retribution in the sentencing exercise: *R v GDP* (1991) 53 A Crim R 112; *R v DM* [2005] NSWCCA 181 at [61].

However, when a juvenile offender conducts him or herself in a way that an adult does, and commits a crime that involves violence or is one of considerable gravity, it is the function of the court to protect the community, and to appropriately give effect to the retributive and deterrent elements of sentencing: *R v Pham* (1991) 55 A Crim R 128 at [13]; *R v Tran* [1999] NSWCCA 109 at [10].

In *R v Sharma* (2002) 54 NSWLR 300, Spigelman CJ observed at [74] in relation to armed robberies committed by youthful offenders:

> Armed robberies of the character involved in the present proceedings, committed by young persons, generally with an addiction problem, are so prevalent that the objective of general deterrence is entitled to significant weight in the process of sentencing for this offence, notwithstanding the youth of the typical offender.

It has been held that youth is not a cloak of convenience behind which those who deliberately engage in armed robbery can shelter from the just consequences of their conduct: *R v Mastronardi* (2000) 111 A Crim R 206 at [20]; *R v Drollett* [2002] NSWCCA 13 at [19].

In the *R v Henry* guideline judgment, Spigelman CJ included the expression "young offenders" among the characteristics of the category of cases which was "sufficiently common for purposes of determining a guideline" at [162]. The youth of the offender is one of the factors that might mitigate a sentence below the indicative range: at [170].

Although the *R v Henry* guideline judgment was not specifically addressed to the sentencing of offenders under 18 years of age, there is no error in using the guideline as a starting point when sentencing a child: *R v SDM* (2001) 51 NSWLR 530 at [40]–[43]; *TS v R* [2007] NSWCCA 194 at [25]. The special considerations that apply under s 6 of the *Children (Criminal Proceedings) Act* 1987 can be taken into account, along with all the other aspects of sentencing policy and principle relevant to offenders who were children at the time of offending, within the ambit of the guideline judgment: *R v SDM*, above, at [20].

See further **Youth** at [10-440] and **Sentencing principles applicable to children dealt with at law** at [15-090].

Juvenile and adult co-offenders — sentencing parity

It is not uncommon when robbery offences are committed by multiple offenders for one or more of the offenders to be a juvenile and the other or others an adult. Recent examples include *DGM v R* [2006] NSWCCA 296, *Ersman v R* [2007] NSWCCA 161 and *DFS v R* [2007] NSWCCA 77. The different sentencing objectives and considerations applicable to sentencing offenders in the Children's Court and adult courts restrict comparison of the sentences handed down to co-offenders under the two regimes: *R v Ho* (unrep, 28/2/97, NSWCCA).

The sentence imposed on a person in the Children's Court that would otherwise give rise to issues of parity is not always irrelevant, however. In *R v Colgan* [1999] NSWCCA 292 Spigelman CJ said at [15]: "… an individual sentenced as an adult may very well have a justifiable sense of grievance with respect to that very difference of

the regimes": following *R v Govinden* (1999) 106 A Crim R 314 at [36]–[38]. It was subsequently held in the two judge bench case of *R v Boney* [2001] NSWCCA 432 at [14] per Wood CJ; approved in *Ersman v R* at [74]:

> There is no longer an inflexible rule that there is no utility in comparing the sentences imposed upon co-offenders who are separately dealt with: one in the Children's Court and the other as an adult.

In *R v Tran* [2004] NSWCCA 6 the court held at [17] that, while the sentences were within the range indicated in the *R v Henry* guideline judgment, the appellant had a justifiable sense of grievance arising from the difference between his sentence and that of his co-accused. The latter received a control order in the Children's Court of 15 months. Despite the fact that there are different sentencing objectives in the Children's Court, which limit the worth of any comparison, the sentencing judge should have paid some regard to the control order imposed on the co-offender.

The relevance of comparing such sentences is the greater in cases where all offenders were sentenced in the District Court in accordance with law pursuant to the *Children (Criminal Proceedings) Act* 1987: *R v Cox* [2004] NSWCCA 413 at [28].

See further **Juvenile and adult co-offenders** at [10-820].

[20-310] Table 1: Crown appeals against the non-imposition of full-time custodial sentences for s 97(1) offences 1999–2007*

Matter	NSWCCA	Section	Penalty	Age	Was error disclosed?	Appeal result	Most exceptional circumstances
1999							
R v Tran	109	97(1)	s 558 Recog. 3 yrs, 6 mths.	18	Yes	Allowed	> min 2 yrs, add 1 yr 6 mths. Discussed.
R v Govinden	118	97(1)/346	s 558 Recog. 2 yrs.	18	No	Dismissed	**Most exceptional circumstances.**
R v Khamas	436	97(1)/ 344A (x2)	PD fixed 2 yrs.	18	Yes	Allowed	> PD fixed 3 yrs. Discussed.
2000							
R v Calderoni	511	97(1)	s 12 susp. W/o super. — 2 yrs.	22	Yes	Dismissed — CCA discretion	Not discussed. Assistance to authorities.
R v Metcalf	277	97(1) (x2)	PD fixed 3 yrs.	19	No	Dismissed	**Most exceptional circumstances.**
R v Mastronardi	12	97(1)	s 558 Recog. 3 yrs.	28	Yes	Allowed	> PD fixed 3 yrs. Not discussed.
R v Griggs	33	97(1)	s 558 Recog. 2 yrs.	19	Yes	Allowed	> PD fixed 18 mths. Not discussed.
2001							
R v Cimone	98	97(1)	PD head 3 yrs, npp 2 yrs.	19	No	Dismissed	Not discussed. Technical issue.
R v Pamplin	327	97(1)	s 12 susp. W super. — 14 mths.	28	Yes	Allowed	Not discussed. Technical issue re s 12 sentences — became mentally ill on remand.
R v Hoschke	317	97(1)	PD head 2 yrs, npp 18 mths.	18	Yes	Allowed	> Head 2 yrs, 9 mths, npp 16 mths. Discussed.

*Details relate to the principal offence only.

Matter	NSWCCA	Section	Penalty	Age	Was error disclosed?	Appeal result	Most exceptional circumstances
2002							
R v Israil	255	97(1)	s 12 susp. W super. — 2 yrs.	26	No	Dismissed	Not discussed. Mental illness and rehabilitation the issues.
R v Barre	432	97(1)/346	s 9 GBB W super. — 2 yrs.	18	No	Dismissed	Not discussed. Assistance to authorities.
2003							
R v Azzi	10	97(1)	s 12 susp. W super. — 2 yrs.	19	Yes	Dismissed — CCA discretion	Discussed as intellectual. disability and parity issues. Should have been sentenced to PD.
R v Bendt	78	97(1) (x2)	Control Order — susp GBB 18 mths	17	Yes	Allowed	> Head 18 mths, npp 12 mths. Not discussed.
R v Russell	273	97(1)	s 12 susp. W super. — 2 yrs.	19	Yes	Dismissed — CCA discretion	Not discussed. Joint criminal enterprise.
R v Iremonger	273	97(1)	s 12 susp. W super. — 2 yrs.	19	Yes	Dismissed — CCA discretion	Not discussed. Joint criminal enterprise.
R v Nair	368	97(1)	s 12 susp. W super. — 12 mths.	22	No	Dismissed	**Most exceptional circumstances.**
2004							
R v DT	349	97(1)	s 12 susp. W super. — 18 mths.	17	No	Dismissed	**Exceptional case.**
2005							
R v Alameddine	68	97(1) (x2)	s 11 — remand for 4 mths 13 days on 28/10/2004	20	Yes	Dismissed — CCA discretion	Following remand sentenced on 10/3/2005 to head 20 mths, npp 11 mths. Not discussed.
R v DV	319	97(1)	PD term of sentence 3 yrs, npp 2 yrs, 3 mths	22	No	Dismissed — CCA discretion	This was an appeal by the Crown under s 5DA where the respondent had reniged on his offer of assistance. The quality of the assistance to authorities was the **exceptional circumstance**, even when the respondent withdrew his offer. DV had completed service of the entirety of the custodial element of his sentence and the delay in bringing the co-offender before the court was not the fault of the respondent.

Matter	NSWCCA	Section	Penalty	Age	Was error disclosed?	Appeal result	Most exceptional circumstances
R v Gadsden	453	97(1)	CSO 200 hrs	18	No	Dismissed	**Most exceptional circumstances.**
2006 — No cases.							
2007							
R v Naji	198	97(1) (x2)	s 12 susp. — 2 yrs.	22	Yes	Allowed	> Npp 2 yrs, balance of term 2 yrs. No exceptional circumstances.

[The next page is 9601]

Murder

[30-000] Introduction

Murder is defined in s 18(1)(a) *Crimes Act* 1900 (NSW) in the following terms:

> Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.

There are therefore four identifiable bases of liability of murder, involving:

- an intent to kill
- an intent to inflict grievous bodily harm
- reckless indifference to human life, or
- the commission of a crime punishable by life imprisonment or imprisonment for 25 years.

Murder has been described as the most serious offence in the criminal calendar: *R v Penisini* [2003] NSWSC 892 at [82]; *R v Dalley* [2002] NSWCCA 284 at [95]. It carries a maximum penalty of life imprisonment: s 19A *Crimes Act* 1900.

[30-010] Relative seriousness of the categories of murder

Intent to kill — seriousness compared to inflict grievous bodily harm

The state of mind in which murder is committed is directly relevant to determining the objective seriousness of the crime: *Charbaji v R* [2019] NSWCCA 28 at [180]. However, while intent to kill generally tends to greater objective seriousness than an intention to inflict grievous bodily harm, the question of intent is not the only relevant consideration: *Charbaji v R* at [180]; *Apps v R* [2006] NSWCCA 290 at [49]; *Versluys v R* [2008] NSWCCA 76 at [32]. There may be circumstances where an intention to inflict grievous bodily harm reflects similar criminality to cases involving an intention to kill: *R v Nelson* (unrep, 25/6/96, NSWCCA); *R v Wilson* [2005] NSWCCA 112 at [22]; *R v Hillsley* [2006] NSWCCA 312 at [16]–[17].

However, the existence of particular features is not determinative of where a particular offence of murder might sit within the range of objective seriousness. While in *Nguyen v R* [2007] NSWCCA 363 Smart AJ had said at [143] "An intention to kill and premeditation are usual elements in a murder of midrange objective seriousness", subsequently in *Park v R* [2019] NSWCCA 105, RA Hulme J observed that that statement had been misconstrued and that when taken in context indicated that those two features were not unusual elements of such an offence: at [52]–[53]; see also Harrison J at [23].

In *Park v R* the court reviewed a number of murder cases at [24]–[33] and concluded there was no reliable relationship between an assessment of any particular degree of objective seriousness and the sentence imposed but that factors present in cases described as significantly above the mid-range might include gratuitous cruelty,

contract killings, causing death in a way likely to cause excruciating pain or agony or particularly doing so in order that the process of dying occurs over an extended period or where the victim might have had undue time to contemplate the terror of what was coming: at [36].

Intent to inflict grievous bodily harm — seriousness compared to constructive murder

In *R v Wilson* [2005] NSWCCA 112, where the sentencing judge found that the basis for murder was an intention to inflict grievous bodily harm, as opposed to constructive murder, it was said at [22] that "[a]n offence of murder on some other basis than intent to kill is not necessarily of less culpability for that reason, and attention must be directed to the actual circumstances."

Reckless indifference to human life — seriousness compared to specific intention

In *R v Holton* [2004] NSWCCA 214, a case in which the appellant's vehicle collided with a police officer while the officer was in the process of deploying road spikes, the prosecution relied on reckless indifference to human life as the basis for liability for murder. The Crown appealed against the sentence of 16 years imprisonment with a non-parole period of 12 years. Grove J observed at [59] (cf Hulme J who would have increased the sentence at [120]):

> There is no prima facie presumption that murder resulting from reckless indifference to human life is less culpable than murder resulting from specific intention: *R v Ainsworth* 1994 76 A Crim R 127, but so to say inheres recognition that murder by reckless indifference is not necessarily as culpable as other forms. Each case must be considered on its own facts.

The need to consider each case on its own facts was recognised by the Victorian Court of Criminal appeal in *R v Aiton* (unrep, 5/10/93, VSC) referred to with approval by Gleeson CJ in *R v Ainsworth* (unrep, 6/12/94, NSWCCA).

Constructive murder — degrees of seriousness

The common law offence of felony murder has been replaced by the fourth category of murder as set out in s 18(1)(a) *Crimes Act* 1900. The term "constructive murder" should generally be used in preference to "felony murder" to avoid confusion with the common law: *R v Spathis; R v Patsalis* [2001] NSWCCA 476 at [209].

In *R v Jacobs* [2004] NSWCCA 462 at [332] Wood CJ at CL said:

> Constructive murder is not to be regarded as less serious, and thereby attracting a lighter total sentence or non-parole period than that which is appropriate for other categories of murder: *R v Mills* NSWCCA 3 April 1995. Just as is the case for the other categories, there are degrees of seriousness of constructive murder, and the determination of the appropriate sentence for any individual offence depends upon the nature of the offender's conduct and the part which he or she played in the events giving rise to death: *R v JB* [1999] NSWCCA 93.

Aslett v R [2006] NSWCCA 360 was a case of constructive murder, the foundational crime being one of robbery armed with a dangerous weapon. The court observed at [21] that "[a] murder committed in these circumstances may be as serious as a murder committed with intent to kill", but on appeal reduced a life sentence to a non-parole period of 28 years with an additional term of six years.

In *R v Mills* (unrep, 3/4/95, NSWCCA), Cole JA said:

> As the trial judge made clear, taking a loaded firearm and using it as a threat whilst in the course of committing a serious felony is a most serious matter. It is to be greatly discouraged by sentences of this Court. The fact that the murder was a felony murder is no ground for reducing either the minimum term or the total sentence.

Gleeson CJ agreed:

> The major premise underlying the argument of counsel for the appellant was that cases of felony murder involved a lower level of culpability than cases of murder involving intention to kill and therefore should receive a lower level of sentence than applies to intentional killing.
>
> I would reject that premise. Indeed, it would be difficult to select a better case than the present for the purpose of demonstrating its falsity. This was a case where a young man with an appalling history of criminal offending used a loaded gun in an armed robbery. He came to close quarters with the surprised victim. As is highly likely to occur in such circumstances, the weapon discharged. For the sake of the appellant's determination to get his hands on a few hundred dollars, an innocent person lost his life. This is a case of murder involving a very high degree of seriousness.

Mercy killings

While courts have generally found the moral culpability of an offender who commits a "mercy killing" to be less than other forms of intentional murder, a sentencing judge must still bear in mind that the offence involves deliberately taking a human life, the maximum penalty for which is life imprisonment with a standard non-parole period of 20 years. Unlawful homicide, in whatever form, has always been recognised as a most serious crime and protecting human life and personal safety is a primary objective of the criminal justice system: *Cooper v R* [2021] NSWCCA 65 at [83], [86]; *R v Edwards* (1996) 90 A Crim R 150 at 51. The court in *Cooper v R*, at [84], applied the observations of Hamill J at [7]–[8] in *R v Dowdle* [2018] NSWSC 240. His Honour said at [8] in respect of a manslaughter mercy killing:

> Sympathy which is legitimately aroused, and leniency and compassion that should be properly afforded, must never mask the objective gravity of any offence of homicide… Sentencing in such cases… must be seen to send a message to the community that nobody, however desperate things may get, is justified in taking it upon themselves to expunge human life.

[30-020] Standard non-parole periods

There are three standard non-parole periods prescribed for murder:

- 20 years for murder (general) committed on or after 1 February 2003
- 25 years for the murder of a person falling within a category of occupation committed on or after 1 February 2003
- 25 years for the murder of a child, whenever committed.

A table of standard non-parole period appeal cases is available for JIRS subscribers at https://jirs.judcom.nsw.gov.au/benchbks/sentencing/snpp_appeals.html.

Standard non-parole period — murder (general)

For offences of murder (other than those set out below) committed after 1 February 2003, there is a standard non-parole period of 20 years. The standard non-parole period

does not apply to matters for which a life sentence is imposed: s 54D(1)(a) *Crimes (Sentencing Procedure) Act* 1999. A list of appeal cases and summaries involving murder, which were decided following *Muldrock v The Queen* (2011) 244 CLR 120 is accessible via "SNPP Appeals" on the JIRS website. For a general discussion on standard non-parole periods see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

The standard non-parole period — victim occupation category

A standard non-parole period of 25 years is prescribed for murders committed after 1 February 2003 "where the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation": item 1A, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act* 1999.

Even before the introduction and application of the above standard non-parole period, it was recognised that an offender's culpability may be aggravated by the fact that the victim was a police officer: *R v Adam* [1999] NSWSC 144 at [44]–[46]; *R v Penisini* [2004] NSWCCA 339 at [20]; *R v Holton* [2004] NSWCCA 214 at [100], [125]. In *R v Rees* (unrep, 22/9/95, NSWCCA), Gleeson CJ said that the deliberate killing of a police officer warrants "severe retribution."

Standard non-parole period — child victims

A standard non-parole period of 25 years is prescribed for murder cases where the victim is a child under the age of 18 years: item 1B, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act* 1999. Unlike other categories of murder with a standard non-parole period, this item applies "to the determination of a sentence whenever committed" (subject to the conviction being recorded or a plea being entered before 1 January 2008): Sch 2, Pt 17, cl 57, *Crimes (Sentencing Procedure) Act* 1999.

The murder of a child has always been considered a crime of extreme gravity, whether committed by a stranger or family member. The courts have recognised the enhanced culpability of an offender who is motivated to kill their child in order to punish the other parent. In *R v Fraser* [2005] NSWCCA 77, which involved the murder of the offender's three children during an access visit, Grove J said at [41]–[42]:

> there is one factor which is present in the circumstances for which the applicant must be sentenced, which was absent from all the cases cited, and that is that the applicant's motive in killing the children was, at least in part, to punish his wife. To that end he took steps to plan the homicides and to fulfil a threat which he had made on multiple occasions prior to carrying it out.
>
> I would uphold the Crown submission that, given that anger directed towards his wife played a significant role in determining to kill the children, and that the anger was focussed upon his beliefs as to her relationship and the institution of legal proceedings, there was a heightened need for denunciation and general deterrence. Some remarks of Lander J in *R v Hull* [1997] SASC 6087 are pertinent:
>
> > "This is a case where aspects of general deterrence are important. Many persons are involved in marital disputes and many of those disputes often become heated and some unfortunately become violent. Too often, sadly, children become pawns

> in those marital disputes. That is bad enough but those who do become involved in marital disputes must clearly understand that they cannot visit violence upon their children for any reason whatsoever, but in particular for the purpose of upsetting or punishing their spouse. Such action, it should be understood, will attract very severe punishment. The community ought to be able to expect that the courts will be quick to protect the defenceless, particularly children."

Whether the rationale for this standard non-parole period is reduced when the victim is just under 18 years old and the offender/s are just over was considered and rejected in *R v Hopkinson; R v Robertson* [2022] NSWCCA 80: see Leeming JA at [3]–[6]; Rothman J at [131]–[133]; Hamill J at [169]; see also *Milat v R; Klein v R* [2014] NSWCCA 29 at [164].

[30-025] Provisional sentencing of children under 16

Part 4, Div 2A *Crimes (Sentencing Procedure) Act* 1999 provides for provisional sentencing of children convicted of murder.

Section 60B(1) enables a court to impose a provisional sentence where:

(a) the offender was less than 16 years of age at the time of the murder; and

(b) the offender is less than 18 years when the provisional sentence is imposed; and

(c) the sentence proposed is a term of imprisonment; and

(d) the court cannot satisfactorily assess the offender's prospects of rehabilitation or likelihood of re-offending because the information available does not permit a satisfactory assessment of whether the offender has or is likely to develop a serious personality or psychiatric disorder or a serious cognitive impairment.

A court that imposes a provisional sentence on an offender is to review the case at least once every two years after the provisional sentence is imposed: s 60E. Following a progress review, the court may impose or decline to impose a final sentence: s 60G(1). However, a final sentence must be imposed before the expiry of the "initial custodial period" as defined by s 60H(2). The term of imprisonment imposed under the final sentence, as well as the non-parole period if any is set, must not exceed the term of imprisonment and the non-parole period imposed under the provisional sentence: s 60G(3)(a), (b). The final sentence is taken to have commenced on the day on which the provisional sentence commenced: s 60G(3)(c).

Provisional and final sentences are subject to appeal under s 2(3) *Criminal Appeal Act* 1912. The Court of Criminal Appeal may substitute a new provisional sentence or a final sentence: s 60I(1).

Provisional sentencing applies to any sentence imposed after 25 March 2013, including a sentence for an offence committed before that date: Sch 2, Pt 23, cl 64, *Crimes (Sentencing Procedure) Act*.

[30-030] Life sentences

If an offender is sentenced to life imprisonment under s 19A, a non-parole period cannot be imposed and the offender must serve the sentence for their natural life, subject to the exercise of the prerogative of mercy: *R v Harris* (2000) 50 NSWLR 409 at [122], [125].

Life sentences at common law

See generally the discussion with regard to worst cases at [10-005] **Cases that attract the maximum**.

Under the common law, the maximum penalty of life imprisonment is intended for cases that are so grave as to warrant the maximum prescribed penalty: *The Queen v Kilic* (2016) 259 CLR 256 at [18].

Life sentences under s 61, Crimes (Sentencing Procedure) Act 1999

Section 61(1) *Crimes (Sentencing Procedure) Act* 1999 provides:

> A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

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

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

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

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

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

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

v R at [636]. The latter may include the offender's background and any mental health impairment, disorder or incapacity with a causative influence on their level of culpability but *not* consideration of remorse, admissions, whether or not there was a guilty plea or the offender's prospects of rehabilitation: *R v Harris (Bell J)* at [84]–[85]; *Rogerson v R* at [623]–[625].

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

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

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

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

Life sentences may be imposed despite presence of subjective mitigating factors

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

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

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

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

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

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

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

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

Murder of police officers

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

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

Multiple murders

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

It is permissible to take the fact that there are multiple murders into account in determining whether an offence should attract the maximum: see *R v Harris* (2000) 50 NSWLR 409 at [94]–[95]; *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. See also, *Ah Keni v R* [2021] NSWCCA 263 where the applicant, over a 5 month period, attempted to conceal her husband and his associate's involvement in the victim's murder and also attempted to assist her husband to leave the jurisdiction. Subsequent conduct by an accessory beyond assistance to the principal, for example lying about his or her own involvement to police, may nevertheless be relevant to findings of remorse and contrition: *R v Farroukh and Farroukh*.

[30-090] Conspiracy/solicit to murder: s 26 Crimes Act 1900

The offence of conspiracy or solicit to murder carries a maximum penalty of 25 years' imprisonment: s 26 *Crimes Act* 1900. In *R v Potier* [2004] NSWCCA 136 at [55], the maximum penalty was said to provide "a clear indication that the offence is one of the most serious in the criminal calendar". The court went on to say at [55]–[56]:

> On any view, the soliciting of a person to kill a third party is a fundamentally abhorrent and heinous crime. It is a crime for which the sentence must reflect a significant element of personal and general deterrence.
>
> Deterrence has a particular relevance by reason of the cold blooded motivation that lies behind the act of an offender in engaging or attempting to engage a hit man to kill another for regard. It also has a particular relevance in that part of the motivation, in contracting the job out to a professional, is to reduce the chances of detection, not only because that person is assumed to have special skills, but also because the offender is able to place himself or herself one step removed from the killing.

In that case, the fact that the offender was motivated by a desire to frustrate Family Court proceedings was held to place his criminality "in the upper level of objective seriousness": *R v Potier* at [81]. In *R v Lo* [2003] NSWCCA 313 at [42], the conspiracy to murder a witness in pending criminal proceedings was held to fall within the worst case category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). Offences arising from a desire to interfere with criminal proceedings involve a high degree of culpability: *R v Lewis* (unrep, 24/4/98, NSWCCA).

In *R v Baker* [2019] NSWCCA 58, the respondent recruited his estranged wife to act as his agent by engaging an undercover operative (acting as a "hit man") to murder his son and his son's friend (both aged 14), who were witnesses at his pending trial for aggravated sexual assault (of his son's friend) and firearm offences. The court found the offending should have been assessed as well above the middle of the range and approaching the high range not, as was found at first instance, just above the mid-range: *R v Baker* at [62]–[63]. Factors influencing that decision included the fact the respondent instigated the plan, gave the directions to his co-offender who passed them on and did not avail himself of any of the many opportunities to resile from his intention to have the witnesses (both children) killed.

In *R v Qutami* [2001] NSWCCA 353 the respondent had sought to have his niece killed after she left her husband to live with a man of different religion. Smart AJ said at [37] that it was irrelevant that the victim had assured the court she no longer feared the respondent. His Honour went on to say at [57]:

> I wish to emphasise that this Court will ensure that those who solicit to murder are severely punished. It will not tolerate people taking the law into their own hands because others do not meet their standards or their code of morality or comply with their religious beliefs and practices.

An offender's culpability may be reduced if there is a real possibility that the offence would not have been committed but for the assistance, encouragement or incitement offered by undercover police officers: *R v Taouk* (unrep, 4/11/92, NSWCCA). However, there is no mitigation where the effect of police involvement is to detect the offence and obtain evidence against an offender, rather than encourage a person who would otherwise not have committed the offence: *R v Stockdale* [2004] NSWCCA 1 at [28].

Because there are relatively few cases on offences under s 26, they cannot be relied upon as establishing a relevant range of sentences: *R v Potier* at [75].

Standard non-parole period

For offences under s 26 committed after 1 February 2003 there is a standard non-parole period of 10 years: item 2, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act* 1999. Cases such as *Bou-Antoun v R* [2008] NSWCCA 1 and *Benitez v R* [2006] NSWCCA 21 have to be read in light of *Muldrock v The Queen* (2011) 244 CLR 120. See **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

[30-095] Cause loss of foetus (death of pregnant woman)

Section 54B(1) *Crimes Act* 1900 provides that a person commits the offence of causing the loss of a foetus (death of pregnant woman) if:

(a) the person's act or omission constitutes an offence under a homicide provision (the "relevant homicide provision"), and

(b) the victim of the offence is a pregnant woman, and

(c) the act or omission includes causing the loss of the pregnant woman's foetus.

The maximum penalty for the offence is 3 years' imprisonment: s 54B(3).

To be charged with an offence against s 54B(1) the person must also be charged with an offence under a relevant homicide provision relating to the same act or omission: s 54B(2). "Homicide provision" is defined to include murder: s 54B(6). These provisions apply to offences committed on or after 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act* 2021: Sch 1[2].

[30-100] Attempted murder

Introduction

Offences of attempted murder by various means are provided in ss 27, 28, 29 and 30 *Crimes Act* 1900.

Each form of attempted murder is liable to a maximum penalty of 25 years. The high maximum penalty reflects the obvious seriousness of the offence: *R v Thew* (unrep, 25/8/98, NSWCCA).

Where an offence under ss 27–30 is committed on or after 1 February 2003, a standard non-parole period of 10 years is prescribed: item 3, Table of standard non-parole periods, s 54D(2), *Crimes (Sentencing Procedure) Act* 1999.

The offender in *R v Amati* [2019] NSWCCA 193 pleaded guilty to three offences including two against s 27. In upholding a Crown appeal, the court observed that while caution is required in considering sentences imposed in s 27 cases, they remain useful given the relatively small number of such cases: at [87]–[89]. Examining other cases assisted the court to conclude the sentence was manifestly inadequate: see the discussion of those cases at [90]–[111].

Objective factors

Relevant objective factors include the skill and determination of the attempt, the motive, whether it was premeditated, the likelihood of death, and the injuries inflicted: *R v Nguyen* (unrep, 13/6/91, NSWCCA); *R v McCaffrey; R v Rowsell* [1999] NSWCCA 363 at [20]; *R v Hynds* (unrep, 4/6/91, NSWCCA); *R v Rae* [2001] NSWCCA 545 at [13].

The objective seriousness of an attempted murder may fall little short of the culpability for the completed crime: *R v Macadam-Kellie* [2001] NSWCCA 170 at [42] (two-judge bench).

In *R v Rae* the offender broke into the home of his former girlfriend, doused her in petrol, then set her alight. The sentencing judge described her injuries as "appalling" and her chances of a normal life "ruined forever". On appeal, Sully J suggested the objective circumstances were within the worst category of crime (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256). The court also affirmed the continual need to condemn violence stemming from the breakdown of domestic relationships. Sully J said at [21]:

> The Courts, including this Court variously constituted, have tried to make it clear beyond any doubting that the breakdown of personal relationships, marital and extramarital alike, cannot be allowed to justify vengeful violence of any kind, let alone extreme violence of the kind here relevant. The facts of this present case require, sadly from the points of view of all concerned, that the principles be reaffirmed with all proper resolve.

To similar effect are observations in *Vaughan v R* [2020] NSWCCA 3, where the offender attacked his wife by knife and motor vehicle and also attacked a work colleague who came to her assistance. The court described the s 27 offence as a serious domestic violence offence stating the offender "sought to exercise control and domination over his wife as if he [was] … [entitled] to do so": at [108].

It is important, where there are multiple s 27 offences, for the aggregate (or effective) sentence to properly recognise the principle of totality and the harm done to each victim. In *R v Amati*, the offender randomly attacked two people with an axe, inflicting significant injuries and then attacked another person, terrifying him but not inflicting any physical injury. The first two offences were found to be above the mid-range of objective seriousness. The offender had mental health issues associated

with gender dysphoria and, after consuming alcohol and drugs, and in a fit of anger, went out intending to inflict violence on strangers. The court allowed a Crown appeal, concluding the aggregate sentence did not recognise the harm done to the first two victims: at [115]. The fact the offences occurred over a relatively short period of time did not assist the offender because there were three deliberate and separate attacks on different individuals who believed they were going to die, which was what the offender intended: at [112]. See also *Vaughan v R* at [110].

An example of an offence against s 29 is *R v Askarou* [2020] NSWCCA 222 which involved a premeditated attempt by the offender to execute the victim by deliberately discharging a firearm at him at close range. The offence was found to be within the high range of objective seriousness and aggravated by the degree of planning (the offender obtained a firearm in advance, disguised himself and arranged a getaway car nearby to facilitate him fleeing the scene) and the harm to the victim (left with permanent and catastrophic injuries): at [19]–[21]. The Crown appeal in that case was allowed and a sentence of 19 years with a non-parole period of 13 years was imposed: at [51].

An offender acting as an accessory or principal in the second degree may not be as culpable as a principal, although much will depend on the circumstances of the offender's involvement. In *R v Doan* [2003] NSWSC 345 at [10], the applicant's conduct was described as "both minimal and reluctant". In contrast, in *R v AM* [2001] NSWCCA 80 at [20], the applicant's role in a contract killing was seen as crucial to carrying out the enterprise.

Mitigating factors

In the most serious attempted murder cases, the gravity of the crime may reduce the weight otherwise accorded to an offender's subjective circumstances. For example in *R v Rae* [2001] NSWCCA 545, the injuries inflicted on the victim were so severe that the offender's youth and absence of prior record carried less significance. Similarly, in *R v Quach* [2002] NSWCCA 173 (a two-judge bench) prior good character carried little weight in light of the seriousness of the attempted murder. However, it was an error for the sentencing judge to ignore good character entirely: at [19].

Mental disorder suffered by an offender at the time of an attempted murder, including depression, may be a mitigating factor: *R v Thew* (unrep, 25/8/98, NSWCCA); *R v Macadam-Kellie* [2001] NSWCCA 170 at [62]; see also *R v Cheatham* [2002] NSWCCA 360 at [134]. Although in *R v Amati*, at [87] the court recognised it was not uncommon for s 27 offences to be committed by persons who were, at the time of the offending, experiencing significant mental health issues.

In circumstances where an offender would otherwise have been prosecuted for a less serious offence, but voluntarily discloses an intention to kill the victim, some measure of leniency is warranted: *R v Bell* [2005] NSWCCA 81 at [11]–[12].

In *Davis v R* [2015] NSWCCA 90, it was held that a pre-existing heart condition, which may have contributed to the death of the victim, was not a mitigating factor.

Comparison with homicide sentences

Given the serious and long-lasting injuries inflicted in many attempted murder cases, comparisons with more severe sentences imposed in cases involving death are generally unhelpful: *R v Rae* [2001] NSWCCA 545 at [19].

When sentencing an offender convicted of separate offences for both attempted murder and murder, the attempt may be relevant to assessing the culpability for murder, particularly in considering whether a life sentence is warranted under s 61(1) of the *Crimes (Sentencing Procedure) Act* 1999: *R v Villa* [2005] NSWCCA 4 at [93].

[30-105] Conceal corpse

The common law offence of "conceal corpse" is satisfied if a person (1) knowingly buries or otherwise conceals, destroys or mutilates, a corpse, (2) knowing circumstances suggesting death resulted from some abnormal cause, and (3) the way in which the person deals with the corpse in fact operates, or is likely, to prevent or prejudice inquiry by the proper authorities: *R v Davis* (1942) 42 SR (NSW) 263 at 265; *Bentley v R* [2021] NSWCCA 18 at [120]. Conceal corpse offences prevent the family formally marking the passing of the deceased which would magnify their pain and grief. The concealment also does a more public harm – it has a substantially adverse impact on the progress of the police investigation into the death: *R v Aljubouri* [2019] NSWSC 180 at [48]–[49].

The penalty for the offence of conceal corpse is at large. Whilst some general guidance as to sentence can be taken from statutory offences where there is real similarity between them, there is no crime with a sufficient degree of similarity to provide any real assistance of that nature. In *R v Aljubouri*, Wilson J said at [50]–[51]:

> Perhaps the closest parallel is found in the public justice offences in Part 7 of the *Crimes Act*, such as an offence contrary to s 317 of tampering with evidence. However, even this offence, which carries 10 years imprisonment upon conviction, does not import the full criminality of concealing the body of a human being... Even on the basis of the very limited information provided to the Court about this offence, I regard it as gravely serious.

The fact the location of the corpse is unknown and never likely to be recovered, as distinct from an offender's failure to disclose its whereabouts, can increase the objective seriousness of the offence, as may the secretive fashion of disposing of the body: *Bentley v R* at [118]–[121]; *R v Davis* at 265–267. The concealment is also associated with an attempt to avoid detection and responsibility for the death. It causes public mischief by its tendency to obstruct the course of justice: *R v Davis* at 265–267; *Bentley v R* at [218]. However, it is not necessary for the Crown to demonstrate an intention to obstruct the course of justice to satisfy the offence: *R v Heffernan* (1951) 69 WN (NSW) 125 at 126.

In *Bentley v R* [2021] NSWCCA 18, the fact the deceased's body had not been recovered, and was never likely to be recovered, elevated the objective seriousness of the offence to well above the middle of the range: see [68], [120].

[The next page is 20001]

Manslaughter and infanticide

[40-000] Introduction

The *Crimes Act* 1900 (NSW) does not define manslaughter, except to provide that it comprises all unlawful homicides other than murder: s 18(1)(b). There are only two categories of manslaughter at common law: manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence: *The Queen v Lavender* (2005) 222 CLR 67 at [38]. They are referred to as forms of "involuntary manslaughter" because the ingredients of each do not include intent to kill or inflict grievous bodily harm. Under the *Crimes Act* there are three statutory categories of manslaughter, based on the reduction of murder to manslaughter by reason of provocation (s 23), substantial impairment (s 23A), or excessive self-defence (s 421). The first two are referred to as forms of "voluntary manslaughter". The third category may or may not be described that way depending upon whether the fact finder accepts the presence of an intent to kill or cause grievous bodily harm: *Ward v R* [2006] NSWCCA 321 at [40].

A protean crime

The maximum penalty for manslaughter is 25 years imprisonment: s 24. Since the offence covers a wide variety of circumstances, calling for a wide variety of penal consequences, determining an appropriate sentence for manslaughter is "notoriously difficult": *R v Green* [1999] NSWCCA 97 at [24]. Although some assistance may be received from a consideration of facts of other cases and the sentences imposed therein, those cases do not determine an inflexible range: *R v Green* at [24].

Spigelman CJ said in *R v Forbes* [2005] NSWCCA 377 at [133]–[134]:

> manslaughter is almost unique in its protean character as an offence. (See in particular the observations of Gleeson CJ in *R v Blacklidge*). In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder.
>
> It is also relevant to recognise that, although manslaughters can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation *within* any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter. [Citations omitted; emphasis in original.]

In *R v Blacklidge* (unrep, 12/12/95, NSWCCA), Gleeson CJ said:

> It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability.
>
> At the same time, the courts have repeatedly stressed that what is involved in every case of manslaughter is the felonious taking of a human life. That is the starting point for a consideration of the appropriate penalty, and a key element in the assessment of the gravity of the objective circumstances of the case. [Citations omitted.]

Similar observations were made in *R v MacDonald* (unrep, 12/12/95, NSWCCA).

In *R v Dawes* [2004] NSWCCA 363, a case involving the killing of a severely disabled 10-year-old boy by his mother, Dunford J said at [31]:

> Manslaughter, whatever form it takes, constitutes unlawful homicide. It is always a most serious offence as it involved the taking of another human life and it is the responsibility

> of the courts to protect and preserve human life and to punish those who unlawfully take it. All human life is to be protected including that of the disabled, the handicapped, the criminal, the derelict and the friendless.

An assessment of the objective criminality of an offence of manslaughter will depend on the factual findings made by the sentencing judge: *R v MD* [2005] NSWCCA 342 at [62]. In that case it was also said at [65]:

> In many cases where an offender is convicted of manslaughter there will be exculpatory matters and personal circumstances that can lead the court to significantly ameliorate the sentence which might otherwise be imposed. However, as this Court pointed out in *R v Troja* (unreported, CCA 16 July 1991) it is important for the court to ensure that the subjective circumstances of an individual offender do not divert the court from imposing a sentence which adequately reflects the part which the law must play in upholding the protection of human life and in punishing those who take it.

Where the offence of manslaughter involves either an intention to kill or an intention to cause grievous bodily harm, the degree of harm the offender knows will be caused by the offence may be highly relevant to their moral culpability: *Sheiles v R* [2018] NSWCCA 285 at [29]–[39]. See also **Murder — Aggravating factors and cases that attract the maximum** at **[30-040]**.

There is a degree of overlap in sentencing for murder and manslaughter, and a higher sentence may be warranted in a manslaughter case than in a murder case, although ordinarily a conviction for murder would attract a greater penalty: *R v Hoerler* [2004] NSWCCA 184 at [26]–[28], [30].

It is very difficult to identify any pattern of sentencing: *R v Hill* (unrep, 18/6/81, NSWCCA). Limited assistance is to be derived from sentences in other cases: *Taber v R* [2007] NSWCCA 116 at [102].

Use of statistical data

Statistical data on sentencing for manslaughter is similarly of limited assistance; reliance on such data has been described as "unhelpful and even dangerous": *R v Vongsouvanh* [2004] NSWCCA 158 at [38]. Sentencing statistics for manslaughter are of such limited assistance that they should be avoided: *R v Wood* [2014] NSWCCA 184 at [59].

[40-010] Categories of manslaughter

In some cases the basis for manslaughter — particularly after a jury trial — is unclear. In the case of a jury trial, members of the jury may have been satisfied of guilt on different bases: *R v Dally* [2000] NSWCCA 162 at [56], [64], [68]. In the five-judge case of *R v Isaacs* (1997) 41 NSWLR 374, the court held that although the trial judge has the power to question the jury with a view to eliciting the basis upon which they brought in their verdict, the exercise of such a power "is, save in exceptional circumstances, to be discouraged rather than encouraged" (at 377); see also at 379–380; and *Cheung v The Queen* (2001) 209 CLR 1 at [18]. It is for the judge to determine the facts relevant to sentencing, bound by the need to ensure such facts are consistent with the jury's verdict: *Isaacs* at 378, 380; see further **Fact finding following a guilty verdict** at [1-440].

Although there are different categories of manslaughter — some involving the requisite intent for murder, others not — there is no hierarchy of seriousness between

voluntary and involuntary manslaughter: *R v Isaacs* at 381. As Smart AJ put it in *R v Dally* at [64], "It is not the variety of manslaughter but the facts which determine the objective gravity of the offence. Neither variety [in that case, provocation or unlawful and dangerous act] is inherently more serious than the other".

Similarly, Spigelman CJ said in *R v Hoerler* [2004] NSWCCA 184 at [29]:

> Even a case where there is present an intention to kill or maim, which would constitute murder but which is reduced, by reason of provocation or diminished responsibility, to a charge of manslaughter, will not necessarily attract a higher sentence than other forms of manslaughter, including the one relevant here, i.e. killing by an unlawful and dangerous act. As a five judge bench of this Court, including Gleeson CJ, Mason P, Hunt CJ at CL, Simpson and Hidden JJ, said in *R v Isaacs* (1997) 41 NSWLR 374 at 381:
>
> > "The argument for the appellant advanced on this appeal appeared to assume that a case of provocation manslaughter is necessarily, or at least ordinarily, worse than a case of manslaughter by unlawful and dangerous act. We do not accept that. Each case depends upon its own circumstances. The range of sentencing available in the case of manslaughter is notoriously wide. There have been cases where provocation manslaughter has resulted in non-custodial sentences."

In *R v Ali* [2005] NSWSC 334 at [56], it was said that "it is often not of any great consequence whether a killing is characterised as coming within any particular head of manslaughter. Rather, the critical question is what sentence is required to reflect the objective and subjective facts, and, if necessary, deterrence".

Unlawful and dangerous act

Manslaughter by unlawful and dangerous act does not involve an intention to kill or inflict grievous bodily harm. However, the unlawful and dangerous act involved must be an intentional and voluntary one and it must be established that a reasonable person in the position of the accused would have realised that he or she was exposing the victim to an appreciable risk of serious injury: *Wilson v The Queen* (1992) 174 CLR 313 at 333.

Although there is no murderous intent involved in manslaughter by unlawful and dangerous act, there will be cases where a heavy sentence will be appropriate: *R v Maguire* (unrep, 30/8/95, NSWCCA). In that case James J said:

> So far as comparing different instances of manslaughter by unlawful and dangerous act is concerned, although all such acts after the decision of the High Court in *Wilson v The Queen* must be such that a reasonable person in the position of the offender would have realised he was exposing another person to an appreciable risk of serious injury, the possible range of such acts and the possible range of culpability of the agents who performed those acts is very great.

Where the unlawful and dangerous act is of high objective gravity, the offence may be assessed as so grave as to warrant the maximum penalty. For example, in *Clare v R* [2008] NSWCCA 30, the unlawful and dangerous act was anal intercourse with a three-year-old child, causing the child to vomit and asphyxiate. McClellan CJ at CL said that the "abuse of a 3 years old child for sexual gratification by anal penetration resulting in death is a crime of utmost gravity": *Clare v R* at [48].

It is not a matter in mitigation that an offender neither desired nor contemplated the deceased's death; if the offender had so contemplated, there would be liability for murder: *R v Chapple* (unrep, 14/9/93, NSWCCA).

Criminal negligence

Manslaughter by criminal negligence arises when the accused does an act "consciously and voluntarily without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment": *Nydam v The Queen* [1977] VR 430 at 445, approved in *The Queen v Lavender* (2005) 222 CLR 67 at [136].

In *R v George* [2004] NSWCCA 247, the offender failed to provide proper care (nutrition, hydration, medication and medical care) for his 86-year-old mother, for whom he was the primary carer. On appeal against sentence, the court said at [19]:

> The views which [were] expressed by Wood CJ at CL in *Regina v Wilkinson* NSWSC 9 April 1998, concerning the heavy responsibility which rests upon carers of young children, to provide for their well being and to secure medical care when needed, in our view, apply equally to those who care for the elderly and infirm. An appeal from that sentence was dismissed (*R v Wilkinson* [1999] NSWCCA 248), and it supports the proposition that offences of this kind must generally be regarded as objectively serious. However, the extent of that criminality will very much depend upon the individual case.

The sentence was reduced to 3½ years imprisonment with a non-parole period of 2 years. The court, however, thought it necessary to state that "at the most, other cases can do no more than become part of a range of sentencing, which in the case of manslaughter is wider than for any other offence": *R v George* at [48].

Many cases of manslaughter by criminal negligence involve the failure of parents to obtain medical assistance for their children following the infliction of injuries: *R v Wilkinson* [1999] NSWCCA 248 (non-parole period of 3½ years, additional term of 3 years); *R v Eriksson* [2001] NSWSC 781 (non-parole period of 18 months, balance of 18 months); *Hill v R* [2003] NSWCCA 16 (non-parole period of 4½ years, balance of 1½ years). In *R v O'Brien* [2003] NSWCCA 121, the offender failed to have her 14-month-old child hospitalised when advised by medical practitioner that urgent hospitalisation was required. A non-parole period of 3 years, with a balance of 2 years was imposed. In dismissing the appeal against sentence, Dunford J said at [74]:

> This was a very serious offence. The appellant allowed her 14 months old, helpless and defenceless child to die. She was the child's mother, the person from whom above all others, the child was entitled to expect nurture, care, sustenance and protection, and she failed the child in her most important duty, with fatal results. I cannot see how a sentence of less than that imposed by his Honour could be properly regarded as reasonably proportionate to the nature and circumstances of the offence.

In *BW v R* [2011] NSWCCA 176, the court accepted the offending involved was in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256): *BW v R* at [63], [73]. In that case, the applicant's 7-year-old daughter died after a period of "protracted and cruel neglect where the applicant showed not a shred of care to [her] suffering … over a long period of time": *BW v R* at [63]. The court concluded that the non-parole period of 12 years with a balance of term of 4 years while heavy was well within range: *BW v R* at [73].

Significant sentences may be imposed in other cases of criminal negligence involving members of the public. In *R v Simpson* [2000] NSWCCA 284, the deceased died by coming into contact with an electric wire system erected by the offender to

protect an area of land used to grow marijuana. A non-parole period of 6 years and balance of 3 years was imposed; see also *R v Cameron* (unrep, 27/9/94, NSWCCA), where a non-parole period of 8 months and balance of 1 year and 4 months was imposed. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving as it did one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

Provocation

Under s 23 *Crimes Act* 1900, murder is reduced to manslaughter where the act or omission causing death was done or omitted under provocation. The partial defence is available where the act or omission is the result of a loss of self control induced by the deceased's conduct where that conduct could have induced an ordinary person in the position of the accused to have so far lost self control as to have formed an intent to kill or inflict grievous bodily harm.

Reference to other provocation cases may not be helpful. Barr J said *R v Green* [1999] NSWCCA 97 at [32]:

> comparison of the sentences in each of the cases to which I have referred and the similarities and dissimilarities in the facts which gave rise to those sentences illustrate the difficulties faced not only by a trial judge in determining a proper sentence but by an appellant who seeks by reference to such cases to demonstrate that the sentence imposed was outside the available range of sentencing discretion.

It has been said many times that provocation is a concession to human frailty: *R v Chhay* (unrep, 4/3/94,NSWCCA) Gleeson CJ at 11. In *R v Morabito* (unrep, 10/6/92, NSWCCA), Wood J said that "manslaughter, even though committed under provocation, is recognised as a major crime and is one which calls for a correspondingly grave measure of criminal justice being meted out to the guilty party"; see also *R v Bolt* [2001] NSWCCA 487 at [58].

Factors relevant to the determination of the level of culpability in provocation cases were set out by Hunt CJ at CL in *R v Alexande*r (unrep, 26/10/94, NSWSC):

(1) the degree of provocation offered (or, alternatively, the extent of the loss of self-control suffered), which when great has the tendency of reducing the objective gravity of the offence;

(2) the time between the provocation (whether isolated or cumulative in its effect) and the loss of self-control, which when short also has the tendency of reducing the objective gravity of the offence; and

(3) the degree of violence or aggression displayed by the prisoner, which when excessive has the tendency of increasing the objective gravity of the offence.

In *R v Cardoso* [2003] NSWCCA 15 at [10], the court acknowledged the sentencing judge's application of *R v Alexander*, above, at 144 as a "familiar discussion of the approach to sentence for provocation manslaughter".

In *R v Bolt*, above, at [35] it was observed that "as a matter of logic, the degree of provocation must reduce the objective gravity of the offence, and also the degree

of violence employed must increase the objective gravity of the offence". It was also noted that extreme provocation may be accompanied by excessive violence, pointing in opposite directions on the question of objective gravity: *R v Bolt* at [36], [46]. A strong adherence to particular values may be relevant to the gravity of the provocative act: *R v Khan* (unrep, 27/5/96, NSWCCA).

In exceptional cases involving a history of domestic violence perpetrated by the deceased a non-custodial sentence may be appropriate: *R v Bogunovich* (unrep, 30/5/85, NSWSC); *R v Alexander*, above, at 145.

The authors of the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* identified 65 cases where offenders were sentenced upon the basis of provocation defences between 1990 and 2004: see p 8 and the list at p 84 of the publication.

Substantial impairment

Section 23A *Crimes Act* 1900 provides that murder is reduced to manslaughter where a person's capacity to understand events, or to judge whether the person's actions were right to wrong, or to control himself or herself, was substantially impaired because of a mental health impairment or cognitive impairment, provided the impairment was "so substantial as to warrant liability for murder being reduced to manslaughter." Section 23A(8)(a) provides that the person is entitled to be acquitted on the ground that the person was not criminally responsible because of mental health impairment or cognitive impairment. Section 23A(8) defines cognitive impairment for the purposes of s 23A.

As in the case of manslaughter by provocation, what is ordinarily involved in manslaughter by substantial impairment is a conclusion that the taking of human life was the consequence of a deliberate and voluntary act, performed with intent to kill or cause grievous bodily harm, or with reckless indifference to human life: *R v Blacklidge* (unrep, 12/12/95, NSWCCA).

The relevant impairment diminishes — but does not negate — the offender's responsibility: *Blacklidge*, above; *R v Dawes* [2004] NSWCCA 363 at [34]; see also *R v Low* (unrep, 13/8/91, NSWCCA). As stated in *R v Low*, "it is quite wrong to take the view that merely because there is an element of diminished responsibility, which substantially impairs a person's judgment, that that is the end of the matter and a light sentence must inevitably follow": at 18. In *R v Cooper* (unrep, 24/2/98, NSWCCA), Gleeson CJ said, "in some circumstances, a case of manslaughter based on diminished responsibility could attract the maximum penalty for manslaughter". In one case involving five counts of manslaughter by diminished responsibility, the offender was sentenced to concurrent head terms of 25 years imprisonment with non-parole periods of 18 years: *R v Evers* (unrep, 16/6/93, NSWCCA). At the other end of the spectrum, the offenders in *R v Sutton* [2007] NSWSC 295 received five-year good behaviour bonds for the manslaughter by substantial impairment of their severely disabled son.

It is necessary for a sentencing judge to consider the degree to which an offender's mental condition was impaired beyond that required to make out the partial defence: *R v Keceski* (unrep, 10/8/93, NSWCCA). While an impairment of greater degree may tend towards a further diminution in culpability, it may also raise the issue of future

dangerousness. As stated in *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477, where the offender's sentence of life imprisonment for manslaughter (the maximum penalty at the time) was upheld by the High Court at 476–477:

> There is an anomaly, however, in the way in which the mental abnormality which would make an offender a danger if he were at large is regarded when it reduces the crime of murder to manslaughter pursuant to s 23A. Prima facie, a mental abnormality which exonerates an offender from liability to conviction for a more serious offence is regarded as a mitigating circumstance affecting the appropriate level of punishment … However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment … And so a mental abnormality which makes an offender a danger to society when he is at large but which diminished his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.

In *Catley v R* [2014] NSWCCA 249, it was held that the sentencing judge did not err in finding that the offender's mental condition (psychosis) did not play a great part in the commission of the offence and to the extent that it did, the concomitant reduction in his culpability had already been taken into account because he had been found guilty of manslaughter rather than murder.

For a historical summary of the law and cases in this area, see the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* where the authors identified 56 diminished responsibility and 18 substantial impairment cases between 1990 and 2004: see pp 8 and 80–82 of the publication.

Excessive self-defence

Excessive self-defence has an ephemeral history as a partial defence. After a number of lower court rulings, the High Court confirmed it as a partial defence in *Viro v The Queen* (1978) 141 CLR 88, but later abolished it in *Zecevic v DPP (Vic)* (1987) 162 CLR 645 at 664. It was resurrected by Parliament in NSW in the *Crimes Amendment (Self-Defence) Act* 2002. The partial defence to murder of excessive self-defence appears in s 421 *Crimes Act* 1900, which commenced operation on 22 February 2002. It applies to offences whenever committed, except where proceedings were instituted before the commencement of the provision: s 423.

Section 421(1) provides the defence of excessive self-defence reduces murder to manslaughter if:

(a) the person uses force that involves the infliction of death, and

(b) the conduct is not a reasonable response in the circumstances as he or she perceives them,

but the person believes the conduct is necessary:

(c) to defend himself or herself or another person, or

(d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person.

The defence is available where a person uses lethal force and the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person

believes the conduct is necessary to defend himself or herself or another person or to prevent the unlawful deprivation of liberty. If the act causing death is deliberate and is committed with the intent to kill the deceased or inflict grievous bodily harm, an accused is guilty of manslaughter where it is found that there was a reasonable possibility that the accused believed his or her conduct was necessary in his or her own self-defence, but where the fact finder is satisfied beyond reasonable doubt that his or her response was not reasonable in the circumstances as he or she perceived them to be: *Ward v R* [2006] NSWCCA 321 at [41].

Range of conduct

Where a plea of manslaughter on the basis of excessive self-defence is accepted by the Crown, all the elements of murder are present and it is for the court to determine whether the offender intended to kill or commit grievous bodily harm, or acted with reckless indifference to human life: *Grant v R* [2014] NSWCCA 67 at [64], [66]; *Lane v R* [2013] NSWCCA 317 at [50]. It is an acceptance by the offender that his or her mental state was one which, but for the availability of excessive self-defence in s 421 *Crimes Act*, was sufficient to amount to murder: *Grant v R* at [66]. The state of mind must be proved beyond reasonable doubt: *Grant v R* at [77]. The circumstances can vary widely. For example, in *R v Nguyen* [2013] NSWCCA 195, the respondent discharged his pistol and the bullet struck a police officer in the upper arm. Another police officer then discharged his weapon at the offender, however, the bullet struck the victim's neck and he later died in hospital. The Crown accepted the plea on the basis of excessive self-defence, that is, he did not know the victim was a police officer and there was a reasonable possibility that he genuinely believed it was necessary to shoot at the victim whom he believed intended to rob him.

The emphasis in s 421 on the response of an offender "in the circumstances as he or she perceives them" requires a sentencing judge to make a finding as to what the offender perceived the circumstances to be, and to evaluate the degree to which the conduct departed from what would have been a reasonable response to those circumstances as perceived: *Smith v R* [2015] NSWCCA 193 at [45], [56], [59]. Both questions are central to the sentencing exercise where excessive self-defence is made out: *Smith v R* at [45], [59].

In *Smith v R*, the sentencing judge erred by failing to make a direct or express finding of what the applicant perceived the circumstances to be. The content of the applicant's belief was never clearly articulated. The lack of any finding or reference to the circumstances "as perceived" by the applicant had repercussions in the evaluation of the degree to which the applicant's response was unreasonable: *Smith v R* at [36], [61].

Certain of these principles and others were summarised in *Newburn v R* [2022] NSWCCA 139 at [39] as follows:

(1) A conviction of manslaughter based on a finding of excessive self-defence carries with it the implication that the offender perceived they were in a position where it was necessary they act in order to defend themself: *Smith v R* at [44]; *Patel v R* [2019] NSWCCA 170 at [14];

(2) Central to the sentencing exercise is the identification of:
   (a) the circumstances as the offender (rightly or wrongly) perceived them to be; and

(b) the precise conduct the offender believed was necessary in order to defend themself: *Smith* at [44]–[45]; *Patel* at [14];

(3) The offender's perception of the circumstances is relevant to the determination of what they believed it was necessary to do in order to defend themself: s 421(1)(c); *Smith* at [45];

(4) An offender's perception is also integral to the issue of the reasonableness of their conduct in responding to those circumstances: s 421(1)(b); *Smith* at [45], [56], [58];

(5) Both questions are to be assessed by reference to the offender's subjective perception regardless of whether that was objectively reasonable, taking into account any intoxication: *Smith* at [45]; and

(6) The anterior conduct of the offender, including the reasons for their attendance at the scene of the crime and for deciding to confront the deceased, forms no part of the actual offence and is not directly relevant to assessing its objective seriousness: *Patel* at [14].

Events leading to a confrontation are relevant only insofar as they provide context to the actual offence: *Newburn v R* at [41].

Manslaughter by excessive self-defence is a crime "committed under conditions of fear of varying degrees of extremity": *R v Trevenna* [2004] NSWCCA 43 at [46], applied in *Ward v R* [2006] NSWCCA 321 at [59], [70]–[72].

As in other categories of manslaughter, the relevant circumstances vary over a wide range: *R v Forbes* [2005] NSWCCA 377 at [135]. In *Vuni v R* [2006] NSWCCA 171 the court said that the statistical sample for cases involving excessive self-defence (approximately 10 cases by the time the appeal was heard) was too small to be of any real practical value: at [31]. James J said in *R v Williamson* [2008] NSWSC 686 at [40] that, although there have been many cases of excessive self-defence manslaughter, these cases do not establish a tariff. The cases "exhibit a wide degree of variation in their facts, which is typical of cases within any category of manslaughter" but nevertheless, provide some limited guidance.

Multiple partial defences

In cases where more than one partial defence is established, a more lenient sentence is likely to be warranted than would be the case if only one partial defence applied: *R v Low* (unrep, 13/8/91, NSWCCA). In *R v Ko* [2000] NSWSC 1130, Kirby J found that both the provocation by the deceased and the offender's substantial impairment constituted "significant extenuating circumstances": *R v Ko* at [41]. See, for a historical summary, the Judicial Commission monograph *Partial Defences to Murder in New South Wales 1990–2004* which identifies 10 cases where offenders were sentenced upon the basis of two partial defences between 1990 and 2004, including *R v Anthony* (unrep, 23/09/94, NSWSC); *R v Chaouk* (unrep, 17/8/93, NSWSC); *R v Diamond* (unrep, 15/4/94, NSWSC); *R v Gardner* (unrep, 27/3/92, NSWSC); *R v Kali* (unrep, 27/5/91, NSWSC); *R v K* [1999] NSWSC 933; and *R v Spencer* (unrep, 18/12/92, NSWSC).

[40-020] Killing of children by parents or carers

The protection of children is of fundamental importance to society: *R v Howard* [2001] NSWCCA 309 at [19]. However, "[t]here is no rule that the intentional killing of a child must always attract a custodial sentence. Each case must be judged on its peculiar facts": *R v Dawes* [2004] NSWCCA 363 at [70].

In *R v Hoerler* [2004] NSWCCA 184, the Crown appealed against the sentence imposed on the respondent, who had pleaded guilty to the manslaughter by unlawful and dangerous act of his girlfriend's seven-month-old son. Spigelman CJ rejected the proposition that there is an identifiable range of sentences for child killing on a charge of manslaughter by unlawful and dangerous act: *R v Hoerler* at [36]. Nor is there a distinct subcategory of manslaughter committed by parents or carers: *R v Hoerler* at [45], [47]. His Honour said at [41]:

> It may be possible to identify a distinct category of manslaughter for which variations on a basically similar factual situation can be identified … However, this can only be done if there is a significant number of cases which share the common characteristic and which represent a very broad range of differing circumstances. Child killing by a parent or carer does not occur so frequently to make it possible to deduce a sentencing pattern from past cases.

The killing of children cannot be excused by the existence of stress factors which often confront parents raising young children: *R v Vaughan* (unrep, 7/5/91, NSWCCA). In that case Lee CJ at CL said that "Courts have always regarded assault by parents upon little children resulting in death, as grave and serious cases of manslaughter": at 359.

See the earlier discussion of **Criminal negligence** at [40-010].

[40-030] Motor vehicle manslaughter

Motor vehicle manslaughter would generally fall under the category of criminal negligence or unlawful and dangerous act. In cases of manslaughter involving motor vehicles, it is "unproductive" to consider what might have been the appropriate sentence for an offence of aggravated dangerous driving occasioning death: *R v Cameron* [2005] NSWCCA 359. It was recognised in *R v Cramp* [1999] NSWCCA 324 at [108] that manslaughter is "a much more serious offence than aggravated dangerous driving occasioning death", which carries a maximum penalty of 14 years imprisonment as opposed to 25 years for manslaughter: *R v Cramp* at [108].

In *R v McKenna* (1992) 7 WAR 455, Ipp J (then of the Western Australian Court of Criminal Appeal) stated that "criminality is not reduced simply because the crime can be categorised as 'motor vehicle manslaughter'": at 469. This approach has since been adopted in New South Wales. In *R v Lawler* [2007] NSWCCA 85, the applicant appealed against his sentence of 10 years and 8 months, with a non-parole period of 8 years for manslaughter caused when his prime mover collided with the victim's vehicle. The applicant was aware that the braking system of his prime mover and trailer was defective, but continued to drive for commercial gain. In dismissing the appeal, the Court of Criminal Appeal emphasised the importance of general deterrence in such cases (at [42]) and held that the applicant's conduct involved a high degree of criminality, adding, "It is to be clearly understood that manslaughter is no less serious a crime because it is committed by the use of a motor vehicle": at [41].

The judge in *Lees v R* [2019] NSWCCA 65 was entitled to find the objective seriousness of the offence to be "of a very high order", and the dangerousness of the unlawful act "extreme" in circumstances where the applicant conceded she intended to drive into the deceased (her husband), which was very close to the intention required for murder (that is, an intention to inflict grievous bodily harm): at [56]–[57]. Had her actions not been spontaneous, the offence would likely have been one of murder rather than manslaughter: at [65].

See also the discussion of **Motor vehicle manslaughter** at [18-350].

[40-040] Discount for rejected offer to plead guilty to manslaughter

An offender convicted of manslaughter by a jury may receive a discount for offering to plead guilty to manslaughter when that offer was rejected by the Crown in preference to proceeding on a trial for murder: *Ahmad v R* [2006] NSWCCA 177 at [20]; *R v Nguyen* [2005] NSWSC 600 at [52]. As stated by Spigelman CJ in *R v Forbes* [2005] NSWCCA 377 at [121], "it is relevant to take into account an offer of a plea of guilty for the crime for which a person is ultimately convicted." Statements to similar effect can be found in *R v Cardoso* [2003] NSWCCA 15 at [19]–[21]; and *R v Oinonen* [1999] NSWCCA 310 at [15]–[18]. However, the discount is only available if the offer is made on terms which fully disclosed the circumstances and degree of culpability intended to be acknowledged by the plea. This facilitates comparison with the outcome of the trial: *Merrick v R* [2017] NSWCCA 264 at [117], [121]–[122]. In *Merrick v R*, the offender was denied a discount after being convicted of an alternative charge of manslaughter because his initial plea offer was conditional on an undefined statement of facts, which was not capable of acceptance by the Crown and did not demonstrate a willingness to admit the facts eventually found by the jury: at [109]–[110], [120].

[40-050] Joint criminal enterprise

An offender's liability for manslaughter may arise from a joint criminal enterprise or an extended joint criminal enterprise. Although not directly responsible for inflicting fatal injuries, an offender whose liability arises from an extended joint criminal enterprise may receive a significant sentence: see for example, *R v Diab* [2005] NSWCCA 64 (non-parole period of 6 years, balance of 3 years); *R v Taufahema* [2007] NSWSC 959 (non-parole period of 7 years, balance of 4 years). An aider and abetter is not necessarily less culpable than a principal: *GAS v The Queen* (2004) 217 CLR 198 at [23].

[40-060] Accessories after the fact to manslaughter

Accessories after the fact to manslaughter are liable to a statutory maximum of 5 years: s 350, *Crimes Act* 1900.

In the remarks on sentence in *R v Walsh* [2004] NSWSC 111 at [3]–[4], Howie J observed:

> The maximum penalty for manslaughter is imprisonment for 25 years and that for being an accessory after the fact to manslaughter imprisonment for 5 years. This maximum penalty for the latter offence is in my view completely inadequate to deal with the

> criminality that such an offence might involve. In my view it says nothing about the very grave seriousness of assisting a person who the offender knows has unlawfully taken the life of another human being.
>
> In many cases, the criminality of an accessory after the fact to manslaughter will be the same as that of a person convicted of being an accessory after the fact to murder.

The discrepancy between the maximum penalties has also been observed by Studdert J in *R v Abdulrahman* [2007] NSWSC 578 at [9].

[40-070] Infanticide

Section 22A(1) of the *Crimes Act* 1900 provides:

1. A woman is guilty of infanticide and not of murder if —

   (a) the woman by an act or omission causes the death of a child, in circumstances that would constitute murder, within 12 months of giving birth to the child, and

   (b) at the time of the act or omission, the woman had a mental health impairment that was consequent on or exacerbated by giving birth to the child.

Section 22A(3) provides that a woman found guilty of infanticide is to be sentenced as though she had been found guilty of manslaughter. Accordingly, the maximum penalty for infanticide is therefore 25 years imprisonment.

In *R v Cooper* [2001] NSWSC 769, the offender received a four-year good behaviour bond for the infanticide of her seven-month-old daughter. Simpson J emphasised that imposing a non-custodial sentence was an unusual course: at [5]–[6]:

> Where the court takes an unusual course such as imposing a non-custodial sentence where the death of a human being has been caused the community is entitled to a full explanation. What must never be lost sight of is that, at the heart of this case, is the loss of life of a seven month old child. The loss of human life is something to be treated with utmost gravity. Where the life lost is that of a baby, completely defenceless, and at the hand of her mother, from whom she could ordinarily expect nurture and care, the obligation on the courts to signify its respect for the sanctity of life and to punish those who wrongfully take it is so much greater. I am fully conscious of previous statements of this court and other courts emphasising the importance of the recognition of the gravity of offences of homicide.
>
> Equally, of course, I am conscious that s 22A was inserted into the Act as long ago as 1951 in order to recognise a perceived phenomenon relating to the effects, in some instances, of childbirth. The legislature then identified infanticide as a form of homicide having particular characteristics and a particular genesis which therefore justifies, in an appropriate case, a different approach to sentencing. This is an appropriate case. That the maximum penalty applicable is the maximum penalty applicable to an offence of manslaughter in no way negates the recognition given to the particular circumstances that go to make up the offence of infanticide.

Section 22A is rarely utilised. According to the statistics recorded in the Judicial Information Research System, there has only been one case of infanticide between January 2006 and September 2018. The offender received a suspended sentence. In an

earlier case, *R v Pope* [2002] NSWSC 397, the offender, who suffered from post-natal psychotic episodes and drowned her 12-week-old daughter in a baby bath, received a three-year good behaviour bond.

[40-075] Cause of loss of foetus (death of pregnant woman)

Section 54B(1) of the *Crimes Act* 1900 provides that a person commits the offence of causing the loss of a foetus (death of pregnant woman) if:

(a) the person's act or omission constitutes an offence under a homicide provision (the "relevant homicide provision"), and

(b) the victim of the offence is a pregnant woman, and

(c) the act or omission includes causing the loss of the pregnant woman's foetus.

The maximum penalty is 3 years' imprisonment: s 54B(3).

To be charged with an offence against s 54B(1), the person must also be charged with a relevant homicide provision in relation to the same act or omission: s 54B(2). "Homicide provision" is defined to include manslaughter: s 54B(6). These provisions apply to offences committed on/after 29 March 2022: *Crimes Legislation Amendment (Loss of Foetus) Act* 2021: Sch 1[2].

For the offence of causing the loss of a foetus where the pregnant woman is injured, see **Assault, wounding and related offences** at [50-125] **Cause loss of a foetus**. See also [18-310] **The statutory scheme for dangerous driving offences**.

[The next page is 25001]

Firearms and prohibited weapons offences

[60-000] Introduction

The section discusses offences relating to the use, possession, manufacture, purchase and supply of firearms and other weapons in New South Wales under the following Acts:

- *Firearms Act* 1996, ss 7, 7A, 36(1), 50A, 51(1A), 51(2A), 51D(1), 51D(2), 51F, 51H
- *Crimes Act* 1900, ss 33A, 93G, 93GA
- *Weapons Prohibition Act* 1998, s 7
- For Commonwealth offences related to firearms trafficking see Pt 9.4 *Criminal Code* (Cth).

Although the commentary in this chapter is organised by reference to particular offences, it is clear from the caselaw that general sentencing principles, particularly in relation to deterrence and assessing objective seriousness, may apply regardless of the particular offence.

[60-010] Offences under the Firearms Act 1996

The *Firearms Act* 1996 (the *Firearms Act*) repealed the *Firearms Act* 1989 and was introduced as part of a national campaign to implement firearms control following the Port Arthur massacre: *R v Cromarty* [2004] NSWCCA 54 at [15]; *Luu v R* [2008] NSWCCA 285 at [32]. Offences in the *Firearms Act* regulate the unauthorised possession, use, purchase, manufacture and supply of firearms. In the Second Reading Speech introducing the Firearms Bill, the then Police Minister explained the rationale for the new offences: "This legislation puts the public's right to safety before the privilege of gun ownership." (NSW, Legislative Assembly, *Debates*, 19 June 1996, p 3204.)

[60-020] Principles and objects of the Act

The *Firearms Act* stipulates principles and objects at s 3 "which the courts must seek to implement" (*R v Tolley* [2004] NSWCCA 165 at [53]); which require "strict control" (*R v Cromarty* [2004] NSWCCA 54 at [67]); *Luu v R* [2008] NSWCCA 285 at [32]); and "strict adherence" (*Cramp v R* [2008] NSWCCA 40 at [52]). Section 3 provides:

> (1) The underlying principles of this Act are:
>
> (a) to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety, and
>
> (b) to improve public safety:
>
> (i) by imposing strict controls on the possession and use of firearms, and
>
> (ii) by promoting the safe and responsible storage and use of firearms, and
>
> (c) to facilitate a national approach to the control of firearms.

(2) The objects of this Act are as follows:

(a) to prohibit the possession and use of all automatic and self-loading rifles and shotguns except in special circumstances,

(b) to establish an integrated licensing and registration scheme for all firearms,

(c) to require each person who possesses or uses a firearm under the authority of a licence to prove a genuine reason for possessing or using the firearm,

(d) to provide strict requirements that must be satisfied in relation to licensing of firearms and the acquisition and supply of firearms,

(e) to ensure that firearms are stored and conveyed in a safe and secure manner,

(f) to provide for compensation in respect of, and an amnesty period to enable the surrender of, certain prohibited firearms.

Depending on the nature of evidence concerning an offender's mental state, issues of public safety arising from the possession of a loaded pistol may justify a significant allowance for personal and general deterrence when considering an appropriate sentence: *Thalari v R* (2009) 75 NSWLR 307 at [93].

[60-025] Definitions

Section 4(1) of the Act defines a firearm as "a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive". The definition includes a blank fire firearm or air gun, but not anything declared by the regulations not to be a firearm (*Firearms Regulation* 2017, cl 4).

"Prohibited firearm" means a firearm described in Sch 1: s 4(1). "Pistol" and "prohibited pistol" are defined separately in ss 4 and 4C. The primary difference between the two is calibre size and pistol length.

Any collection of component parts that, if assembled, would be a firearm or prohibited firearm (or would be a firearm or prohibited firearm if it did not have something missing, or a defect or obstruction in it, or if it were not for the fact something has been added to it) is taken to be a firearm or prohibited firearm: s 4(2)(c).

Special provisions related to imitation firearms are in s 4D. An "imitation firearm" does not include any object produced and identified as a children's toy: s 4D(4). See *Darestani v R* (2019) 100 NSWLR 461 at [60]–[67] which considers the operation of the exception.

[60-030] Unauthorised possession or use: ss 7(1), 7A(1) and 36(1)

Part 2 Div 1 of the Act is headed "Requirement for licence or permit". The Division contains two sections, ss 7(1) and 7A, each with at least two substantive offences.

"A person must not possess or use a firearm unless authorised to do so by a licence or permit": s 7A(1). The maximum penalty is 5 years imprisonment. No standard non-parole period is specified.

"A person must not possess or use a pistol or prohibited firearm unless authorised to do so by a licence or permit": s 7(1). The maximum penalty is 14 years imprisonment. A standard non-parole period of 4 years applies.

Offences related to the registration of firearms are in Pt 3, Div 2 of the Act. "A person must not supply, acquire, possess or use a firearm that is not registered": s 36(1). The maximum penalty, if the firearm concerned is a pistol or prohibited firearm, is 14 years imprisonment. A maximum penalty of 5 years applies in any other case.

The offences under ss 7A(1), 7(1) and 36(1) are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1 Table 2 Part 4 *Criminal Procedure Act* 1986. JIRS sentencing statistics reveal that summary disposition is the most frequent mode of dealing with possession offences where it is the principal charge. A court dealing with an offence on indictment may have regard to the fact the offence could have been dealt with summarily but only in the circumstances outlined in *Zreika v R* [2012] NSWCCA 44 at [107]–[109].

Where an offender is convicted of unauthorised possession of a firearm under ss 7–7A *Firearms Act* and also convicted of discharging that firearm under s 93G *Crimes Act*, these should be regarded as distinct offences with separate criminal elements and generally not part of one course of conduct: *Rickaby v R* [2007] NSWCCA 288 at [17]–[19].

[60-040] Assessing the objective seriousness of possession/use

Johnson J referred to the policy reasons behind s 7(1) *Firearms Act* and matters relevant to the seriousness of the offence in *Ayshow v R* [2011] NSWCCA 240 at [64]–[73].

The importance of assessing the seriousness of an offence by reference to the principles and objects set out in s 3 was addressed in *R v Tolley* [2004] NSWCCA 165 where Howie J said at [53]:

> The courts must seek to implement the policy of the existing legislation and that is to control the possession and use of firearms in the community by honest citizens, and not simply to disarm the criminally minded.

Latham J said in *R v Krstic* [2005] NSWCCA 391 at [14] that "the policy of the legislature evinced by the enactment of the offence and a maximum penalty of 14 years imprisonment is to deter and punish possession of firearms per se". See also *R v AZ* [2011] NSWCCA 43 at [73].

Part of the rationale behind s 7(1) was explained by Hulme J in *R v Najem* [2008] NSWCCA 32 at [40]:

> That rationale includes at least a recognition that firearms and pistols, if possessed, are liable to be used, and if used, are liable to be a source of great danger or damage. It includes also a recognition that not all persons can be relied on to avoid or minimise such danger and not misuse the weapons and that misuse, even without discharge, is liable to amount to a great infringement of others [sic] rights.

The importance of giving full weight to the intent of the legislature, when the offender was a member of a criminal gang and prohibited by a firearms prohibition order from possessing a firearm, was addressed in *Chandab v R* [2021] NSWCCA 186 at [81] where Wilson J said:

> Firearms in the hands of those not permitted to possess them, and even more so in the hands of the criminally minded who may be the subject of a prohibition order, represent a clear and profound threat to the safety of the community. No doubt for this reason,

> and despite the relatively low standard non-parole period that applies to such offences, the maximum penalty … reflects the seriousness with which the Parliament and the community view firearms offences. The rule of law and the safety of others equally are imperilled by the unauthorised possession of firearms, and such offences must be treated as serious contraventions of the criminal law — to punish offenders, to deter others, and to protect the community.

An offender's criminality is more serious where he or she possesses a firearm as part of their involvement in crimes such as trading in illegal drugs: *R v Amurao* [2005] NSWCCA 32 at [69]; *R v Mehcur* [2002] NSWCCA 56 at [25]; *Luu v R* [2008] NSWCCA 285 at [32]; *R v AZ* at [76]; *SY v R* [2020] NSWCCA 320 at [30]; and serious assaults: *R v Najem* [2008] NSWCCA 32 at [41]. In *Amurao*, Hulme J said at [69]:

> It behoves the Courts to discourage any tendency for such objects to become just tools of trade for those whose activities are outside the law.

Possession of a concealed weapon, such as a keyring pistol which was not capable of lawful use, is a significant offence: *R v AZ* at [77]; *Cao v R* [2013] NSWCCA 321 at [35].

The court in *R v Najem* held that the judge was correct in implicitly accepting that the respondent's criminality was exacerbated by the fact that the pistol was loaded, in his possession, and available for use at the scene where a violent crime was carried out (by a co-offender): at [42].

The unauthorised possession of a loaded firearm that has had its serial number removed may be consistent with it being used for criminal purposes: *Yang v R* [2007] NSWCCA 37 at [18]; see also *Chandab v R* at [75]. It is impermissible, however, to sentence an offender on the basis that their possession was for an illegal purpose that would have amounted to a more serious unproven offence. This would infringe the *De Simoni* principle: *R v Thurgar* (unrep, 17/12/90, NSWCCA); *R v Harris* [2001] NSWCCA 322 at [37]–[38]. However, a finding that an offender must have known it was likely prohibited weapons and firearms would be used in connection with serious criminal activity did not infringe the *De Simoni* principle and was "plainly inescapable": *KC v R* [2009] NSWCCA 110 at [10].

The court in *Atkinson v R* [2014] NSWCCA 262 held (by majority) that the sentencing judge had not erred in finding the possession of two pistols for the criminal enforcement of debts was within the "worst case" category (as that concept was understood before *The Queen v Kilic* (2016) 259 CLR 256): *Atkinson v R* at [2], [86]. Simpson J, at [4], regarded the applicant's argument that he acquired weapons for on-sale as superfluous: possession for on-sale (which would clearly have been to the criminal milieu) was no better or worse than possession for criminal activity.

In *Z v R* [2015] NSWCCA 274, it was not an error for the sentencing judge to have regard to the applicant's membership of, and participation in, an outlaw motorcycle gang, and his possession and use of firearms as a means to advance the perceived interests of that gang. The context of the applicant's possession of a loaded and unsecured firearm was a relevant sentencing consideration: at [99]–[100]; see also *Raniga v R* [2016] NSWCCA 36 at [43].

Possession even for non-criminal purposes is generally not regarded as a matter in mitigation. The fact possession of a prohibited firearm is for personal protection is not

a matter of significant, if any, mitigation: *R v Krstic* at [14]. Similarly, in *R v AA* [2006] NSWCCA 55, the respondent had possession of a prohibited pistol for self-protection following a severe assault. Rothman J stated at [46]:

> It cannot be emphasised enough that the rule of law and the authority of courts depends upon the proposition that persons do not take into their own hands the enforcement of the law, retaliation for past offences or protection by means inconsistent with the law. It is for law enforcement agencies to protect members of the community and it is for the courts to enforce the law.

The principles in *Krstic* and *AA* were applied by the court in *Thalari v R* (2009) 75 NSWLR 307 at [88]. See also *Chandab v R* at [58]–[60]] where Wilson J concluded that the principles in *AA* and *Thalari* should be given particular weight when the offender was precluded by a firearms prohibition order (see s 73) from having firearms and was also a member of a criminal gang.

In *Thurgar*, the offender offered no innocent explanation for possession of a pistol and failure to obtain a licence. In these circumstances Gleeson CJ said, "The judge was entitled to infer that such failure was deliberate": at [117]. Some weapons, by their nature, preclude an offender from offering an innocent explanation. For example, there is no legitimate purpose for possessing a sawn-off shotgun: *R v Harris*, above, at [38]; *Alrubae v R* [2016] NSWCCA 142 at [37].

In *Do v R* [2010] NSWCCA 182, the offender was in possession of a loaded and unsecured pistol in an urban area. The possession of the pistol created a high risk to the safety of the public and arresting officers even though it was not used. The court concluded, at [23], that the objective seriousness of this offence was very high: see also the related matter of *Tran v R* [2010] NSWCCA 183.

An offender's criminality is not necessarily affected by the length of time of their possession of the firearm. However, a very short period of possession may, in the circumstances of a case, reduce the seriousness of the offence: *R v Goktas* [2004] NSWCCA 296 at [26].

A firearm loaded with live rounds of ammunition may aggravate the seriousness of the possession: *R v Mitchell* [2002] NSWCCA 270 at [14]. In *Gall v R* [2015] NSWCCA 69, the offender's possession of a readily available, unsecured and loaded firearm in a domestic dwelling was a serious example of a s 7(1) offence, particularly given his son had killed a person with a firearm seven months earlier: at [222], [244]. By way of contrast, in *Barnes v R* [2022] NSWCCA 40, it was unfair for the sentencing judge to regard the fact ammunition of a similar calibre was found with the firearm (a sawn-off .22 rifle) as an aggravating factor when there was no evidence the ammunition could be used with the firearm and no evidence the firearm was in working order: at [59]–[60]. The offence in that case was one of possessing a shortened firearm contrary to s 62(1)(b).

It is a matter in aggravation where the unauthorised possession enables others in the community to make use of the firearms even though such a result is unintended: *Cooper v R* [2005] NSWCCA 428 at [20]. In *Cooper*, although the sentencing judge found the offender stole two pistols and three revolvers because the owner threatened to shoot the offender's cousin, and the offender said he intended to dispose of them safely, Barr J nonetheless described the offences as "serious ones of their kind": at [20].

Pointing a loaded pistol is a very serious offence — more so when the holder is intoxicated, suffering from a lack of judgement and is aggressive: *R v Do* [2005] NSWCCA 183 at [25]–[27]. Considerations of general deterrence and retribution require a substantial sentence for such conduct, especially where the pistol is actually used and serious injury is caused: at [27].

In *Cramp v R* [2008] NSWCCA 40 the offender, a proprietor of a firearms and security business, held a number of licences under the Act permitting him to possess and use various forms of firearms. Police conducted a firearms and security industry audit and found he was in possession of two pistols which were used in the security part of his business. Neither had been the subject of test firing and one was unregistered. The conviction and imposition of a s 9 bond for the s 7(1) offence had the effect that the applicant's licence for other firearms may not (as opposed to will not as erroneously submitted, see [45]–[47]) be renewed by the Commissioner of Police. The court held that the judge did not err in deciding not to impose a s 10 dismissal without conviction: at [48], [52]. The offences could not be characterised as trivial within the terms of s 10; nor were they "technical and clerical" in nature: at [44].

While extra-curial punishment can be taken into account in an appropriate case, it would be wrong for a court to impose a s 10 dismissal without conviction calculated to circumvent or influence the exercise of discretions of other statutory office holders responsible for the licensing provisions under the Act: *Cramp* at [51]. Rather, it is of fundamental importance that strict adherence to the firearms legislation be enforced. It is appropriate, if not inevitable, that a conviction be imposed: *Cramp* at [52]. Hulme J dissented (at [7]) on this aspect of the case:

> The likely impact of a decision to convict or, in the exercise of a statutory discretion not to convict, and the likely impact of any particular sentence is something to which regard should be had.

Cumulative sentences may be warranted where there are separate offences of possession under s 7(1) and the removal of a serial number: *R v Amurao* at [73]. As to setting an aggregate sentence see [7-505].

The standard non-parole period provision

A standard non-parole period of 4 years applies for s 7(1) offences committed on or after 21 August 2015. For offences committed on or after 1 February 2003 and before 21 August 2015, the standard non-parole period is 3 years. The standard non-parole period does not apply if the offence is dealt with summarily: *Crimes (Sentencing Procedure) Act* 1999, s 54D(2).

The court queried in *R v Najem* [2008] NSWCCA 32 at [38] the "two irreconcilable standards" of the (then) 3 year standard non-parole period and the 14 year maximum penalty for s 7 offences. Hulme J stated at [39]:

> One would fairly have expected that the standard non-parole period for an offence in such mid-range to be of the order of half of the maximum. Nothing in the Explanatory Memorandum to the Bill that led to the enactment of these sections or the Ministers' Second Reading speeches when introducing the Bill provides any assistance in answering the quandary.

Possession of prohibited firearms and good character

It cannot be said that offences of possession of prohibited firearms are committed frequently by persons of otherwise good character so as to fall within the category of

offence where less weight is afforded to an offender's prior good character: *Athos v R* (2013) 83 NSWLR 224 at [44]. A court can consider the question of the weight that should be attributed to an offender's good character but any reduction in weight cannot be on the basis of the type of offence that has been committed: *Athos v R* at [45].

Section 21A(2)

See generally [11-000] **Section 21A factors "in addition to" any Act or rule of law**. It is impermissible to have regard to an aggravating factor in s 21A(2) if it is an inherent characteristic of an offence: *Elyard v R* [2006] NSWCCA 43 at [9]–[10].

In *Gall v R* [2015] NSWCCA 69, the offender and his son were charged with multiple offences, including the unauthorised possession of a prohibited firearm, following a violent altercation with members of an outlaw motorcycle gang during which one gang member was shot. There had been no retaliatory action following that incident. Subsequently, a firearm was found, during a police search, on the kitchen table of the offender's home where, the sentencing judge found, it was readily accessible and loaded, available for use. The Court concluded that in the particular circumstances, it was not an error for the judge to conclude the offence was aggravated as the degree of planning (s 21A(2)(n)) went beyond what one would normally expect for an offence of that kind. The positioning of the firearm was well thought through — it was loaded and readily available for use: at [216]–[218].

See further discussion below under **Section 21A(2)** at [60-050].

[60-045] Section 50A: unauthorised manufacture of firearms

A person who manufactures a firearm, without being authorised by a licence or permit, is liable to a maximum of 10 years imprisonment: s 50A(1) *Firearms Act*. The maximum increases to 20 years where a person manufactures a pistol or prohibited firearm: s 50A(2). A standard non-parole period has not been been assigned to either offence. Given the definition of "manufacture" in s 50A(5) of "assemble a firearm from firearm parts", the criminality encompassed can extend from a very sophisticated operation at the one end of the spectrum to a relatively minor adjustment to a pre-existing firearm at the other: *Truong v R* [2013] NSWCCA 36 at [111]. A relevant factor in determining the objective seriousness of a particular offence is whether the firearm is in working order: *Truong v R* at [111]. Manufacturing offences which were committed as part of a small scale business to make and sell seven firearms, including two sub-machine guns with "devastating firing capabilities", were regarded as very serious in *Smart v R* [2013] NSWCCA 37 at [36]. This was particularly so where the manufactured sub-machine guns were destined for sale and, if they had been sold, two extremely dangerous weapons would have been delivered into the community, probably the criminal fraternity: *Smart v R* at [36].

[60-050] Section 51D: possession of more than three firearms

Section 51D prohibits the possession of more than three firearms if the firearms are not registered and the person is not licensed to possess them. The basic offence under s 51D(1) attracts a maximum penalty of 10 years imprisonment.

Section 51D(2) provides a higher maximum penalty of 20 years if a person is in possession of more than three firearms any one of which is a pistol or prohibited firearm. A standard non-parole period of 10 years imprisonment applies.

In the Second Reading Speech to the Bill which introduced the standard non-parole period for s 51D(2) and several other firearm offences, the Attorney General stated (NSW, Legislative Council, *Debates*, 17 October 2007, p 2667 at 2668):

> In particular, these serious offences of possession, sale and supply of firearms may lead to other crimes of ever escalating gravity, including firearms usage and ultimately crimes of violence including armed robbery and even murder.

Spigelman CJ explained the rationale behind s 51D in *R v Brown* [2006] NSWCCA 249 at [21]–[22]:

> When s 51D was introduced by the *Firearms Amendment (Public Safety) Act* 2002, the Minister said: "Firearm related crime is a major concern for both police and the community." The offence, in a series of offences relating to firearms in the *Firearms Act* 1996, is directed to persons who are engaged in the warehousing of firearms for sale. A person so engaged plays a critical role in the perpetration by other criminals of the worst crimes of violence in this community. The maximum sentence reflects the important role that such conduct plays in the injuries inflicted upon members of the community by deadly weapons.

Sentences imposed for such offences must reflect the legislative intention expressed in the Act, which is to eliminate firearms from the community unless their possession is expressly authorised, and "operate as real disincentives to those otherwise attracted to the illegal possession of firearms": *R v Mahmud* [2010] NSWCCA 219 at [71]. There is no discernible range of sentences for offences against s 51D(2) given the small number of decided cases: *Yammine v R* [2010] NSWCCA 123 at [52]; *Dionys v R* [2011] NSWCCA 272 at [45], [46]; *Taylor v R* [2018] NSWCCA 50 at [65].

Matters relevant to assessing the objective seriousness of an offence include: the number of firearms and the number which are prohibited or pistols, the nature and type of the firearms, the purpose for their possession, whether there is evidence showing any relationship between the possession of the firearms with the drug industry, the location of the property and the security under which the firearms are kept: *Mack v R* [2009] NSWCCA 216 at [40]; see also *R v Mahmud* at [62]–[66].

The offence in *Brown* "was a serious example of the offence under s 51D" (at [24]) since the offender "… intended to sell the firearms to criminals for profit. He had in his possession, for that purpose, an automatic self-loading rifle, which he called a 'machine gun' and which was clearly capable of inflicting serious injury and also some compact 'keyring' firearms, which were particularly dangerous by reason of their capacity for concealment." at [23]. Similarly in *R v Lachlan* [2015] NSWCCA 178, the respondent possessed the firearms to buy and sell for profit and was contributing to their potential use for purposes which may lead to serious injury or death: at [74]. By comparison, the offending in *Aird v R* [2021] NSWCCA 35, where the offender was in possession of two pen guns and seven low-calibre hunting rifles for more than 10 years (some of which were inherited), while serious, was less so than the cases involving holding firearms for the purpose of sale or storage because in those cases the risk they "might end up in the hands of criminals, and be used to perpetrate crimes of violence, is foreseeable and a likely outcome of the possession": at [45], [50]–[51].

The purpose of the prohibition under s 51D is broader than the punishment of criminals who warehouse and harbour illegal firearms. It extends to the stockpiling

of weapons by persons without any further criminal intent: *R v Cromarty* [2004] NSWCCA 54; applied in *Taylor v R* at [59]. This is because of the risk that the stockpile, if vulnerable, may inadvertently feed the market in illegal supply of firearms: *Cromarty* at [86]. There is a particular risk of firearm theft from remote rural properties by persons engaged in criminal activities, which may be relevant in assessing the objective seriousness of an offence: *Taylor v R* at [50], [52]; see also *Cornish v R* [2015] NSWCCA 256 at [74]. An offender is not less culpable for such an offence if they collect a substantial number of firearms for defensive purposes: *Yammine v R* at [42].

In *Dionys v R*, the s 51D(2) offence related to five firearms, one of which was a light machine gun. Another 89 weapons, some of which were semi-automatic, were included on a Form 1. In that case, the sheer number of weapons increased the objective seriousness of the offence as did the fact the offender's motivation was monetary gain. In such circumstances, general deterrence and denunciation required condign punishment: at [48].

In *R v Lachlan*, one factor which rendered the offence under s 51D(2) serious was that all of the firearms were in working order and none were stored securely, with two loaded and the remaining two in close proximity to ammunition: *R v Lachlan* at [73]. Further, s 51D(2) requires that at least one firearm is "prohibited", and in *R v Lachlan*, all four firearms were "prohibited firearms": at [71].

Shortened firearms have no legitimate purpose and are particularly dangerous due to their capacity for concealment, which makes them suited for serious criminal activity: *R v Lachlan* at [71], [72]; *R v Brown* [2006] NSWCCA 249; *El Jamal v R* [2017] NSWCCA 243 at [34]–[35]. The fact an offender themselves shortens a firearm, although not an element of the offence, may be taken into account as part of the context of the offending: *Weaver v R* [2021] NSWCCA 215 at [117].

Possessing a number of firearms knowing it is illegal to do so increases the objective seriousness of the offence: *Basedow v R* [2010] NSWCCA 76 at [20]; *Taylor v R* at [63]. The objective criminality of an offender who possesses a number of weapons because of a "fetish" is less serious than possession for a more sinister motive: *R v Mahmud* at [64].

The period of time an offender was in possession of the relevant firearms may be relevant to an assessment of the objective seriousness of the offence but if an offender wishes to argue the period of possession was so short as to make the offence less objectively serious then the burden of proof is on the offender: *Yammine v R* at [46]–[47].

Possessing unserviceable weapons is less objectively serious than the possession of serviceable weapons although the degree to which the weapon is unserviceable will be relevant: *R v Mezzadri* [2011] NSWCCA 125 at [19].

[60-052] Supply and acquisition of firearms

Part 6 *Firearms Act* contains a range of offences relating to the unauthorised supply and acquisition of firearms. These include supply to an unauthorised person (s 51(1), or s 51(1A) in the case of a pistol or prohibited firearm), acquisition of an unauthorised firearm (s 51A), and the supply of firearms on an ongoing basis (s 51B(1)).

Supply is defined under s 4(1) to mean "transfer ownership of, whether by sale, gift, barter, exchange or otherwise". "Acquire" means accept or receive supply of: s 4(1).

Deterrence

Spigelman CJ said in *R v Howard* [2004] NSWCCA 348 at [66]:

> Where it appears that there are elements within the community who refuse to accept that firearms offences must be regarded as serious, the objectives of general and personal deterrence are entitled to substantial weight in sentencing for such offences. The availability of such weapons poses a major threat to the community particularly where, as here, an accused is completely indifferent to the persons who were to acquire them. The community has determined that trade in such weapons on any other than a strictly regulated basis is to be regarded as a serious offence. That must be reflected in the sentence imposed.

Assessing seriousness of supply and acquisition offences

The number and quality of firearms purchased or sold is relevant to the gravity of the offence: *R v Dunn* [2003] NSWCCA 169 at [21].

Where an offender acts as an agent for others engaged in the business of illegally supplying weapons this will have a bearing on the determination of the objective seriousness of an offence: *R v Parkinson* [2010] NSWCCA 89 at [45], although note this discussion occurred in the context of a finding by the sentencing judge that the offence was "below the mid-range" and before the High Court decision in *Muldrock*.

It is an aggravating feature if:

- a person sells a weapon with a silencer and does not have any concern about the identity of the purchaser since "[a silencer] is quintessentially a feature of weapons used in violent crimes": *Howard*, above, per Spigelman CJ at [65]
- firearms are sold to members of an outlaw motorcycle gang: *R v Sward* [2014] NSWCCA 259 at [44].

An intermediary who arranges the unauthorised purchase or sale of firearms may not be substantially less culpable than the principal: *R v Mohamad* [2005] NSWCCA 406, Hidden J stated at [17]:

> Even if the applicant were acting as an intermediary, given the number of weapons involved and the surrounding circumstances, he could have been in no doubt that they were being purchased for an unlawful end. As his Honour pointed out, the provisions of the *Firearms Act* restricting the sale and purchase of weapons were born of the recognition of the association of "the unlawful disposal of firearms with the subsequent illegal use of those firearms by the criminal element". Involvement in that distribution as an intermediary may be, as his Honour recognised, "somewhat less culpable" than that of the purchaser, but not markedly so.

In *Dionys v R* [2011] NSWCCA 272, the court found the offence of selling firearms on an ongoing basis (s 51B(1)) was of substantial objective seriousness. The offender had sold five firearms, one of which was a light machine gun. The court said at [68]:

> The type and number of weapons sold is indicative of their being part of a substantial business of trading weapons without regard to the character of the purchaser and the

> inevitable consequence that some at least would end up in the hands of criminals. But for the true identity of the purchaser and the intervention of the police, the trade in weapons would have continued.

The offender in *R v Sward* was sentenced for four offences under s 51(1A)(a). The court concluded that imposing four equal and concurrent sentences did not take account of the additional criminality in the sale of four prohibited pistols: at [44].

In considering a submission concerning the degree of commonality between the offences under s 51B(1) and 51D(2) in *Dionys v R*, the court concluded the offences were quite different. Hoeben J, with whom McClellan CJ at CL agreed, said, at [61]:

> Count 1 deals with the sale of weapons on at least three occasions. Count 2 is directed to the warehousing of firearms for sale. While an element of possession and control is essential for a sale to take place, the offences themselves are qualitatively and in fact, different.

For a discussion of other factors relevant to the supply of prohibited firearms, see *Truong v R; Le v R; Nguyen v R* [2013] NSWCCA 36, where each offender had two counts of offending under s 51(1A).

Standard non-parole period

The unauthorised supply of a pistol or prohibited firearm under s 51(1A) or (2A), and supplying firearms on an ongoing basis (on three or more occasions within 12 months) under s 51B, each carries a maximum penalty of 20 years. A standard non-parole period of 10 years was also introduced for these offences on 1 January 2008. As to the application of the standard non-parole period see the discussion at [7-890]ff.

Section 21A(2) "without regard for public safety" and planning

Section 21A(2)(i) *Crimes (Sentencing Procedure) Act* 1999 provides a court can take into account as matter in aggravation that "the offence was committed without regard for public safety".

In *MP v R* [2009] NSWCCA 226 the offender was charged with the common law offence of conspiracy to sell unregistered firearms. Over a lengthy period of time, the offender funded and made various arrangements related to the purchase of firearms interstate for sale in NSW. The court held that where an "inherent characteristic" of a particular offence exceeds the norm it may be taken into account as an aggravating factor within s 21A(2). The court concluded it was appropriate to take the disregard of public safety into account as an aggravating factor because "the longevity of the risk, the fact that in excess of 740 weapons were placed into circulation as a result of the applicant's participation in the conspiracy … overwhelmingly establish that the risk to the public brought about by this offence 'exceeds the norm'": at [37].

Similarly, the court concluded that the scale and extent of the conspiracy exceeded what could be regarded as the normal level of planning associated with a criminal activity: s 21A(2)(n). Justice Hoeben said, at [40]:

> The offence involved the acquisition of specific weapons, their modification, the preparation of false documents, the storage and transportation of weapons interstate, the identification of appropriate purchasers and the ultimate sale of specified weapons to these purchasers. Apart from the sophistication of these procedures, the sheer scale of the enterprise took it beyond the norm.

[60-055] Other miscellaneous offences

Each of the following offences are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1, Table 2, Pt 4 *Criminal Procedure Act* 1986.

Stolen firearms

It is an offence to use, supply, acquire or possess a stolen firearm or firearm part, or to give possession of a stolen firearm or firearm part to another person: s 51H(1). The maximum penalty is 14 years imprisonment.

The provision applies to a stolen firearm or firearm part whether it was stolen before or after the commencement of s 51H: s 51H(3). It is a defence if the defendant proves that they did not know, and could not be reasonably expected to have known, that the firearm or firearm part was stolen: s 51H(2).

Possession of digital blueprints for manufacture of firearms

A person must not possess a digital blueprint for the manufacture of a firearm on a 3D printer or on an electronic milling machine: s 51F(1). A maximum penalty of 14 years imprisonment applies. Innocent production, dissemination or possession, conduct engaged in for public benefit and approved research are available defences under s 51G.

The offences in ss 51H and 51F were inserted by the *Firearms and Weapons Prohibition Legislation Amendment Act* 2015 and commenced on 24 November 2015.

Remote controlled possession and use of firearms

A person must not possess or use a firearm by remote control unless authorised by a permit. The maximum penalty is 5 years imprisonment, or 14 years if the weapon is a pistol or prohibited firearm: s 51I(1)–(2). These offences were inserted by the *Firearms and Weapons Legislation Amendment Act* 2017 and commenced on 1 November 2017.

[60-060] Prohibited weapons offences under Weapons Prohibition Act 1998

The *Weapons Prohibition Act* 1998 commenced on 8 February 1999 (GG No 15 of 5.2.1999, p 392) and was introduced to replace the "inadequate and outmoded" *Prohibited Weapons Act* 1989 (Second Reading Speech, Weapons Prohibition Bill, NSW, Legislative Assembly, *Debates*, 22 October 1998, p 8912).

The principles and objects of the Act are outlined at s 3. The underlying principles confirm that the possession and use of prohibited weapons is a privilege that is conditional on the overriding need to ensure public safety. The specific objectives include to require each person under the authority of a permit to have "a genuine reason for possessing or using the weapon" and "to provide strict requirements that must be satisfied in relation to the possession and use of prohibited weapons."

Types of weapons

The term "prohibited weapon" is defined by s 4(1) as "anything described in Schedule 1." The weapons listed in Sch 1 include knives (cl 1), military style weapons (cl 1A), miscellaneous weapons such as spear guns, crossbows, batons and tasers (cll 2(4), 2(5), 2(17)–(18A)), imitations (cl 3) and handcuffs (cl 4(2)).

A "prohibited weapon" also includes any collection of disassembled parts which would, if assembled, be a prohibited weapon: s 4(2)(a1). Section 4(2)(a1) was inserted by the *Firearms and Weapons Legislation Amendment Act* 2017, in response to *Jacob v R* [2014] NSWCCA 65 where the majority concluded that an unassembled crossbow was not a prohibited weapon: at [16]; [141].

A hierarchy of prohibited weapons was recognised in *R v Williams* [2005] NSWCCA 355, where Simpson J said at [37]:

> Recourse to Schedule 1 of the Weapons Prohibition Act, which defines prohibited weapons, shows that a wide variety of items much more dangerous than a replica pistol are encompassed in the prohibition contained in s 7(1). These include flick-knives, ballistic knives, and a variety of other kinds of obviously dangerous knives, bombs, grenades, rockets, missiles and mines in the nature of explosives or incendiaries, flame throwers, darts, dart projectors, devices capable of administering electric shocks. The starting point for this offence was ten years out of a possible maximum of fourteen years. I would think that the replica pistol would be among the least dangerous of the weapons prohibited by s 7, which would put the applicant's offence at a lower point on the scale than his Honour appears to have treated it.

Possess or use a prohibited weapon: s 7(1)

Section 7(1) *Weapons Prohibition Act* 1998 makes it an offence to "possess or use a prohibited weapon unless the person is authorised to do so by a permit." A holder of a permit commits an offence under s 7(2) if they possess or use the weapon for any purpose other than the "genuine reason" for possessing or using the weapon, or if they contravene any condition of the permit. Section 11 provides a list of nine "genuine reasons". Possession or use of a prohibited weapon for personal protection is generally not permitted as a genuine reason: s 11(3).

The maximum penalty for conviction on indictment is 14 years imprisonment. Where prosecuted on indictment, the offence carries a standard non-parole period of 3 years for offences committed before 21 August 2015, and 5 years for offences committed on or after 21 August 2015.

The offences under s 7 of the Act are Table 2 indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Sch 1, Table 2, Pt 4 *Criminal Procedure Act* 1986. JIRS sentencing statistics reveal that summary disposition is the predominant method of dealing with a possession offence where it is the principal charge.

RS Hulme AJ (Ward JA agreeing) in *Jacob v R* [2014] NSWCCA 65 recognised the difficulties in assessing objective seriousness given the wide variety of "prohibited weapons" encompassed by the Act, particularly given military style weapons are included and all weapons in the non-military category lack a common feature other than their capacity to assist in inflicting serious injury: at [180]–[184]. In that case, a sentence of 2 years, 6 months for possession of a slingshot was found to be manifestly excessive. While a slingshot could be fatal, particularly if used to fire a ball bearing, it is very unlikely to be so. In the scale of weapons, it falls a long way below military weapons: at [184]–[185].

An extendable baton, although dangerous and designed for concealment, falls towards the low end of the scale of weapons: *Marracos v R* [2008] NSWCCA 267 at [24]–[25]; *Leung v R* [2014] NSWCCA 44 at [73]. Similarly, the nature of the

taser possessed in *Tran v R* [2010] NSWCCA 183 rendered the offence in that case significantly below the middle range of objective seriousness: at [23]. However in *R v Lachlan* [2015] NSWCCA 178, the offender was in possession of a stun gun, extendable baton, knuckledusters and taser. The court noted that there could be no legitimate purpose for the possession of such weapons, and the ease of their concealment also made them particularly dangerous: at [78].

The court in *Jones v R* [2016] NSWCCA 230 rejected a submission that a custodial sentence was not warranted for possession of a set of knuckledusters which were home-made from solid metal with many jagged edges. The knuckledusters were capable of causing more serious (although not life-threatening) injuries than normal knuckledusters and the offence was therefore more objectively serious: at [13], [16].

However, in *R v Porte* [2015] NSWCCA 174, an 18-month ICO was held to be unwarranted for possession of a can of mace found at the offender's home, given his evidence that he acquired it at a trade fair and believed it legal to possess. There was no evidence of criminal purpose: at [27]. In re-sentencing, the court imposed a s 10A conviction with no further penalty: at [158].

The offender in *Della-Vedova v R* [2009] NSWCCA 107 was sentenced for possession of ten rocket launchers containing ten rockets acquired in his position as an army officer responsible for their destruction. Simpson J observed that although the sentencing judge made no express finding that the offences were in the worst case category, such a finding was open: at [77]. The offence involved a serious breach of trust resulting in the availability of the weapons on the black market; the offence was committed to enrich the offender; the weapons were dangerous and life threatening and the only reasonable use of them was for criminal or terrorist activities: at [84], [85]. Note: the expression "worst case category" should now be avoided, see *The Queen v Kilic* (2016) 259 CLR 256 at [18] and the discussion at [10-005] **Cases that attract the maximum**.

Where an offender is being sentenced for possession of a prohibited weapon as well as possession of a firearm (s 7 *Firearms Act* 1996) some accumulation may be warranted to reflect that there are separate and distinct weapons: *Tran v R* at [23].

Other offences under Weapons Prohibition Act

Other offences under the *Weapons Prohibition Act* include restrictions on the sale or purchase of prohibited weapons (ss 23, 23A, 23B), unauthorised manufacture of prohibited weapons (s 25A), possession or use of a prohibited weapon or military-style weapon by remote control without a permit (s 25D), possession of digital blueprints for manufacture of prohibited weapons (s 25B), breach of safe-keeping requirements (s 26), offences relating to permits (ss 20, 29–32), and offences against weapons prohibition orders (s 34).

Some offence provisions, such as ss 23A, 25A and 25D, provide maximum penalties which differ for military and non-military weapons. In those circumstances, an offence involving a non-military weapon must be assessed against the maximum, shorn of the impact of military weapons: *Jacob v R* [2014] NSWCCA 65 at [187].

Offences pursuant to ss 20, 23(1), 23A(1), 25B(1), 25D, 31 and 34 are also Table 2 offences under the *Criminal Procedure Act* 1986.

[60-070] Firearms offences under the Crimes Act 1900

Section 33A: discharge firearm with intent

Part 3 Div 6 *Crimes Act* contains firearms offences relating to acts causing danger to life or bodily harm. Section 33A(1) makes it an offence to discharge or attempt to discharge a firearm with intent to cause grievous bodily harm. Section 33A(2) creates an offence of discharging or attempting to discharge a firearm with intent to resist arrest. Both offences carry a maximum penalty of 25 years imprisonment, and for offences committed on or after 21 August 2015, a standard non-parole period of 9 years also applies.

The seriousness of an offence under s 33A(1) will be aggravated if substantial injury is sustained: *Melbom v R* [2011] NSWCCA 22 at [97]; *R v Tuala* [2015] NSWCCA 8 at [45]. In *Melbom v R*, where the offender fired a round of ammunition towards a group of people and hit an innocent bystander, the offence was found to be at the high end of the range: at [137].

Section 33B: use or possess weapon to resist arrest

See **Assault, Wounding and Related Offences** at [50-090].

Section 93G: causing danger with firearm

Offences relating to public disorder are found in Pt 3A *Crimes Act*. Division 2 deals with firearms offences relating to public order.

Section 93G(1)(a) prohibits the possession of a loaded firearm in a public place, or in any other place so as to endanger the life of another person. The community regards the crime of carrying a concealed weapon such as a pistol (under s 93G(1)(a)) as a very serious offence: *Saad v R* [2007] NSWCCA 98 at [38]. The reason for possession is relevant to an assessment of the objective seriousness of an offence. A common feature which elevates objective gravity, is that the offender possesses the firearm in connection with a criminal enterprise: *Sumrein v R* [2019] NSWCCA 83 at [34]–[36] (see also the discussion of the cases cited at [60-040] above), [45]. In *Sumrein v R,* the court found the judge erred by failing to take into account that the applicant's motive for obtaining the gun was to protect himself and his family because that was relevant to assessing the objective seriousness of the offence and the offender's moral culpability: at [45]–[46].

Section 93G(1)(b) prohibits the discharge of a firearm in or near a public place. Section 93G(1)(c) prohibits carrying or firing a firearm in a manner likely to injure any person or property, or with disregard for the safety of the offender or others. All three offences under s 93G have a maximum penalty of imprisonment for 10 years.

Parliament has treated the s 93G offences as more serious, because of their 10-year maximum penalty, than malicious wounding (now reckless wounding under s 35(4), with a maximum penalty of 7 years): *R v Cicekdag* [2004] NSWCCA 357. In that case, Hoeben J stated at [35] in relation to s 93G(1)(b):

> The problem with a projectile weapon, such as a firearm, is that once the projectile has been released it will travel a considerable distance and the firer has no control over its ultimate destination. Death or injury can result. This is particularly so where the discharge is indiscriminate in a public place and as happened here, a number of shots are fired.

In a case involving an offence under s 93G(1)(b), especially where more than one shot has been fired, the principle of deterrence and in particular general deterrence is of considerable importance: *Cicekdag*, above, at [38].

Motive is not a relevant consideration because the potential consequences of an offence are the same regardless: *Ah-Keni v R* [2020] NSWCCA 122 at [59]. In that case, the court found it was open for the sentencing judge to find the objective seriousness of an offence against s 93G(1)(b) was in the upper range: [58]–[59]. The intoxicated offender had, as a prank, produced a pistol in a taxi where it discharged without injuring anyone.

Lacking knowledge or experience in the use of a firearm is not a mitigating factor for an offence under s 93G(1)(b). In *R v Abdallah* [2005] NSWCCA 365 at [81], Simpson J stated:

> In a crowded venue, with a large number of people moving rapidly, the appellant, inexperienced in the use of firearms, picked up and fired a gun in the direction of the crowds of people. While, in one sense, his inexperience in the use of firearms might weigh in his favour, in another, it points the other way: the appellant did not know how to use the gun safely.

Discharging a firearm in the direction of another person will aggravate the seriousness of the offence: *R v Adams* [2004] NSWCCA 279 at [33], [36], where an offence called "fire firearm with disregard for safety" in the judgment is identified by court records as s 93G(1)(c). While an offence under s 93G(1)(c) is regarded as serious, in *R v Cahill* [2004] NSWCCA 451, the court found the judge erred in describing a s 93G offence as "almost in the same category as murder or manslaughter"; s 93G does not require injury, but there is the potential for it: at [17].

Where a charge under s 93G does not refer to a disregard for public safety as an element of the offence, such a circumstance may be an aggravating factor under s 21A(2)(i): *Haidar v R* [2007] NSWCCA 95 at [26]. (The specific wording of the charge in *Haidar* at [9] was to "endanger the safety" of another person, which is one form of the offence under s 93G(1)(c)).

The type of weapon fired in an offence under s 93G is relevant to the gravity of the conduct. In *Crago v R* [2006] NSWCCA 68, the firearm used was an air rifle and not the much more dangerous firearms that fall within the operation of the *Firearms Act*: at [47].

Section 93GA: firing at dwelling-houses or buildings

Section 93GA(1) makes it an offence to fire a "firearm at a dwelling-house or other building with reckless disregard for the safety of any person". The offence attracts a maximum penalty of 14 years imprisonment.

An offence under s 93GA(1A) was inserted by the *Crimes Legislation Amendment (Gangs) Act* 2006 on 15 December 2006: a person must not fire a firearm, during a public disorder, at a dwelling-house or other building with reckless disregard for the safety of any person. A maximum penalty of 16 years applies.

On 9 April 2012, s 93GA(1B) was inserted by the *Crimes Amendment (Consorting and Organised Crime) Act* 2012. The provision makes it an offence for a person to

fire a "firearm at a dwelling-house or other building with reckless disregard for the safety of any person in the course of an organised criminal activity": s 93GA(1B). The maximum penalty is 16 years imprisonment.

It is not necessary, in the prosecution of any offence under s 93GA, to prove that a person was actually placed in danger by the firing of the firearm: s 93GA(2).

Standard non-parole periods were introduced for each offence under s 93GA on 21 August 2015. For offences committed on or after that date, a standard non-parole period of 5 years (s 93GA(1)) or 6 years (s 93GA(1A) or (1B)) applies.

Offences of the kind under s 93GA(1) require condign punishment: *Powell v R* [2014] NSWCCA 69 at [38]; *Raad v R* [2015] NSWCCA 276 at [32].

In *Powell v R*, the applicant and a co-offender had attended a boarding house to enquire as to someone's whereabouts. At least one shot was fired at the home from a shortened rifle. The court found that although a lengthy sentence for the dangerous and anti-social act was inevitable, a sentence of 9 years with a non-parole period of 5 years for a s 93GA(1) offence was outside the bounds of the sentencing discretion, though not to an extreme degree: at [30], [37].

In *Quealey v R* [2010] NSWCCA 116, the court found the sentencing judge did not err by characterising a s 93GA(1) offence as at "the upper end of the middle range" of objective seriousness, given a shotgun was discharged on two separate occasions at residential premises, in the knowledge four persons were inside, the first shot penetrating the house and the second in the constructive presence of the applicant's two year old granddaughter: at [18]–[19].

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Appeals

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Appeals

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Appeals

[70-000] Introduction

This chapter first discusses sentence appeals for matters dealt with on indictment and then appeals from the Local Court. A creature of statute, the precise nature of a sentence appeal depends on the language and context of the statutory provision(s): *Dinsdale v The Queen* (2000) 202 CLR 321 at [57]; *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at [8].

[70-020] Section 5(1)(c) severity appeals

Section 5(1)(c) *Criminal Appeal Act* 1912 provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave.

Time limits and applications out of time

The provisions of the *Criminal Appeal Act* and the Criminal Appeal Rules (repealed but now see Supreme Court (Criminal Appeal) Rules 2021, with similar provisions) relating to time limits and applications out of time are explained in *Kentwell v The Queen* (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) *Criminal Appeal Act* requires notice of intention to apply for leave to appeal to be given within 28 days from the date of sentence. If notice is not given by the defendant, the applicable period for a notice of appeal is three months after the sentence: r 3.5(2)(b) Supreme Court (Criminal Appeal) Rules 2021. A notice of appeal against a sentence under s 5D *Criminal Appeal Act* must be filed 28 days after the sentence: r 3.5(3). If a notice of appeal is filed after the time for filing has expired, the application for leave may only be made with the leave of the Court: r 3.5(5). The Court has a discretion to dispense with the rules in particular cases: r 1.4.

Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.

An application should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: *Kentwell v The Queen* at [4], [30], [44]; *O'Grady v The Queen* (2014) 252 CLR 621 at [13]. In considering whether to grant an extension of time a court must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: *Kentwell v The Queen* at [32].

The prospect of success of the appeal is relevant. This involves considering the merits of an appeal. That issue is addressed by reference to s 6(3) *Criminal Appeal Act*: *Kentwell v The Queen* at [33]–[34]. As to the approach the court must take to s 6(3), see further below at [70-040].

The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: *Lowe v R* [2015] NSWCCA 46 at [14].

[70-030] The ordinary precondition of establishing error

Severity appeals under s 5(1)(c) *Criminal Appeal Act* 1912 are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: *Lowndes v The Queen* (1999) 195 CLR 665 at [15]. Nor is an appeal the occasion for revising and reformulating the case presented below: *Zreika v R* [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish the sentencing judge made an error in the exercise of their discretion: *House v The King* (1936) 55 CLR 499 at 505. In *Markarian v The Queen* (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said:

> As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in *House v The King* … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy".

See also the explanation of specific error in *Kentwell v The Queen* (2014) 252 CLR 601 at [42].

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59], referring to *Dinsdale v The Queen* (2000) 202 CLR 321 at [6] and *Wong v The Queen* (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons: *Hili v The Queen* at [59].

Failure to attribute sufficient weight to an issue

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in *House v The King* (1936) 55 CLR 499: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [48].

Such a ground of appeal has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: *DF v R* [2012] NSWCCA 171at [77]; *Hanania v R* [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: *Hanania v R* at [33].

Failure of defence to refer to matters at first instance later relied upon

It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the sentencing judge: *Stewart v R* [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: *Stewart v R* at [56], citing *Zreika v R* [2012] NSWCCA 44.

Errors of fact and fact finding on appeal

Factual findings are binding on the appellate court unless they come within the established principles of intervention: *AB v R* [2014] NSWCCA 339 at [44], [50],

[59]; *R v Kyriakou* (unrep, 6/8/87, NSWCCA); *Skinner v The King* (1913) 16 CLR 336 at 339–340; *Lay v R* [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: *AB v R* at [52], [59]; *R v O'Donoghue* (unrep, 22/7/88, NSWCCA); *Kentwell v The Queen* (2014) 252 CLR 601 at [35]; *Hopley v R* [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of *House v The King* (1936) 55 CLR 499 as a ground of appeal: *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24]; *Camm v R* [2009] NSWCCA 141 at [68]; *Cao v R* [2010] NSWCCA 109 at [48].

It is incumbent on the applicant to show that the factual finding was not open: *Turnbull v Chief Executive of the Office of Environment and Heritage* [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: *AB v R* at [59]. The court cannot review the finding of fact made and substitute its own findings: *R v O'Donoghue* at 401.

In *Clarke v R* [2015] NSWCCA 232 at [32]–[36] and *Hordern v R* [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of *R v O'Donoghue* and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view has failed to receive support in subsequent judgments of the court: see *Yin v R* [2019] NSWCCA 217 at [27]; *Gibson v R* [2019] NSWCCA 221 at [2]–[6]; *TH v R* [2019] NSWCCA 184 at [1]; [22]–[23].

If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: *R v MD* [2005] NSWCCA 342 at [62]; *R v Merritt* (2004) 59 NSWLR 557 at [61]; *Carroll v The Queen* (2009) 83 ALJR 579 at [8], [24].

There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: *Lay v R* at [51]; *Aoun v R* [2011] NSWCCA 284. Where a factual error has been made in the *House v The King* sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: *Lay v R* at [53] applying *Kentwell v The Queen* at [40]–[43].

[70-040] Section 6(3) — some other sentence warranted in law

Section 6(3) *Criminal Appeal Act* 1912 provides:

> On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

It is only open to the CCA to quash the sentences if it is of the opinion stipulated in s 6(3) as one "that some other sentence ... is warranted in law and should have been passed": *Elliott v The Queen* (2007) 234 CLR 38 at [34].

The phrase "is warranted in law" assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it: *Elliott v The Queen* at [36].

Once a specific error of the kind identified in *House v The King* (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: *Kentwell v The Queen* (2014) 252 CLR 601 at [42] citing Spigelman CJ in *Baxter v R* [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: *Baxter v R*. It is not necessary to determine whether the error had an actual effect on the sentence, only that it had the capacity to do so: *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]–[13]; *Tomlinson v R* [2022] NSWCCA 16 at [200]. In this context use of the term "material" to distinguish between errors impacting on the sentencing discretion and those that do not should be avoided: *Newman (a pseudonym) v R* at [11]; *Ibrahim v R* [2022] NSWCCA 134 at [24].

The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: *Kentwell v The Queen* at [42]; *Thammavongsa v R* [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made at the end of the process required under s 6(3) to check that the sentence arrived at by the appellate court does not exceed the original sentence: *Thammavongsa v R* at [5]–[6].

Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: *Kentwell v The Queen* at [42].

In *Lehn v R* (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the sentencing exercise, the court is required under s 6(3) to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: *Lehn v R* at [68]. The High Court in *Kentwell v The Queen* at [42] held that the CCA's task on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome, but to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: *Lehn v R* at [77] quoting *Kentwell v The Queen*. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: *Lehn v R* at [78].

Where error may not require re-exercise of sentencing discretion

There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: *Lehn v R* (2016) 93 NSWLR 205 at [72]. For example, where an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: *Lehn v R*

at [72]. In *Greenyer v R* [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court. A similar arithmetical error was found to affect the non-parole period in *Li v R (Cth)* [2021] NSWCCA 100 and was corrected without the court proceeding to re-sentence: at [58]; [66]; [71].

The sentencing error in *Lehn v R* of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: at [65], [118], [128], [140].

Is a lesser sentence warranted

The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: *Kentwell v The Queen* at [43]. If the court concludes either that the same, or a greater, sentence should be imposed, it is not required to re-sentence: *Kentwell v The Queen* at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: *Kentwell v The Queen* at [43] citing *Neal v The Queen* (1982) 149 CLR 305 at 308.

The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease as it lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: *Thammavongsa v R* at [3], [16].

Reception of evidence following finding of error

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: *Betts v The Queen* (2016) 258 CLR 420 at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: *Kentwell v The Queen* at [43] citing *Douar v R* [2005] NSWCCA 455 at [124] and *Baxter v R* at [19] with approval. In *Douar v R* at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: *R v Deng* [2007] NSWCCA 216 at [43]; *R v Fordham* (unrep, 2/12/97, NSWCCA).

The appellant cannot run a "new and different case": *Betts v The Queen* at [2]. It is not the case that once error is demonstrated, the appellate court may receive *any* evidence capable of bearing on its determination of the appropriate sentence: *Betts v The Queen* at [8], [12]–[13] approving *R v Deng* [2007] NSWCCA 216 at [28]. The conduct of

an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by *House v The King* (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: *Betts v The Queen* at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: *Betts v The Queen* at [14].

In *Betts v The Queen*, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: at [57]–[59].

The power to remit under ss 12(2) and 6(3)

Section 12(2) *Criminal Appeal Act* 1912 provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made".

The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: *Betts v The Queen* at [17]. The issue was unnecessary to determine in *Betts v The Queen* at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): *Betts v The Queen* at [17].

The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in *O'Neil-Shaw v R* [2010] NSWCCA 42: *Betts v The Queen* at [19].

It was held in *O'Neil-Shaw v R* at [56] that s 6(3) should not be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: *O'Neil-Shaw v R* at [32]. Remittal under s 12(2) *Criminal Appeal Act* is the more appropriate course since this permits a judge to determine the question of sentence upon the evidence adduced in the second hearing: *O'Neil-Shaw v R* at [57].

The meaning of "sentence" in s 6(3)

An aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act* 1999 is a "sentence" within s 6(3): *JM v R* [2014] NSWCCA 297 at [40]; see also **[7-508] Appellate review of an aggregate sentence**. The appeal is against the aggregate sentence, not the individual indicative sentences: see, for example, *R v Kennedy* [2019] NSWCCA 242 at [78]; *DS v R* [2017] NSWCCA 37 at [63]–[64]. However, in determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences: *JM v R* at [40]; *Gibson v R* [2019] NSWCCA 221 at [88].

In the past there was an issue about whether the word "sentence" in s 6(3) refers only to a specific sentence for a particular offence and did not include a reference to an overall effective sentence: see *R v Bottin* [2005] NSWCCA 254 (as to the latter) and *Arnaout v R* [2008] NSWCCA 278 at [21] (as to the former). That debate was noted in *Nahlous v R* (2010) 77 NSWLR 463 at [12] and by Hodgson JA in *McMahon v R* [2011] NSWCCA 147 at [2]–[4].

[70-060] Additional, fresh and new evidence received to avoid miscarriage of justice

The Court of Criminal Appeal has flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice: *Betts v The Queen* (2016) 258 CLR 420 at [2], [10]. More than one approach has been adopted (as explained below). *Barnes v R* [2022] NSWCCA 140 contains a summary of the relevant principles at [24]–[34].

The conventional approach is for the court to ask whether the additional evidence is "fresh", that is, evidence which the applicant was unaware of and could not have obtained with reasonable diligence: *R v Goodwin* (unrep, 3/12/90, NSWCCA); *R v Abou-Chabake* [2004] NSWCCA 356 at [63]. Fresh evidence is to be contrasted with new evidence which is not received. It is evidence that was available at the time, but not used and could have been obtained with reasonable diligence: *Khoury v R* [2011] NSWCCA 118 at [107]; *R v Many* (unrep, 11/12/90, NSWCCA); *Barnes v R* at [28]. Even if evidence is fresh, it will not be received by the court unless it affects the outcome of the case: *R v Fordham* (unrep, 2/12/97, NSWCCA) at 378. For example, the evidence in *Bajouri v R* [2016] NSWCCA 20 of images on Facebook showing the victim doing activities such as jet skiing 10 months after the assault offence and 18 months before his victim impact statement could not qualify as fresh evidence. It did not contradict or cast doubt on the contents of the victim impact statement: at [44], [46], [51]. "New" evidence is evidence that was available but not used, or was discoverable with the exercise of reasonable diligence at the time of sentence: *Khoury v R* at [107]; *Barnes v R* at [28].

Evidence of factual circumstances which existed at sentence

The Court of Criminal Appeal has received additional evidence of facts or circumstances which existed at the time of sentencing, even if not known, or imperfectly understood, at that time: *Khoury v R* [2011] NSWCCA 118 at [113]. That is, circumstances existed which were known at sentence but their significance was not appreciated: *Khoury v R* at [114]–[115]. See the examples referred to in *Springer v R* [2007] NSWCCA 289 at [3]. The rationale for the receipt of the additional evidence is that the sentencing court proceeded on an erroneous view of the facts before it: *Khoury v R* at [113].

The decision to admit additional evidence is discretionary and caution must be exercised: *Khoury v R* at [117]; *Wright v R* [2016] NSWCCA 122 at [19], [71]. The applicant must establish a proper basis for the admission of the evidence: *Khoury v R* at [117]. Relevant factors to be taken into account according to Simpson J in *Khoury v R* at [121] include:

> … the circumstances of, and any explanation for, the non-production of the evidence — a deliberate decision on the part either of the applicant, or his or her legal representatives, ignorance in the applicant of the significance of the evidence, resulting in its not being communicated to the legal representatives, incompetent legal representation [and] … the potential significance of the evidence to have affected the outcome at first instance …

Two categories of case have emerged:

- medical evidence cases: *Khoury v R* at [115]
- assistance to authorities cases: *R v Many* (unrep, 11/12/90, NSWCCA); *ZZ v R* [2019] NSWCCA 286.

Medical evidence cases

The general principle that parties will not normally be able to produce fresh or new evidence on appeal reflects the importance of finality: *Cornwell v R* [2015] NSWCCA 269 at [39]. However, evidence as to a medical condition may form the basis for an exception to this principle where it is in the interests of justice: *Cornwell v R* at [39], [57], [59]; *Turkmani v R* [2014] NSWCCA 186; *Khoury v R* [2011] NSWCCA 118 at [115]; *Dudgeon v R* [2014] NSWCCA 301.

In *Turkmani v R*, the court at [66] identified three categories of case where fresh evidence is sought to be adduced in relation to the health of an offender. First, where the offender was only diagnosed as suffering from a condition after sentence but was affected at the time of sentence; secondly where, although the symptoms of a condition may have been present, their significance was not appreciated and; thirdly where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but did not. See the discussion of *Turkmani v R* in *Wright v R* [2014] NSWCCA 186 at [73].

The discretion to admit fresh evidence of an offender's medical condition was permitted in *Cornwell v R* on the basis that he was clearly suffering Huntington's disease at the time of sentencing which was likely to make custody more burdensome for him: at [59], [64]. The evidence established that the pre-sentence instructions given by the applicant to his legal representatives — that he did not wish to undergo testing for the disease — were justified by psychological factors including the fear of a positive diagnosis following his experience of family members with the same disease: at [58].

In *Wright v R*, the applicant was sentenced on the basis he was in poor health and of advanced age. Following sentence, he was diagnosed with Alzheimer's disease. Although the evidence qualified as fresh evidence, the court exercised its discretion not to admit it because the evidence would not have made a significant difference to the sentence imposed by the judge: at [1], [20], [84], [98], [100]. The sentence already represented a lenient outcome: at [86].

Evidence the applicant had developed terminal liver cancer was admitted as fresh evidence in *Lissock v R* [2019] NSWCCA 282. The Crown accepted the condition was present to some degree at sentence and its significance not fully appreciated until much later. The applicant was re-sentenced on the basis his time in custody would be more difficult physically and psychologically than if he were completely well: at [92]–[94], [113]–[114].

As to psychological conditions, there is an unresolved issue as to whether the additional evidence is the psychological condition existing at the time or the later diagnosis by the expert in a report prepared after sentence proceedings: *Khoury v R* at [118], quoting Basten JA in *Einfeld v R* [2010] NSWCCA 87 at [45], [50]. A psychological report prepared after sentence is not necessarily fresh or new evidence because it was prepared after sentence: *Khoury v R* at [120], but see *R v Fordham* at 377–378.

Assistance to authorities

In the particular circumstances of *ZZ v R* [2019] NSWCCA 286, the court concluded that information provided by the applicant in an interview with police upon her arrest which, after the sentence proceedings, resulted in arrests overseas, qualified as fresh evidence and resulted in a reduction of her sentence on appeal: at [29]–[30], [33]–[34]. See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]–[42].

Evidence of facts that have arisen entirely after sentence

The past tense used in s 6(3) "some other sentence, whether more or less severe is warranted in law and should have been passed" has the effect according to Simpson J in *Khoury v R* [2011] NSWCCA 118 at [110] that:

> … evidence of events or circumstances or facts that have arisen *entirely* since sentencing cannot be taken into account, no matter how compelling they may be. If the facts did not exist at the time of sentencing, it cannot have been an error for the sentencing judge not to have taken them into account [emphasis added].

See also *Agnew (a pseudonym) v R* [2018] NSWCCA 128 at [38]. While there is some flexibility with respect to the application of this principle (see *Agnew v R* at [39]–[40] and the discussion below) the view, for example, that a post-sentence reduction in a custodial sentence for assistance to authorities can be achieved by means of an appeal where no error or miscarriage has been found should not be encouraged: *Agnew v R* at [40]–[42].

Evidence that an applicant assisted authorities post sentence: *JM v R* [2008] NSWCCA 254, or had a medical condition that did not exist at sentence, has not been received by the court: *Khoury v R* at [111]–[112].

[70-065] Miscarriage of justice arising from legal representation

The general rule as set out in *R v Birks* (1990) 19 NSWLR 677 at 683 and 685 that "a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted" applies to sentencing proceedings: *Khoury v R* [2011] NSWCCA 118 at [104]; *Tran v R* [2014] NSWCCA 32 at [12]; *CL v R* [2014] NSWCCA 196. However, fresh evidence has been admitted by the Court of Criminal Appeal without error being established where a miscarriage of justice occurred because the applicant was incompetently or carelessly represented at sentence: *R v Fordham* at 377–378, citing *R v Abbott* (unrep, 12/12/85, NSWCCA); *Munro v R* [2006] NSWCCA 350 at [23]–[24].

Where evidence was available to the defence at the time of sentencing, a miscarriage of justice will rarely result simply from the fact that the evidence was not put before the sentencing judge, even if the evidence may have had an impact upon the sentence passed: *R v Fordham* at 377.

Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked better: *Ratten v R* (1974) 131 CLR 510 at 517; *R v Diab* [2005] NSWCCA 64 at [19].

In *Khoury v R*, counsel said it did not occur to him to call psychiatric evidence concerning the applicant's low intellectual functioning. Evidence was received on appeal because of its significance in the case: see the explanation of *Khoury v R* in *Grant v R* [2014] NSWCCA 67 at [57]. Conversely, in *Grant v R*, the court refused to admit two psychological reports prepared many years after sentence proceedings: *Grant v R* at [58].

A miscarriage of justice was found in *Grant v R* where the applicant pleaded guilty to manslaughter on the basis of excessive self-defence because the legal representative: failed to explain to the client the various states of mind within the offence of manslaughter; failed to obtain clear instructions from the client on that issue; and, informed the court what he thought was his client's intention without having obtained clear instructions on the issue: at [71], [77].

[70-070] Crown appeals for matters dealt with on indictment

Section 5D(1) *Criminal Appeal Act* 1912 provides:

> The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper.

Although the Attorney General (NSW) has a statutory right to appeal against sentence, it has only been exercised once since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the *Director of Public Prosecutions Act* 1986 (NSW). See *CMB v Attorney General for NSW* (2015) 256 CLR 346. The decision to institute a Crown appeal is made by the DPP, although the Executive government sometimes requests that the DPP consider an appeal on behalf of the Crown to correct a sentence perceived to be inadequate.

Time limits to appeal and specifying grounds

Section 10(1) *Criminal Appeal Act* (which provides that a notice of intention to appeal must be filed 28 days from the date of sentence), does not apply to Crown appeals: *R v Ohar* (2004) 59 NSWLR 596. However, under the rules, the period for filing a Crown appeal against sentence under s 5D *Criminal Appeal Act* is 28 days after the sentence: r 3.5(4), Supreme Court (Criminal Appeal) Rules 2021. If a notice of appeal is filed after this period, the court must grant leave: r 3.5(5). Delay in bringing an appeal is relevant to the court's exercise of its discretion to intervene: *Green v The Queen* (2011) 244 CLR 462 at [43].

A notice of a Crown appeal (as filed) must be served on the respondent, the Legal Aid Commission and the last known Australian legal practitioner representing the respondent (r 3.7(1)) and must be personally served on the respondent if they are not represented (r 3.7(2)).

While not specifically addressed in the rules, it appears clear from the approved Notice of Appeal and accompanying Annexure A (available on the Supreme Court website) that documents setting out all grounds relied on in the appeal and written submissions addressing each ground are to be attached to the relevant notice of appeal: cf *R v JW* (2010) 77 NSWLR 7 at [33] .

At some stage a formal document identifying the grounds should be brought into existence in a Crown appeal: *R v JW* (2010) 77 NSWLR 7 at [33], [35]. The court acknowledged in *R v JW* at [33] that it is a desirable "rule of practice", within the meaning of r 76, that a Crown appeal should identify grounds of appeal in the notice of appeal, but that practice does not require grounds to be identified when the notice is first filed and failure to do so does not render the appeal incompetent: *R v JW* at [33]. The High Court decision of *Carroll v The Queen* (2009) 83 ALJR 579 does not imply a contrary position: *R v JW* at [35].

[70-080] Matters influencing decision of the DPP to appeal

The NSW Prosecution Guideline Chapter 10: DPP appeals, at [10.2], states in part that the DPP will only lodge an appeal if satisfied that:

1. all applicable statutory criteria are established
2. there is a reasonable prospect that the appeal will succeed
3. it is in the public interest.

The Guideline states, at [10.4] Appeals against sentence, that the primary purpose of DPP sentence appeals to the Court of Criminal Appeal is to allow the court to provide governance and guidance to sentencing courts. The Guideline recognises that such appeals are, and ought to be, rare. The Guideline states they should be brought in appropriate cases:

1. to enable the courts to establish and maintain adequate standards of punishment for crime
2. to enable idiosyncratic approaches to be corrected
3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice.

The *Prosecution policy of the Commonwealth: guidelines for the making of decisions in the prosecution process* (issued by the CDPP in July 2021) sets out the Director's policy in relation to Commonwealth prosecution appeals against sentence. It can be accessed from "Prosecution Process" on the CDPP website.

Guideline 6.35 of the Commonwealth prosecution policy states that the prosecution right to appeal against sentence "should be exercised with appropriate restraint" and "consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful". Guideline 6.36 further states that an appeal against sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation.

[70-090] Purpose and limitations of Crown appeals

The primary purpose of a Crown appeal is to lay down principles for the governance and guidance of courts with the duty of sentencing convicted persons: *Green v The Queen* (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [1], [36], quoting Barwick CJ in *Griffith v The Queen* (1977) 137 CLR 293 at 310. See also *R v DH* [2014] NSWCCA 326 at [19]; *R v Tuala* [2015] NSWCCA 8 at [98]. Their Honours in *Green v The Queen* continued at [36]:

> That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion.

The High Court affirmed the above passage in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [55].

The purpose of Crown appeals extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing: *Lacey v Attorney General of Queensland* (2011) 242 CLR 573 at [16]; *Everett v The Queen* (1994) 181 CLR 295 at 300; *Dinsdale v The Queen* (2000) 202 CLR 321 at [61]–[62].

The two hurdles in Crown appeals

In a Crown appeal against sentence, the Crown is required to surmount two hurdles: firstly, it must identify a *House v The King* [(1936) 55 CLR 499 at 505] error in the sentencing judge's discretionary decision; and secondly, it must negate any reason why the residual discretion of the CCA not to interfere should be exercised: *CMB v Attorney General for NSW* at [54] citing *Everett v The Queen* (1994) 181 CLR 295 at 299–300 and *R v Hernando* [2002] NSWCCA 489 per Heydon JA at [12] with approval. The discretion is residual only in that its exercise does not fall to be considered unless *House v The King* error is established: *CMB v Attorney General for NSW* at [33], [54]. Once the discretion is enlivened, it remains incumbent on the Crown as the appellant under s 5D to demonstrate that the discretion should be exercised: *CMB v Attorney General for NSW* at [33], [54].

Error and manifest inadequacy

The court may only interfere where error, either latent or patent, is established: *Dinsdale v The Queen* at [61]; *Wong and Leung v The Queen* (2001) 207 CLR 584 at [58], [109]. The bases of intervention in *House v The King* (1936) 55 CLR 499 at 505 are not engaged by grounds of appeal which assert that the judge erred by (a) failing to properly determine the objective seriousness of the offence, or (b) failing to properly acknowledge the victim was in the lawful performance of his duties, or (c) by giving excessive weight to an offender's subjective case to reduce the sentence: *Bugmy v The Queen* (2013) 249 CLR 571 at [22], [53]; *R v Tuala* [2015] NSWCCA 8 at [44]. These are just "particulars of the ground that the sentence was manifestly inadequate": *Bugmy v The Queen* at [22], [53].

Manifest inadequacy of a sentence is shown by a consideration of all matters relevant to fixing a sentence and, by its nature, does not allow lengthy exposition. Reference to the circumstances of the offending and the personal circumstances of an offender, may sufficiently reveal the bases for concluding that a sentence is manifestly inadequate: *Hili v The Queen* (2010) 242 CLR 520 at [59]–[61].

As to the application of the parity principle in Crown appeals see [10-850].

Assessment of objective seriousness

It is open to an appeal court in a Crown appeal to form a different view from the sentencing judge as to the objective seriousness of an offence where the (only) *House v The King* error asserted is that the sentence is "plainly unjust": *Carroll v The Queen* (2009) 83 ALJR 579 at [24]. However, in reaching its conclusion, the appeal court cannot discard the sentencing judge's factual findings where the findings are not challenged: *Carroll v The Queen* at [24]. In *Decision Restricted* [2014] NSWCCA

116 at [79]–[89], Simpson J expressed reservations about the authority of *Mulato v R* [2006] NSWCCA 282 in light of the approach in *Carroll v The Queen* at [24] described above: *Sabongi v R* [2015] NSWCCA 25 at [70]. Spigelman CJ had said in *Mulato v R*:

> Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself …

Mulato v R was applied in *Stoeski v R* [2014] NSWCCA 161 at [46]. A subsequent application for special leave to appeal to the High Court, on the basis her Honour's statement at [46] was wrong in principle, was refused: *Stoeski v The Queen* [2015] HCA Trans 19. The court in *Sabongi v R* at [72] held, after reference to *Stoeski v R* [2014] NSWCCA 161 at [46] that: "… the observations of Spigelman CJ and Simpson J in *Mulato* should be applied in New South Wales".

The court in *Ramos v R* [2015] NSWCCA 313 held that notwithstanding what the High Court said in *Carroll v The Queen* at [24] — that "it was open to the Court of Criminal Appeal to form a view different from the primary judge about where, on an objective scale of offending, the appellant's conduct stood" — neither *Carroll v The Queen* nor *Mulato v R* represent any departure from the principles laid down in *House v The King* (1936) 55 CLR 499: per Basten JA at [41]; Campbell J agreeing at [72]. The relevant question is whether the assessment of the objective seriousness of the offending was outside the range properly available to the sentencing judge: *Ramos v R* at [41].

See earlier discussion under **Errors of fact and fact finding on appeal** in [70-030].

Specific error alone is not enough to justify interference in a Crown appeal; the Crown must also demonstrate that the sentence is manifestly inadequate: *R v Janceski* [2005] NSWCCA 288 at [25]. The court must make an express finding that the sentence imposed at first instance is manifestly inadequate and the power to substitute the sentence is not enlivened by a finding that the court would have attributed less weight to some factors and more to others: *Bugmy v The Queen* at [24]; *R v Tuala* at [44]. The court must be satisfied that the discretion miscarried, resulting in the judge imposing a sentence which was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards": *Bugmy v The Queen* at [24], [55]. If that is the case, the court has to then consider whether the Crown appeal "should nonetheless be dismissed in the exercise of the residual discretion": at [24].

As to the residual discretion see further below at [70-100].

Aggregate sentences

Section 5D *Criminal Appeal Act* permits the Crown to appeal "against any sentence pronounced". The Crown cannot appeal an indicative sentence (the sentence that would have been imposed for an individual offence under s 53A(2)(b) *Crimes (Sentencing Procedure) Act*) because it is neither pronounced nor imposed: *R v Rae* [2013] NSWCCA 9 at [32]. Where an aggregate sentence is imposed only one sentence is pronounced, but the appellate court can consider submissions as to the inadequacy or otherwise of an indicative sentence in determining whether an aggregate sentence is inadequate: *R v Rae* at [32]–[33].

Double jeopardy principle

The *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act* 2009 abolished the principle of double jeopardy in Crown appeals on sentence. A new s 68A entitled "Double jeopardy not to be taken into account in prosecution" was inserted into the *Crimes (Appeal and Review) Act* 2001. It provides:

> (1) An appeal court must not:
>
> (a) dismiss a prosecution appeal against sentence, or
>
> (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate,
>
> because of any element of double jeopardy involved in the respondent being sentenced again.
>
> (2) This section extends to an appeal under the *Criminal Appeal Act* 1912 and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal.

The terms of s 68A(1), "[an] appeal court", and s 68A(2), "extends to an appeal under the *Criminal Appeal Act* 1912", on their face appear also to apply to Crown appeals from the Local Court to the District Court.

The expression "double jeopardy" in s 68A is limited to "the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence": *R v JW* (2010) 77 NSWLR 7 at [54]. Chief Justice Spigelman said at [141] (with support of other members of the Bench at [205] and [209]):

> (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice.
>
> (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject.
>
> (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety.
>
> (iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety.
>
> (v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise.

Application of s 68A to Commonwealth Crown appeals

The High Court held in *Bui v DPP (Cth)* (2012) 244 CLR 638 that ss 289–290 *Criminal Procedure Act* 2009 (Vic) (which are materially similar double jeopardy provisions to s 68A) do not apply to Crown appeals against sentence for a Commonwealth offence. The court made explicit reference to the NSW decision of *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 in deciding the issue. See also *DPP (Cth) v Afiouny* [2014] NSWCCA 176 at [75]. Section 80 *Judiciary Act* 1903 (Cth), which enables State courts to exercise federal jurisdiction, allows the common law to apply where it has not been modified by State legislation and so far as the laws of the Commonwealth are not

applicable or their provisions insufficient: *Bui* at [27]. The High Court held that no question of picking up the Victorian provisions arose because the issue can be resolved by reference to s 16A *Crimes Act* 1914 (Cth) itself. In short, there is "no gap" in the Commonwealth laws: *Bui* at [29]. Section 16A does not accommodate the common law principle of "presumed anxiety": *Bui* at [19]. The same reasoning applies to s 68A.

Although presumed anxiety cannot be read into the text of s 16A(1), actual mental distress can be taken into account under s 16A(2)(m) both when the court is determining whether to intervene and in resentencing: *Bui* at [21]–[24], approving *DPP (Cth) v De La Rosa*. Simpson J's view in that case of s 16A(2)(m) at [279]–[280] — that it is limited to a condition of distress and anxiety which is the subject of proof — is to be preferred to the views expressed by Allsop P and Basten JA: *Bui* at [23]. Section 16A(2)(m) refers to the actual mental condition of a person, not his or her presumed condition. A condition of distress or anxiety must be demonstrated before s 16A(2)(m) applies: *Bui* at [23].

Counsel for the respondent in *R v Nguyen* [2010] NSWCCA 238 at [125]–[127] unsuccessfully relied upon the offender's anxiety and distress suffered as a consequence of the Crown appeal. However, in *R v Primmer* [2020] NSWCCA 50 the respondent's affidavit, setting out his personal anxiety and distress when advised of the appeal and the prospect of his sentence being increased, was one matter taken into account by the court in exercising its discretion to decline to intervene: at [40]–[43].

Rarity

It was long established at common law that appeals by the Crown should be rare: *Malvaso v The Queen* (1989) 168 CLR 227. The application of that factor has been abolished, see *R v JW* at [141] in (v) (see above). In *R v JW* at [124], [129], Spigelman CJ said that insofar as "rarity" was intended to apply as a sentencing principle by way of guidance to courts of criminal appeal, it should be understood as reflecting the double jeopardy principle, now abolished. Other reasons for the frequency or otherwise of such appeals are not matters that are generally of concern to a court of criminal appeal. They are directed to the prosecuting authorities.

[70-100] The residual discretion to intervene

Once error is identified in a Crown appeal, the court is not obliged to embark on the resentencing exercise: *R v JW* (2010) 77 NSWLR 7 at [146]. The court has a discretion to refuse or decline to intervene even if error is established: *R v JW* at [146]; *Green v The Queen* (2011) 244 CLR 462 at [1], [26]; *R v Reeves* [2014] NSWCCA 154 at [12].

It is an error for the court to fail to consider the exercise of its residual discretion to dismiss the Crown appeal despite finding error: *Bugmy v The Queen* (2013) 249 CLR 571 at [24]; *Reeves v The Queen* (2013) 88 ALJR 215 at [60]–[61].

Two questions are relevant to the exercise of the residual discretion: first, whether the court should decline to allow the appeal even though the sentence is erroneously lenient; and second, if the appeal is allowed, to what extent the sentence should be varied: *R v Reeves* at [13]; *Green v The Queen* at [35]. The purpose of Crown appeals is not simply to increase an erroneous sentence. The purpose is a "limiting purpose" to establish sentencing principles and achieve consistency in sentencing: *R v Reeves* at [14]–[15]; *Griffiths v The Queen* (1977) 137 CLR 293 at [53]; *R v Borkowski* [2009]

NSWCCA 102 at [70]. Where the guidance provided to sentencing judges is limited, for example, because the proceedings are subject to non-publication orders, it may be appropriate to dismiss the appeal in the exercise of the residual discretion: *HT v The Queen* (2019) 93 ALJR 1307 at [51]; [55]; [90].

In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing: *R v Reeves* at [19]; *R v Deng* [2007] NSWCCA 216 at [28]; *R v Allpass* (unrep, 5/5/93, NSWCCA).

The onus is on the Crown to negate any reason why the residual discretion should be exercised: *R v Hernando* [2002] NSWCCA 489 at [12], cited with approval in *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [34], [66].

Section 68A(1) expressly removes double jeopardy as a discretionary consideration for refusing to intervene: *R v JW* at [95] but it "leaves other aspects untouched" and "there remains a residual discretion to reject a Crown appeal" for reasons other than double jeopardy: *R v JW* per Spigelman CJ at [92], [95] (other members of the court agreeing at [141], [205], [209]).

The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand: *R v Holder and Johnston* [1983] 3 NSWLR 245 at 256.

Factors that bear upon the residual discretion

The category of factors that bear upon the residual discretion are not closed. Rarity and the frequency of Crown appeals is no longer a relevant consideration: *R v JW* (2010) 77 NSWLR 7 at [129].

Conduct of the Crown

The conduct of the Crown at first instance is an important consideration. A Crown concession before the sentencing judge that a non-custodial sentence is appropriate, bearing in mind the Crown's duty to assist a sentencing court to avoid appellable error, is a consideration weighing strongly against interference: *CMB v Attorney General for NSW* at [38], [64]; see also *R v Allpass* (unrep, 5/5/93, NSWCCA); *R v Chad* (unrep, 13/5/97, NSWCCA); *R v JW* (2010) 77 NSWLR 7 at [92]. The failure of the Crown to indicate that a proposed sentence is manifestly inadequate is a material consideration in the exercise of the CCA's residual discretion: *CMB v Attorney General for NSW* at [64]. When the Crown asks the CCA to set aside a sentence on a ground, conceded in the court below, the CCA in the exercise of its discretion should be slow to interfere: *CMB v Attorney General for NSW* at [38], [64], [68]; citing *R v Jermyn* (1985) 2 NSWLR 194 at 204 with approval.

Other factors

Some of the other factors that may favour the exercise of the discretion are:

- delay by the Crown in lodging the appeal: *R v Hernando* at [30]; *R v JW* at [92]; *R v Bugmy (No 2)* [2014] NSWCCA 322 at [19], [101]
- conducting a case on appeal on a different basis from that pursued at first instance: *R v JW* at [92]

- delay in the resolution of the appeal: *R v Price* [2004] NSWCCA 186 at [60]; *R v Cheung* [2010] NSWCCA 244 at [151]; *R v Hersi* [2010] NSWCCA 57 at [55]
- the fact a non-custodial sentence was imposed on the offender at first instance: *R v Y* [2002] NSWCCA 191 at [34]; *R v Tortell* [2007] NSWCCA 313 at [63]
- the fact the non-parole period imposed at first instance has already expired: *R v Hernando* at [30]; or the fact the respondent's release on parole is imminent: *Green v The Queen* at [43]
- the fact the offender has made substantial progress towards rehabilitation: *CMB v Attorney General for NSW* at [69]
- "the effect of re-sentencing on progress towards the respondent's rehabilitation": *Green v The Queen* at [43]
- where resentencing would create disparity with a co-offender: *R v Bavin* [2001] NSWCCA 167 at [69]; *R v McIvor* [2002] NSWCCA 490 at [11]; *R v Cotter* [2003] NSWCCA 273 at [98]; *R v Borkowski* at [67]; *Green v The Queen* at [37]. See **Crown appeals and parity** at [10-850]
- the deteriorating health of the respondent since sentence: *R v Yang* [2002] NSWCCA 464 at [46]; *R v Hansel* [2004] NSWCCA 436 at [44]
- the fact that, were the court to impose a substituted sentence, the increase would be so slight as to constitute 'tinkering': *Dinsdale v The Queen* (2000) 202 CLR 321 at [62]; *R v Woodland* [2007] NSWCCA 29 at [53]
- the guidance provided to sentencing judges will be limited and the decision will result in injustice: *Green v The Queen* at [2]; *CMB v Attorney General for NSW* at [69]
- the case is unlikely to ever arise again: *CMB v Attorney General for NSW* at [69].

[70-110] Resentencing following a successful Crown appeal

If a Crown appeal against sentence is successful and the appellate court resentences the respondent, it does so in the light of all the facts and circumstances as at the time of resentencing: *R v Warfield* (1994) 34 NSWLR 200 at 209, following *R v Allpass* (unrep, 5/5/93, NSWCCA). The court will admit evidence of matters occurring after the date of the original sentencing to be taken into account on this basis: *R v Deng* [2007] NSWCCA 216 at [28].

Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: *R v JW* (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in *R v Parkinson* [2010] NSWCCA 89 at [49]–[51].

For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see **Power to reduce penalties for assistance to authorities** at [12-240].

[70-115] Judge may furnish report on appeal

Section 11 *Criminal Appeal Act* 1912 provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case.

A s 11 report should only be provided in exceptional circumstances: *R v Sloane* [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way: *Vos v R* [2006] NSWCCA 234 at [26]; *R v Sloane* at [9]. The relevant and permissible functions of a report are set out in *R v Sloane* at [10]–[12]; see also *Zhang v R* [2018] NSWCCA 82 at [37]–[39].

[70-120] Severity appeals to the District Court

Any person who has been sentenced by the Local Court may appeal to the District Court against the sentence: s 11(1) *Crimes (Appeal and Review) Act* 2001. The appeal is by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings: s 17.

The nature of an appeal "by way of rehearing" was discussed in *Fox v Percy* (2003) 214 CLR 118. Referring to the "requirements and limitations of such an appeal" the court said at [23]:

> On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. [Citations omitted.]

Section 20(2) *Crimes (Appeal and Review) Act* empowers the District Court on a sentence appeal to set aside or vary the sentence or dismiss the appeal. "Sentence" is exhaustively defined in s 3. "Varying a sentence" is defined in s 3(3) to include: (a) a reference to varying the severity of the sentence, (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature, and (c) a reference to varying or revoking a condition of, or imposing a new condition on, an intensive correction order, community correction order or conditional release order. The power conferred to vary a sentence includes the power to make an order under s 10 of the *Crimes (Sentencing Procedure) Act* 1999 and, for that purpose, to set aside a conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: s 3(3A).

The exercise of a power to set aside or vary a sentence under s 20 operates prospectively and extends to cases where the variation includes the imposition of a s 10 order and the setting aside the conviction: *Roads and Maritime Services v Porret* (2014) 86 NSWLR 467 at [33]. The exercise of the power to impose a s 10 order does not render the effect of the sentence up to the time of the appeal a nullity: *Roads and Maritime Services v Porret* at [33].

Where the judge is contemplating an increased sentence, the principles in *Parker v DPP* (1992) 28 NSWLR 282 require the judge to indicate this fact so the appellant can

consider whether or not to apply for leave to withdraw the appeal: at 295. See further discussion in **Procedural fairness** at [1-060]. The court is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. Any sentence varied or imposed and any order made has the same effect and may be enforced in the same manner as if it were made by the Local Court: s 71(3).

[70-125] Appeals to the Supreme Court from the Local Court

A person who has been sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone: s 52 *Crimes (Appeal and Review) Act*. However, such a person may appeal to the Supreme Court on a ground that involves a question of fact, or a question of mixed law and fact, if the court grants leave: s 53.

A person sentenced by the Local Court with respect to an environmental offence may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court: s 53(2).

A question of law alone does not include a mixed question of fact and law: *R v PL* [2009] NSWCCA 256 at [25]. A question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law; while a question concerning the application of incorrect legal principle to the facts of a particular case can give rise to a question of law alone: *Brough v DPP* [2014] NSWSC 1396 at [49]. In that case, an appeal founded upon a critique of the way in which a sentencing magistrate applied well-established principles of totality to the evidence was not a question of law alone: *Brough v DPP* at [50]–[51].

To identify an error by the Local Court in the exercise of its sentencing discretion in terms that amount to an error of the kind identified in *House v King* (1936) 55 CLR 499 at 504, does not of itself answer the question posed by s 56(1), that is, whether the court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong: *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [46].

If it is apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome: *Bimson* at [48].

A conclusion that the exercise of judicial discretion was unreasonable or plainly unjust may enable the appellate court to infer there was error but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. It will often be a distraction to attempt to label a sentence appealed from as manifestly inadequate or excessive. Instead, the appellant should isolate the question of law or legal principle that the lower court adopted or assumed and then demonstrate that it was wrong and material to the outcome: *Bimson* at [53]. Therefore an assertion that a sentence is manifestly inadequate does not identify a question of law alone as required by s 56(1)(a): *Bimson* at [57]. It is not the court's function under s 56(1)(a) to embark on an inquiry into the adequacy or even manifest inadequacy of a Local Court sentence: *Bimson* at [93].

A ground of appeal alleging that the magistrate had incorrectly characterised the seriousness of the offences did not raise a question of law alone; however a ground alleging that the magistrate had applied an incorrect maximum penalty and jurisdictional limit did raise a question of law alone: *Bimson* at [66], [77].

In determining a severity appeal from the Local Court, the Supreme Court has the power to set aside or vary the sentence, dismiss the appeal, or to set aside the sentence and remit the matter to the Local Court for redetermination: s 55(2).

The Supreme Court does not have jurisdiction to hear an appeal against a sentence imposed in the Local Court if an application for leave to appeal in the District Court has been dismissed and the magistrate's order has been confirmed: *Devitt v Ross* [2018] NSWSC 1675 at [60]–[62].

[70-130] Crown appeals on sentence to the District Court

Section 23 *Crimes (Appeal and Review) Act* 2001 provides that the DPP may appeal to the District Court against a sentence imposed on a person by a Local Court in proceedings for:

(a) any indictable offence that has been dealt with summarily: s 23(1)(a)

(b) any prescribed summary offence (within the meaning of the *Director of Public Prosecutions Act* 1986): s 23(1)(b), or

(c) any summary offence that has been prosecuted by or on behalf of the DPP: s 23(1)(c).

An appeal pursuant to s 23 is of a different nature to a Crown appeal to the Court of Criminal Appeal under the *Criminal Appeal Act*. Section 26 *Crimes (Appeal and Review) Act* provides that a s 23 Crown appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings. The court may also grant the DPP leave to lead fresh evidence, but only in exceptional circumstances: s 26(2). For the appeal to be upheld, error must be found: *DK v Director of Public Prosecutions* [2021] NSWCA 134 at [32].

The District Court is empowered on an appeal to dismiss the appeal, set aside or vary the sentence: s 27(1); but is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71.

The court has a residual discretion to decline to intervene, on a similar basis to the Court of Criminal Appeal: *DK v Director of Public Prosecutions* at [434]–[445] (see further **[70-100]**–**[70-110]** above). The discretion may not be exercised on the basis of double jeopardy.

[70-135] Crown appeals to the Supreme Court

The Crown may appeal to the Supreme Court against a sentence imposed by a Local Court in any summary proceedings, but only on a ground that involves a question of law alone: s 56(1)(a) *Crimes (Appeal and Review) Act*. Sentences imposed with respect to environmental offences may be appealed by the Crown but only with the leave of the court and on a question of law alone: s 57(1)(a).

See [70-125], above, for discussion of what constitutes a question of law alone. A Crown appeal alleging manifest inadequacy of sentence does not itself raise an error of law: *Morse (Office of the State Revenue) v Chan* [2010] NSWSC 1290 at [5], [39]; *Bimson, Roads and Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 at [51]. The function of the Supreme Court on appeals under s 56(1) is to identify and correct legal error, not to ensure consistency in sentencing for similar offences by magistrates across New South Wales: *Bimson* at [54].

In determining a Crown appeal on a question of law alone, the Supreme Court has the power to set aside or vary the sentence, or to dismiss the appeal: s 59(1). The court is prevented from imposing or varying a sentence to one which could not have been imposed in the Local Court: s 71.

In addition, the court retains a discretion to decline to intervene where an error of law has been established. In *Bimson*, an appeal under s 56, the court declined to intervene although error was established on the basis that the error was caused solely by a statement made to the court by counsel for the prosecution: see [94].

[70-140] Judicial review

Judicial review is another type of appeal available against a District Court judgment following an appeal from the Local Court. There is no right of appeal from the judgment of the District Court given in its criminal jurisdiction, on an appeal to it from the Local Court: *Hollingsworth v Bushby* [2015] NSWCA 251; *Toth v DPP (NSW)* [2014] NSWCA 133 at [6].

Section 69C *Supreme Court Act* 1970 applies to proceedings for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court or sentence imposed by the Local Court. The proceedings are instituted in the supervisory jurisdiction of the Court of Appeal with respect to a judgment of the District Court: *Tay v DPP (NSW)* [2014] NSWCA 53 at [1]. The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced: at s 69C(2); *Tay v DPP (NSW)* at [5].

Part 59 Uniform Civil Procedure Rules 2005 (NSW), dealing with judicial review proceedings, requires that proceedings must be commenced within three months of the date of the decision sought to be reviewed: r 59.10(1); *Toth v DPP (NSW)* at [6]. Section 176 *District Court Act* 1973 relevantly provides: "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". Section 176 prevents the Court of Appeal exercising its supervisory jurisdiction for error of law on the face of the record: *Hollingsworth v Bushby* at [5], [84], [92]; *Toth v DPP (NSW)* at [6]. The provision does not preclude relief under s 69 *Supreme Court Act* on the ground of jurisdictional error: *Hollingsworth v Bushby* at [5], [84], [92]; *Garde v Dowd* (2011) 80 NSWLR 620.

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