Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 52

November 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 52

Update 52, November 2022

Update 52 amends the Bench Book to incorporate recent case law and legislative developments. The following chapters have been revised:

Procedural fairness at:

- [1-040] **Opportunity of addressing the court on issues** to add reference to *Gwilliam v R* [2019] NSWCCA 5, regarding the parties' onus to present evidence necessary for the court to properly determine the issues.

Obligations of the parties at:

- [1-220] **Duty of legal practitioners to assist sentencing judge** to add reference to *Haines v R* [2021] NSWCCA 149 and *McGovern aka Lanesbury v R* [2021] NSWCCA 176, regarding the fundamental obligation of legal practitioners to assist the sentencing judge.

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

- [10-530] **Delay** to incorporate discussion of new s 21B *Crimes (Sentencing Procedure) Act* 1999, regarding the sentencing in accordance with the patterns and practices at the time of sentencing (inserted by *Crimes (Sentencing Procedure) Amendment Act* 2022 and applying to proceedings commenced on or after 18 October 2022).
- [10-570] **Deportation** to add reference to *R v Calica* [2021] NTSCFC 2 and *R v Fati* [2021] SASCA 99, regarding the approach to taking deportation into account on sentence.

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

- [11-337] **Section 21B — sentencing patterns and practices** to incorporate discussion of new s 21B *Crimes (Sentencing Procedure) Act* 1999, regarding the sentencing in accordance with the patterns and practices at the time of sentencing (inserted by *Crimes (Sentencing Procedure) Amendment Act* 2022 and applying to proceedings commenced on or after 18 October 2022).

Power to reduce penalties for assistance to authorities at:

- [12-205] **Rationale** to add *AGF v R* [2016] NSWCCA 236, confirming the rationale for the discount as explained in *R v Cartwright* (1989) 17 NSWLR 243 remains valid despite s 23 *Crimes (Sentencing Procedure) Act* 1999.
- [12-210] **Procedure** to add *Macallister (a pseudonym) v R* [2020] NSWCCA 306, *R v SS* [2021] NSWCCA 56 and *Ahmad v R* [2021] NSWCCA 30, regarding presenting evidence of assistance.
- [12-215] **Broad scope of s 23(1) — "any other offence"** to add *Ahmad v R* [2021] NSWCCA 30.
- [12-218] **Voluntary disclosure of unknown guilt — Ellis principle** to add *R v SS* [2021] NSWCCA 56.
- [12-230] **Applying the discount** to add *FS v R* [2009] NSWCCA 301, *Ahmad v R* [2021] NSWCCA 30 and *McKinley v R* [2022] NSWCCA 14, regarding the level of combined discount that can be applied in sentencing.
- [12-240] **Promised assistance** to add *R v Skuthorpe* [2015] NSWCCA 140, regarding the appellate court's power to vary a sentence under s 5DA(2) *Criminal Appeal Act* 1912.

Sexual offences against children at:

- [17-410] **Sentencing for historical child sexual offences** to incorporate discussion of new s 21B *Crimes (Sentencing Procedure) Act* 1999, regarding the sentencing in accordance with the patterns and practices at the time of sentencing (inserted by *Crimes (Sentencing Procedure) Amendment Act* 2022 and applying to proceedings commenced on or after 18 October 2022).
- [17-420] **Statutory scheme in the Crimes Act 1900 (NSW)** to update the table of sexual offences against children under the *Crimes Act* 1900.
- [17-500] **Persistent sexual abuse of child: s 66EA** to update commentary in light of s 66EA following the commencement of *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018. References have been added to *R v RB* [2022] NSWCCA 142, regarding fact finding following a jury's guilty verdict, and *GP (a pseudonym) v R* [2021] NSWCCA 180 and *Burr v R* [2020] NSWCCA 282, regarding assessing the objective seriousness of a s 66EA offence.

Offences against justice/in public office at:

- [20-195] **Resisting/hindering/impersonating police** to incorporate amendments to the *Crimes Act* 1900 following commencement of the *Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act* 2022 on 18 October 2022 which created new/amended offences involving assaults etc against law enforcement officers and others.

Murder at:

- [30-048] **Delay between murder offence and sentence** has been removed.

Assault, wounding and related offences at:

- [50-000] **Introduction and statutory framework**, [50-120] **Assaults etc against law enforcement officers and frontline emergency and health workers** and [50-125] **Assaults etc against persons who aid law enforcement officers, and other offences** to incorporate amendments to the *Crimes Act* 1900 following commencement of the *Crimes Legislation Amendment (Assaults on Frontline Emergency and Health Workers) Act* 2022 on 18 October 2022 which created new/amended offences involving assaults etc against law enforcement officers and others.

Appeals at:

- [70-040] **Section 6(3) — some other sentence warranted in law** and [70-110] **Resentencing following a successful Crown appeal** to incorporate discussion of new s 21B *Crimes (Sentencing Procedure) Act* 1999 regarding the sentencing in accordance with the patterns and practices at the time of sentencing (inserted by *Crimes (Sentencing Procedure) Amendment Act* 2022 and applying to proceedings commenced on or after 18 October 2022).

Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 52

November 2022

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 52

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Procedural and evidential matters

[The next page is 1051]

Procedural fairness

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

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

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

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

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

[1-010] Reasons for decision

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

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

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

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

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

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

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

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

Matters dealt with on indictment

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

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

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

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

Local Court

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

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

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

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

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

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

The court accepted a submission at [68] that:

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

[1-030] Published in oral form

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

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

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

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

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

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

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

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

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

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

Agreed facts

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

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

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

Later increasing a proposed sentence

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

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

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

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

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

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

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

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

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

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

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

Adjournment of sentence proceedings

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

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

[1-045] Excessive intervention by the court

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

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

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

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

[1-050] Opportunity of meeting the whole case

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

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

[1-060] Appeals

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

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

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

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

A court sentencing a person for a:

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

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

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

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

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

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

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

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Obligations of the parties

[1-200] The prosecutor

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

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

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

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

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

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

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

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

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

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

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

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

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

[1-205] Professional Rules and DPP Guidelines

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

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

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

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

Duty of disclosure

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

[1-210] The defence

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

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

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

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

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

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

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

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Sentencing procedures generally

Sentencing following a retrial

Parity

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

Guilty plea to be taken into account

Power to reduce penalties for pre-trial disclosure

Power to reduce penalties for assistance to authorities

Court to take other matters into account (including pre-sentence custody)

Victims and victim impact statements

Taking further offences into account (Form 1 offences)

Sentencing guidelines

Correction and adjustment of sentences

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

[10-400] Prior record

Section 21A(2)(d) Crimes (Sentencing Procedure) Act 1999 and the common law

Section 21A(2) (aggravating factors) *Crimes (Sentencing Procedure) Act* 1999 provides:

> The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
>
> …
>
> (d) the offender has a record of previous convictions.

Section 21A(4) provides:

> The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

The Court of Criminal Appeal sat a bench of five in *R v McNaughton* (2006) 66 NSWLR 566 to settle how prior criminal record should be used against an offender in light of the common law and the terms of s 21A(2). The following sequential propositions can be extracted from the case with reference to the principle of proportionality:

1. The common law principle of proportionality requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances: *R v McNaughton* at [15]; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348 at 354.

2. Prior offending is *not* an "objective circumstance" for the purposes of the application of the proportionality principle: *R v McNaughton* at [25]; *Veen v The Queen (No 2)*; *Baumer v The Queen* (1988) 166 CLR 51. It is not open for a court to use prior convictions to determine the upper boundary of a proportionate sentence.

3. Prior convictions are pertinent to deciding where, within the boundary set by the objective circumstances, a sentence should lie: *R v McNaughton* at [26].

4. Prior record is not restricted only to an offender's claim for leniency: *R v McNaughton* at [20]; *Veen v The Queen (No 2)* at 477. As stated in *Veen v The Queen (No 2)* at 477, prior record is also relevant:

   > … to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted.

5. There is a difficulty with the reference in *Veen v The Queen (No 2)* to prior convictions "illuminating" the offender's "moral culpability": *R v McNaughton* at [26]. Taking into account in sentencing for an offence all aspects, both

positive and negative, of an offender's known character and antecedents, is not to punish the offender again for those earlier matters: *R v McNaughton* at [28]. As Gleeson CJ, McHugh, Gummow and Hayne JJ explained in *Weininger v The Queen* (2003) 212 CLR 629 at [32]:

> A person who has been convicted of, or admits to, the commission of other offences will, all other things being equal, ordinarily receive a heavier sentence than a person who has previously led a blameless life. Imposing a sentence heavier than otherwise would have been passed is not to sentence the first person again for offences of which he or she was earlier convicted or to sentence that offender for the offences admitted but not charged. It is to do no more than give effect to the well-established principle (in this case established by statute) that the character and antecedents of the offender are, to the extent that they are relevant and known to the sentencing court, to be taken into account in fixing the sentence to be passed. Taking all aspects, both positive and negative, of an offender's known character and antecedents into account in sentencing for an offence is not to punish the offender again for those earlier matters; it is to take proper account of matters which are relevant to fixing the sentence under consideration.

6. The aggravating factor of prior convictions under s 21A(2)(d) *Crimes (Sentencing Procedure) Act* 1999 should be interpreted in a manner consistent with the proportionality principle in *Veen v The Queen (No 2)* at 477; *R v McNaughton* at [30]. Prior criminal record "cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence".

7. The reference to "aggravating factors" in s 21A(2) does not mean that s 21A(4) should be applied to deprive s 21A(2)(d) of any effect: *R v McNaughton* at [33]. The words "aggravating factors" in s 21A(2) should not be interpreted as if they were a reference only to "objective considerations". The aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law: *R v McNaughton* at [34]. Parliament has not used the word "aggravation" in its common law sense. The text of s 21A(1)(c) ("any other objective or subjective factor") and s 21A(2)(h) and (j) supports that interpretation. Thus, prior criminal record may be used in the manner set out in *Veen v The Queen (No 2)* at 477, as a subjective matter adverse to an offender via s 21A(2)(d). The statement by Howie J in *R v Wickham* [2004] NSWCCA 193 at [24], that "[o]n its face [s 21A(2)(d)] would indicate that a prior criminal record is a matter of aggravation by making the offence more serious", confines s 21A(2) to objective considerations and is therefore disapproved.

The court in *Hillier v DPP* (2009) 198 A Crim R 565 and *Van der Baan v R* [2012] NSWCCA 5 at [34] reiterated the above approach.

Requirement to state the precise manner prior record is taken into account under s 21A(2)(d)

It is incumbent upon the court to explain the manner in which the factor has been taken into account. A passing reference to s 21A(2)(d) is unsatisfactory: *R v Walker* [2005] NSWCCA 109 at [32]; *R v Tadrosse* (2005) 65 NSWLR 740 at [21]; *Doolan v R* (2006) 160 A Crim R 54 at [20]; *Adegoke v R* [2013] NSWCCA 193 at [35].

Undetected or ongoing criminal offending

If an offender has committed offences that had gone undetected and unpunished until current proceedings, or is being punished for a series of ongoing offences, the offender may have no record of prior convictions despite having committed numerous offences.

In *R v Smith* [2000] NSWCCA 140, a case which involved ongoing misappropriation of funds, the Court of Criminal Appeal said at [21]–[22]:

> [The offender] was not a first offender from the time he committed the second offence, only he had not been caught out. See also *R v Phelan* (1993) 66 A Crim R 446 at 448.
>
> In many respects the position may be compared with a sexual offender who commits a number of offences on young persons over a number of years where those offences go undetected for a long time. He cannot rely on the fact that he has no previous convictions when he comes to be sentenced for those offences. These offences are of a very different nature but, so far as relying on prior good character, it seems to me that similar considerations apply.

Gap in history of criminal offending

Where an offender's criminal record discloses a long "gap" in offending — a period in which no convictions have been recorded — this may provide a basis for inferring the offender has reasonable prospects of rehabilitation and may be unlikely to return to crime in the future: *Ryan v The Queen* (2001) 206 CLR 267 at 288. This assessment, however, still depends upon the circumstances of the individual case.

For example, in *R v Johnson* [2004] NSWCCA 76 at [29], the court held that, despite a gap in offending of over 10 years, the nature of the crimes committed both before and after the gap "could hardly inspire confidence concerning his rehabilitation or the unlikelihood of his returning to crime" and that leniency was plainly unwarranted.

Subsequent offending/later criminality

Offences in the offender's record which were committed after the date of the offence for which the offender stands for sentence may not be taken into account for the purposes of imposing a heavier sentence, but may be considered for the purposes of deciding whether the offender is deserving of leniency: *R v Hutchins* (1958) 75 WN (NSW) 75; *R v Kennedy* (unrep, 29/5/90, NSWCCA) at p 5, *R v Boney* (unrep, 22/7/91, NSWCCA); *Bingul v R* [2009] NSWCCA 239 at [69]. In *Charara v DPP* [2001] NSWCA 140 at [38], the court queried the logic of the reasoning in *R v Hutchins*:

> It is obvious that, even if taken into account only for the purpose of withholding leniency, offences committed after the offence for which sentence is imposed can result in increased punishment in the sense that the punishment is greater than it would have been in the absence of the later offences.

Charara v DPP was quoted with approval in *R v MAK* [2006] NSWCCA 381 at [58].

In *R v MAK*, the judge erred by treating as a mitigating factor the absence of any criminal record notwithstanding the commission of later sexual offences. The later offending illustrated that the conduct for which the offender stood for sentence was not an aberration but rather the start of a course of conduct: *R v MAK* at [60]. The later offending was relevant not by way of aggravating the offences but by depriving the offender of any leniency to which he might otherwise have been entitled by the fact that he had no criminal record at the time of the commission of the original offences:

R v MAK at [59]. The fact that the offender had no criminal record at the time was not considered to be a significant factor in the determination of the appropriate sentence. The court in *R v MAK* at [61] articulated the tension between the authorities as follows:

> We appreciate that less regard might be paid to later offending because at the time of the offence for which sentence is to be passed the offender has not been subject to the "formal condemnation of the law" or been given "the warning as to the future which the conviction experience implies"; see *[R v] McInerney* [(1986) 42 SASR 111] at 113 applied in *R v Bui* (2002) 137 A Crim R 220 at [27]. But in the circumstances of this case and given the seriousness of the conduct for which he was before Hidden J we do not think that the fact that MAK had not been convicted of sexual assault offences when he committed the offences against TW or TA was a basis for treating as a mitigating factor the absence of any criminal record.

Prior convictions subject of pending appeal

Prior convictions are to be taken into account even in circumstances where the convictions are the subject of a pending appeal on the basis that verdicts are not to be treated as provisional, pending their confirmation on appeal: *R v Sinanovic* [2000] NSWCCA 394 at [84].

Spent convictions

The *Criminal Records Act* 1991 implements a "scheme to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history": s 3(1).

Where a conviction becomes spent (in most cases, after a period of 10 years without further convictions) the conviction ceases to form part of the offender's criminal record. For general purposes *other than in proceedings before a court*, an offender is not required to disclose spent convictions when questioned as to his or her criminal record: s 12.

Because s 12 does not apply to proceedings before courts (s 16), a court may have regard to a spent conviction, and the general rule that the conviction need not be disclosed does not apply.

A court must take reasonable steps to ensure an offender's privacy before admitting evidence of a spent conviction: s 16(2).

Section 10 bonds

The use of the phrase "record of previous convictions" in s 21A(2)(d) excludes s 10 orders under the Act: *R v Price* [2005] NSWCCA 285 at [36]. A s 10 order does not form part of an offender's record of previous convictions. If a s 10 order is to be taken into account it must be done by applying the specific common law principles in *Veen v The Queen (No 2)* in a limited way: *R v Price* at [38].

The absence of a prior record as a mitigating factor

Section 21A(3)(e) provides that a mitigating factor to be taken into account in determining the appropriate sentence for an offence includes the offender not having any record (or any significant record) of previous convictions. However, the provision or the common law on the subject does not apply where the special rule for child sexual assault offences in s 21A(5A) applies (see further below).

Proof of prior convictions

Prior convictions may be formally proved under the provisions of the *Evidence Act* 1995, s 178. It provides that a certificate may be issued by a judge, magistrate, registrar or other proper officer of the court detailing particular convictions and sentences. Such a certificate is proof not only of the conviction or sentence itself, but also evidence of "the particular offence or matter in respect of which the conviction, acquittal, sentence or order was had, passed or made, if stated in the certificate": s 178(3).

Foreign convictions

Evidence of previous convictions in a foreign country may be taken into account in sentencing, even though the foreign procedures have not conformed to local trial methods: *R v Postiglione* (1991) 24 NSWLR 584 per Grove J at 590.

Federal offenders

A court sentencing a federal offender must take into account antecedents: s 16A(2)(m) *Crimes Act* 1914 (Cth). See also *Weininger v The Queen* (2003) 212 CLR 629.

Child offenders

A distinction needs to be made between *recording* a conviction in respect of an offence committed by a juvenile and the *admission of evidence of prior offences,* where those offences were committed by a juvenile.

Recording a conviction

Section 14(1) *Children (Criminal Proceedings) Act* 1987 deals with recording a conviction against a child. It provides that a court shall not, in respect of any offence, proceed to, or record, a conviction in relation to a child who is under the age of 16 years. However, in respect of an offence which is disposed of summarily, the court may either refuse to proceed or record a conviction in relation to a child who is of or above the age of 16 years.

Subsection (1) does not limit any power of a court to proceed to, or record, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily: s 14(2).

Admission of evidence of prior offences

Section 15 sets out the test for the admission of evidence of prior offences where those offences were committed when the offender was a child. It provides:

(1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if:

  (a) a conviction was not recorded against the person in respect of the first mentioned offence, and

  (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.

(2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.

(3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act* 1997 (being in respect of an alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

In *R v Tapueluelu* [2006] NSWCCA 113 Simpson J (Grove and Howie JJ agreeing) said at [30]:

> s 15 is intended to protect a person who has remained crime free for a period of two years from suffering the admission of evidence of offences committed outside of that period, but once it is established that the crime-free period has not existed, then evidence of any other offences, whenever committed, does become admissible, or at least they are not subject to the prohibition otherwise contained in s 15. That is the only logical way of reading s 15.

Duty of Crown to furnish antecedents

The Crown has a duty to assist the court by furnishing appropriate and relevant material touching on sentence, including the offender's criminal antecedents report. This is a well recognised obligation and it is difficult to see how the sentencing process could be properly carried through without the Crown fulfilling it: *R v Gamble* [1983] 3 NSWLR 356 at 359.

[10-410] Good character

At common law, and now under s 21A(3)(f) *Crimes (Sentencing Procedure) Act* 1999, the good character of the offender is a matter that may be taken into account in mitigation of penalty.

Special rule for child sexual offences

There is a statutory exception to this rule introduced by the *Crimes Amendment (Sexual Offences) Act* 2008. An offender's good character or lack of previous convictions is not to be taken into account as a mitigating factor for a child sexual offence if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence: s 21A(5A). Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). "Child sexual offence" is defined in s 21A(6). The exception applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments on 1 January 2009, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59 *Crimes (Sentencing Procedure) Act*.

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

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

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

Circumstances where good character may carry less weight

There are also classes of offences where good character may carry less weight than others because they are frequently committed by persons of otherwise good character. For example, it has been held that less weight may be afforded to this factor in cases of:

- drug couriers: *R v Leroy* (1984) 2 NSWLR 441 at 446–447
- dangerous driving: *R v McIntyre* (1988) 38 A Crim R 135 at 139
- drink driving: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [118]–[119]
- child pornography offences: *R v Gent* [2005] NSWCCA 370 at [64]; and white-collar offences: *R v Gent* at [59]
- child sexual assault offences where s 21A(5A) does not apply on the facts. The common law position is set out in *R v PGM* [2008] NSWCCA 172 152 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

As to adding to the above list, it has been held that there is not a sufficient basis to add offences involving possession of prohibited firearms, but the court can consider the issue of weight in an individual case: *Athos v R* (2013) 83 NSWLR 224 at [44].

The category of offences in relation to which courts have said that less weight should be given on sentence to evidence of prior good character is not closed: *R v Gent* at [61].

Ryan v The Queen (2001) 206 CLR 267, a case involving a paedophile priest, is a leading case discussing good character. What was said there is now subject to the special rule in s 21A(5A) described above. McHugh J in *Ryan v The Queen* at [23] and [25] said that when considering the element of prior good character the court must distinguish two logically distinct stages:

1. It must determine whether the prisoner is of otherwise good character. In making this assessment, the sentencing judge must not consider the offences for which the prisoner is being sentenced.
2. If a prisoner is of otherwise good character, the sentencing judge is bound to take that fact into account.

The weight that must be given to the prisoner's otherwise good character will vary according to all of the circumstances of the case: *Ryan v The Queen* at [25].

The law on good character, including *Ryan v The Queen*, is comprehensively reviewed by Johnson J in *R v Gent* at [51]. The weight to be given to good character on sentence depends, to an extent, on the character of the offence committed: *R v Smith* (1982) 7 A Crim R 437 at 442; *Ryan v The Queen* at [143].

In *R v Kennedy* [2000] NSWCCA 527 at [21]–[22] and later *Jung v R* [2017] NSWCCA 24, it was held that little or no weight may be attributed to an offender's prior good character where:

- general deterrence is important and the particular offence before the court is serious and one frequently committed by persons of good character;
- the prior good character of the offender has enabled the offender to gain a position where the particular offence can be committed. In *Jung v R*, the offender's good character prior to the offences he committed against his clients was of no real assistance to him: *Jung v R* at [56]. Good character was a precondition to his registration as a physiotherapist. The offender's position provided him access to patients and gave him the opportunity to offend: *Jung v R* at [57]–[58];
- there is a pattern of repeat offending over a significant period of time.

The otherwise good character of the offender is only one of a number of matters the court must consider and the nature and circumstances of the offence is of utmost importance: *R v Gent* at [53].

Where a person has been convicted of an offence or offences to which he or she has expressly admitted being "representative", or where there is uncontested evidence supporting such a proposition, the offender should not be given credit for being of prior good character: *R v JCW* [2000] NSWCCA 209, considered in *R v Weininger* [2000] NSWCCA 501 at [51]–[56].

The good reputation of the offender sometimes occurs only because the offences are committed in secret and the offences themselves are seldom committed "out of character" because they are premeditated: *R v Levi* (unrep, 15/5/97, NSWCCA). Gleeson CJ, however, added the following observation:

> there is a certain ambiguity about the expression "good character" in a context such as the present. Sometimes it refers only to an absence of prior convictions and has a rather negative significance, and sometimes it refers to something more of a positive nature involving or including a history of previous good works and contribution to the community.

This was referred to in the judgment of McHugh J in *Ryan v The Queen* at [27] and again in *R v Gent* at [49].

[10-420] Contrition

In *Alvares v R* [2011] NSWCCA 33 at [44], Buddin J said:

> Remorse in [a sentencing] context means regret for the wrongdoing which the offender's actions have caused because it can be safely assumed that an offender will always regret the fact that he or she has been apprehended. Remorse is but one feature of post-offence conduct upon which an offender may seek to rely as a matter which has the potential to mitigate penalty. The manner in which the issue of remorse is approached is not unique

> to either the sentencing process or to the courtroom. Indeed, it is a common feature of everyday existence. Ordinary human experience would suggest that it is only natural that a person who has committed some misdeed would wish to make the most favourable impression possible in seeking to make amends for it.

In *Roff v R* [2017] NSWCCA 208 at [25], the court held:

> An offender who is found to be remorseful, in the particular way required by s 21A(3)(i), is entitled to the benefit of that finding in mitigation, and if other things are equal, may anticipate a lesser sentence than a co-offender who has not been found to be remorseful. Thus the absence of remorse may *explain* why a heavier sentence was imposed upon the co-offender, insofar as it has the consequence that the offender has not been able to establish the mitigating factor of remorse. However, as was common ground on appeal, regard may not be had to the absence of remorse in *imposing* a heavier sentence.

The preferable course is not to quantify a discount for remorse, see **Section 21A(3)(i) — remorse shown by the offender** at [11-290].

The extent to which leniency will be afforded on the ground of contrition will depend to a large degree upon whether or not the plea resulted from a recognition of the inevitable: *R v Winchester* (1992) 58 A Crim R 345. The strength of the Crown case is relevant to the question of remorse: *R v Sutton* [2004] NSWCCA 225 at [12].

The value of a plea of guilty as evidence of contrition is not reduced as a consequence of the Crown case being strengthened by the offender's assistance to authorities. An offender who takes the course of admitting guilt at an early stage should not, because of that, lose the benefit of a subsequent plea of guilty: *R v Hameed* [2001] NSWCCA 287 at [4]–[6].

In addition to remorse, a plea of guilty may indicate acceptance of responsibility and a willingness to facilitate the course of justice: *Cameron v The Queen* (2002) 209 CLR 339. A failure to show remorse is not a justification for increasing the sentence. An offender's reluctance to identify his co-offenders in a drug case was not an indication of an absence of remorse because of the well-known reasons why such offenders might be reluctant: *Pham v R* [2010] NSWCCA 208 at [27].

See further **Ameliorative conduct or voluntary rectification** at [10-560]; **Section 21A(3)(i) — remorse shown by offender** at [11-290]; principle 5 in relation to discount and remorse in **The R v Borkowski principles** at [11-520]; and **General sentencing principles applicable** to Commonwealth offenders at [16-010].

[10-430] Age

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

Advanced age

At common law an offender's age is a relevant subjective consideration at sentence: *R v Yates* (1984) 13 A Crim R 319 at 328; [1985] VR 41 at 50. There is also a statutory basis for taking age into account age as a mitigating factor at sentence under s 21A(3)(j) *Crimes (Sentencing Procedure) Act* 1999, where "the offender was not fully aware of the consequences of his or her actions" because of the offender's age. Section 16A(2)(m) *Crimes Act* 1914 (Cth) requires the court to take into account age for

Commonwealth offenders. However, as in the case of other subjective considerations, the court must nevertheless impose a sentence which reflects the objective seriousness of the offence: *R v Gallagher* (unrep, 29/9/95, NSWCCA); *R v McLean* [2001] NSWCCA 58 at [44]; *R v Knight* [2004] NSWCCA 145 at [33]; *Des Rosiers v R* [2006] NSWCCA 16 at [32].

Advanced age may affect the type or length of penalty to be imposed, and may be relevant in combination with other factors at sentence such as health. Age and health are "relevant to the length of any sentence but usually of themselves would not lead to a gaol sentence not being imposed if it were otherwise warranted": *R v Sopher* (1993) 70 A Crim R 570 at 573. See further **Health** at [10-450].

The extent of any mitigation that results from advanced age will depend on the circumstances of the case, including the offender's life expectancy and any treatment needed: *R v Sopher* at 573. Where "serving a term of imprisonment will be more than usually onerous", age may entitle the offender to some discount on sentence: *R v Mammone* [2006] NSWCCA 138 at [45]; *R v Sopher* at 574. A court cannot overlook that each year of a sentence of imprisonment may represent a substantial proportion of the life left of an offender: *R v Hunter* (1984) 36 SASR 101 at 104. On the other hand, a life sentence may be the appropriate sentence where a person of advanced age commits very serious crimes: *R v Walsh* [2009] NSWSC 764 at [43].

Age is not a licence to commit an offence: *R v Holyoak* (1995) 82 A Crim R 502 at 507, following *R v DCM* (unrep, 26/10/93, NSWCCA). In *R v McLean*, Wood CL at CL stated at [44]:

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

Proportionality or balance remains a guiding principle. Undue emphasis cannot be placed "on the subjective factor of an offender's age, at the expense of other objective and subjective factors": *Des Rosiers v R* at [32]. The court in *R v Sopher* stated at 573:

> An appropriate balance has to be maintained between the criminality of the conduct in question and any damage to health or shortening of life.

The sentence may unavoidably extend for all or most of the offender's life expectancy in order to reflect the objective seriousness of the offence: *Goebel-McGregor v R* [2006] NSWCCA 390 at [128]. Adherence to the principle of proportionality may have the practical effect of imposing a "de facto" life sentence on a person of advanced age: *Barton v R* [2009] NSWCCA 164 at [22]. In *R v Holyoak*, Allen J stated at 507:

> It simply is not the law that it never can be appropriate to impose a minimum term which will have the effect, because of the advanced aged [sic] of the offender, that he well may spend the whole of his remaining life in custody.

However, a sentence should not be "crushing" in the sense that it "connotes the destruction of any reasonable expectation of useful life after release": *R v Yates* (1984) 13 A Crim R 319 at 326; [1985] VR 41 at 48. The Court of Appeal of Victoria later observed that "it does not follow that every sentence which justifiably deserves that

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

[10-440] Youth

See discussion of s 6 *Children (Criminal Proceedings) Act* 1987 in **Section 21A(3)(j) — the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability** at [11-300]; **Principles relating to the exercise of criminal jurisdiction** at [15-010]; **Relevance of youth at sentence** at [15-015]; and **Sentencing principles applicable to children dealt with at law** at [15-090].

[10-450] Health

There are numerous ways in which the intellectual or physical condition of an offender may have an impact on the sentencing process. It has long been the practice of the courts to take into account circumstances which make imprisonment more burdensome for offenders, including considerations pertaining to an offender's health: *R v Bailey* (1988) 35 A Crim R 458 per Lee J, applying *R v Smith* (1987) 44 SASR 587, per King CJ; *Bailey v DPP* (1988) 62 ALJR 319. It is only in relatively rare cases that the *Smith* principle is applicable: *R v Badanjak* [2004] NSWCCA 395 at [11]. Relevant factors set out in *R v Vachalec* [1981] 1 NSWLR 351 at 353 include:

- the need for medical treatment
- hardship in prison
- the likelihood of an offender's reasonable needs being met while imprisoned.

Ill-health cannot be allowed to become a licence to commit crime, nor should offenders expect to escape punishment because of the condition of their health. It is the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners and the court will not interfere: *R v Vachalec* per Street CJ; cited with approval in *R v Achurch* (2011) 216 A Crim R 152 at [135].

Generally, ill-health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his or her state of health, or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health: *R v Smith*, per King CJ at 317; *Bailey v DPP*; *R v Badanjak* at [9]–[11]; *R v Achurch* at [118]; *Pfeiffer v R* [2009] NSWCCA 145; *R v L* (unrep, 17/6/96, NSWCCA).

Serious injuries suffered by an offender as a consequence of a motor vehicle accident, for which he or she is responsible are included: *R v Wright* [2013] NSWCCA 82 at [60]. An offender's condition need not be as serious as identified in *R v Smith* or even life threatening: *R v Miranda* [2002] NSWCCA 89. For example, in *R v Miranda* at [38], the offender had been suffering from bowel cancer. The court found that the inevitable rigidity of the prison system, the need to deal with bowel movements and the extreme embarrassment to the offender on a constant basis, would make the offender's life very difficult.

In *R v Higgins* [2002] NSWCCA 407, the applicant suffered from the HIV virus. The court held that the criminal system could not give priority to the applicant's health and must tailor the sentence with an eye to the overriding concern of the welfare and protection of the community generally, as far as common humanity will allow: per Howie J at [32].

Physical disability and chronic illness

As well as the risks associated with an offender's medical condition, the realities of prison life should not be overlooked: *R v Burrell* [2000] NSWCCA 26 at [27]. This does not necessarily mean that a prison sentence should not be imposed, or that the sentence should be less than the circumstances of the case would otherwise require: *R v L* (unrep, 17/6/96, NSWCCA).

Special circumstances

Serious physical disabilities or poor health rendering imprisonment more burdensome to the offender than for the average prisoner has been held to establish special circumstances warranting a longer period on parole: *R v Sellen* (1991) 57 A Crim R 313.

Foetal alcohol spectrum disorder (FASD)

In *LCM v State of Western Australia* [2016] WASCA 164, the West Australian Court of Appeal considered the medical condition of foetal alcohol spectrum disorder (FASD) and how it could be relevant in sentencing proceedings. FASD is a mental impairment and as such engaged sentencing principles relating to an offender's mental condition: *LCM v State of Western Australia* at [121]. The case contains a comprehensive discussion of Australian and overseas cases and literature. Mazza JA and Beech J at [123] (Martin CJ agreeing at [1] with additional observations at [2]–[25]) cautioned against the use of generalisations about FASD:

> By its nature, and as its name indicates, FASD involves a spectrum of disorders. The particular disorder of an individual with FASD may be severe, it may be minor. FASD may lead to a varying number of deficits of varying intensity. Thus blanket propositions about how a diagnosis of FASD bears on the sentencing process should be avoided. Rather, attention must be directed to the details of the particular diagnosis of FASD, including the nature and extent of the specific disabilities and deficits, and how they bear upon the considerations relevant to sentence.

See also *R v MBQ; ex parte Attorney-General (Qld)* [2012] QCA 202.

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

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

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

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

An offender's mental condition can have the effect of reducing a person's moral culpability and matters such as general deterrence, retribution and denunciation have less weight: *Muldrock v The Queen* (2011) 244 CLR 120 at [53]; *R v Israil* [2002] NSWCCA 255 at [23]; *R v Henry* (1999) 46 NSWLR 346 at 354. This is especially so where the mental condition contributes to the commission of the offence in a material way: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177]; *Skelton v R* [2015] NSWCCA 320 at [141].

The High Court explained the rationale for the principle in *Muldrock v The Queen* at [53]:

> One purpose of sentencing is to deter others who might be minded to offend as the offender has done. Young CJ, [in *R v Mooney* in a passage that has been frequently cited, said this [(unrep, 21/6/78, Vic CCA) at p 5]:
>
> > "General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others."

The High Court continued at [54]:

> The principle is well recognised. It applies in sentencing offenders suffering from mental illness, and those with an intellectual handicap. A question will often arise as to the causal relation, if any, between an offender's mental illness and the commission of the offence. Such a question is less likely to arise in sentencing a mentally retarded offender because the lack of capacity to reason, as an ordinary person might, as to the wrongfulness of the conduct will, in most cases, substantially lessen the offender's moral culpability for the offence. The retributive effect and denunciatory aspect of a sentence that is appropriate to a person of ordinary capacity will often be inappropriate to the situation of a mentally retarded offender and to the needs of the community. [Footnotes excluded.]

Sentencing an offender who suffers from a mental disorder commonly calls for a "sensitive discretionary decision": *R v Engert* (1995) 84 A Crim R 67 at 67. This involves the application of the particular facts and circumstances of the case to the purposes of criminal punishment set out in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 488. The purposes overlap and often point in different directions. It is therefore erroneous in principle to approach sentencing, as Gleeson CJ put it in *R v Engert* at 68:

> as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, what is called for is the making of a discretionary decision in the light of the circumstances of the individual case, and in the light of the purposes to be served by the sentencing exercise.

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

It should not be assumed that all the mental conditions recognised by the *Diagnostic and Statistical Manual of Mental Disorders DSM (IV)*, 4th edn, American Psychiatric Association, 2000, Washington DC, attract the sentencing principle that less weight is given to general deterrence: *R v Lawrence* [2005] NSWCCA 91. Some conditions do no attract the principle. Spigelman CJ cited literature on the limitations of *DSM (IV)* at [23] and said at [24]:

> Weight will need to be given to the protection of the public in any such case. Indeed, one would have thought that element would be of particular weight in the case of a person who is said to have what a psychiatrist may classify as an Antisocial Personality Disorder.

Note: *Diagnostic and Statistical Manual of Mental Disorders DSM-5*, 5th edn, 2013 is now available.

Standard non-parole period provisions

The High Court said in *Muldrock* at [27] that: "The objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. It is to be determined wholly by reference to the nature of the offending." The snpp statutory scheme was amended following *Muldrock* see discussion at **What is the standard non-parole period?** at [7-910] and **Consideration of the standard non-parole period in sentencing** at [7-920].

Section 21A(3)(j) also refers to an offender not being aware of the consequences of his or her actions because of a disability, as a mitigating factor. Whatever it may mean, the terms of s 21A(3)(j) are restricted to the common law on the subject. See discussion of **Section 21A factors "in addition to" any Act or rule of law** at [11-300].

A causal relationship between the mental disorder or abnormality and the commission of the offence will not always result in a reduced sentence. In *R v Engert* (1996) 84 A Crim R 67 Gleeson CJ said at 71:

> The existence of such a causal relationship in a particular case does not automatically produce the result that the offender will receive a lesser sentence, any more than the absence of such a causal connection produces the automatic result that an offender will not receive a lesser sentence in a particular case. For example, the existence of a causal connection between the mental disorder and the offence might reduce the importance of general deterrence, and increase the importance of particular deterrence or of the need to protect the public.

Offender acts with knowledge of what she or he is doing

In *R v Wright* (1997) 93 A Crim R 48 at 51 the court held that it is an accepted principle of sentencing that general deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality, because such an offender is not an appropriate medium for making an example to others. However, if the offender acts with knowledge of what he or she is doing and with knowledge of the gravity of the actions, the moderation need not be great. In *R v Wright* the applicant's psychotic state was self-induced by a failure to take medication and a deliberate or reckless taking of drugs. Hunt CJ at CL stated at 52:

> by his recklessness in bringing on these psychotic episodes, [the applicant] is a continuing danger to the community, a matter which would in any event reduce — if not eradicate — the mitigation which would otherwise be given for the respondent's mental condition.

R v Wright was referred to in passing by the High Court in *Muldrock* (at fn 68). *Wright* has been applied in a number of cases including, *R v Hilder* (1997) 97 A Crim R 70 at 84; *R v Mitchell* [1999] NSWCCA 120 at [42]–[45]; *Benitez v R* [2006] NSWCCA 21 at [41]–[42]; *Taylor v R* [2006] NSWCCA 7 at [30]; *Cole v R* [2010] NSWCCA 227 at [71]–[73]; *R v Burnett* [2011] NSWCCA 276. The Crown in *Adzioski v R* [2013] NSWCCA 69 submitted without success that the judge had failed to apply *R v Wright*.

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

Intermediate appellate court checklists

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

- Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence …
- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed …
- It may mean that a custodial sentence may weigh more heavily on the person. Because the sentence will be more onerous for that person the length of the prison term or the conditions under which it is served may be reduced …
- It may reduce or eliminate the significance of specific deterrence …
- Conversely, it may be that because of a person's mental illness, they present more of a danger to the community. In those circumstances, considerations of specific deterrence may result in an increased sentence ... Where a person has been diagnosed with an Antisocial Personality Disorder there may be a particular need to give consideration to the protection of the public ...

Another factor that may be relevant is whether there is a serious risk that imprisonment will have a significant adverse effect on the offender's mental health: *R v Verdins* at [32]; *Courtney v R* at [14]–[15].

The above principles are not absolute in their terms and there is no presumption as to their application. They merely direct attention to considerations that experience has shown commonly arise in such cases: *Alkanaan v R* [2017] NSWCCA 56 at [108]. The

sentencing judge must examine the facts of the specific case to determine whether the mental condition has an impact on the sentencing process: *Aslan v R* [2014] NSWCCA 114 at [34]; *Jeffree v R* [2017] NSWCCA 72 at [31]. The principles set out in *DPP (Cth) v De La Rosa* have been applied in *Biddle v R* [2017] NSWCCA 128 at [89]–[90]; *Laspina v R* [2016] NSWCCA 181 at [39]; *Aslan v R* at [33] and *Jeffree v R* at [30].

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

As a factor relevant to rehabilitation

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ said at 71:

> there may be a case in which there is an absence of connection between the mental disorder and the commission of the offence for which a person is being sentenced, but the mental disorder may be very important to considerations of rehabilitation, or the need for treatment outside the prison system.

In *Benitez v R* [2006] NSWCCA 21 the judge erred by finding that, although the applicant had good prospects of rehabilitation, his mental condition was not a mitigating factor because it was not the cause of the commission of the offence. It is not necessary to show that it was the cause, or even a cause, of the commission of the crime: *Benitez v R* at [36], referred to in *R v Smart* [2013] NSWCCA 37 at [26], [30].

Protection of society and dangerousness

In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [20]:

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

In *Veen v The Queen (No 2)* (1988) 164 CLR 465, the majority said at 476:

> a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter.

In *R v Engert* (1995) 84 A Crim R 67 Gleeson CJ explained the problem that confronted the High Court in *Veen v The Queen (No 2)*. His Honour stated at 68:

> in the case of a particular offender, an aspect of the case which might mean that deterrence of others is of lesser importance, might, at the same time, mean that the protection of society is of greater importance. That was the particular problem being examined by the court in the case of *Veen (No 2)*. Again, in a particular case, a feature which lessens what might otherwise be the importance of general deterrence, might, at the same time increase the importance of deterrence of the offender.

R v Whitehead (unrep, 15/6/93, NSWCCA) is an example of an application of the principle. Gleeson CJ stated that it would be incongruous to treat sexual sadism as a mitigating factor in sentencing for malicious wounding, explaining:

> One reason for this is that the very condition that diminishes the offender's capacity for self-control at the same time increases the need for protection of the public referred to by the High Court in the case of *Veen v The Queen (No 2)* …

Similarly, in *R v Adams* [2002] NSWCCA 448, a case where the offender had a fascination with knives and suffered from a severe personality disorder of an antisocial type, the court held that there was a "compelling need to have regard to the protection of the community". See *Cole v R* [2010] NSWCCA 227 at [73]–[75].

However, a consideration of the danger to society cannot lead to a heavier sentence than would be appropriate if the offender had not been suffering from a mental abnormality: *Veen v The Queen (No 2)* at 477; *R v Scognamiglio* (1991) 56 A Crim R 81 at 85. In *Veen v The Queen (No 2)*, the High Court put the principle in these terms at 473:

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

Fact finding for dangerousness and risk of re-offending

It is accepted that an assessment of an offender's risk of re-offending where a lengthy sentence is imposed is necessarily imprecise: *Beldon v R* [2012] NSWCCA 194 at [53]. In *Fardon v Attorney General for the State of Queensland* (2004) 223 CLR 575 Gleeson CJ said at [12]:

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

Kirby J discussed the issue in *Fardon v Attorney General for the State of Queensland* at [124]–[125].

Findings as to future dangerousness and likelihood of re-offending do not need to be established beyond reasonable doubt: *R v SLD* (2003) 58 NSWLR 589. The Court of Criminal Appeal stated at [40]:

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

R v SLD was approved in *R v McNamara* [2004] NSWCCA 42 at [23]–[30] and earlier, in *R v Harrison* (1997) 93 A Crim R 314 at 319, the court held that a sentencing judge is not required to be satisfied beyond reasonable doubt that an offender will in fact re-offend in the future. It is sufficient, for the purpose of considering the protection of the community, if a risk of re-offending is established by the Crown: *Beldon v R* at [53].

Provisional sentencing for murder is now available for an offender aged 16 years or less at the time of the offence as was the case in *R v SLD* and also *Elliott v The Queen; R v Blessington* (2007) 234 CLR 38 at [1]. See further at [30-025].

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

[10-470] Race and ethnicity

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

The same sentencing principles are to be applied to every case, irrespective of the offender's identity or membership of an ethnic or other group. However, sentencing courts should take into account all material facts, including those facts which exist only by reason of the offender's membership of such a group: *Neal v The Queen* (1982) 149 CLR 305, per Brennan J at 326.

The High Court in *Munda v Western Australia* (2013) 249 CLR 600 at [53] reiterated the principle in *Neal v The Queen* in the context of a manslaughter committed by an Aboriginal offender who perpetrated domestic violence against his partner:

> It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide. [Footnotes omitted.]

For the purposes of applying the statutory principle of imprisonment as the last resort in s 5(1) *Crimes (Sentencing Procedure) Act* 1999, courts in NSW should not apply a different method of analysis for Aboriginal offenders as a group: *Bugmy v The Queen* (2013) 249 CLR 571 at [36]. Nor should courts in NSW take into account the "unique circumstances of all Aboriginal offenders" as relevant to the moral culpability of an individual Aboriginal offender and the high rate of incarceration of Aboriginal Australians: at [28].

R v Fernando (1992) 76 A Crim R 58

The High Court in *Bugmy v The Queen* (2013) 249 CLR 571 carefully considered the first instance case of *R v Fernando* (1992) 76 A Crim R 58. Principle (E) in *R v Fernando* (also approved by the High Court in *Bugmy v The Queen*) has been altered by s 21A(5AA) *Crimes (Sentencing Procedure) Act* 1999 (see below). In *R v Fernando*, Wood J set out the following propositions:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but, rather, to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence, which to a very significant degree go hand in hand within Aboriginal communities, are very real ones and require more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) In sentencing persons of Aboriginal descent, the court must avoid any hint of racism, paternalism or collective guilt, yet must nevertheless realistically assess the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) In sentencing an Aboriginal person who has come from a deprived background, or is otherwise disadvantaged by reason of social or economic factors, or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him or her and which is dominated by inmates and prison officers of European background, who posses little understanding of Aboriginal culture and society or of the offender's own personality.

R v Fernando gives recognition to social disadvantage at sentence and is not about sentencing Aboriginal offenders: *Bugmy v The Queen* at [37].

The High Court observed in *Bugmy v The Queen* that many of the propositions in *R v Fernando* address the significance of intoxication at the time of the offence and that the decision correctly recognises that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor: *Bugmy v The Queen* at [37]. However, since *Bugmy v The Queen*, s 21A(5AA) *Crimes (Sentencing Procedure) Act* was enacted. It abolishes intoxication as a mitigating factor at the time of the offence (see further below at [10-480]).

The High Court in *Bugmy v The Queen* at [38] affirmed the proposition in *R v Fernando* that a lengthy term of imprisonment might be particularly burdensome for an Aboriginal offender because of his or her background or "lack of experience of European ways". These observations reflect the statement by Brennan J in

Neal v The Queen at 326 that the same sentencing principles are to be applied irrespective of the offender's ethnic or other group. However, a court can take into account facts which exist only by reason of the offender's membership of such a group. Wood J was right to recognise in *R v Fernando* the problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them: *Bugmy v The Queen* at [40].

[10-475] Deprived background of an offender

The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way: *Bugmy v The Queen* (2013) 249 CLR 571 at [40]. The effects of profound deprivation do not diminish over time and should be given "full weight" in determining the sentence in every case: *Bugmy v The Queen* at [42]–[43]. A background of that kind may leave a mark on a person throughout life and compromise the person's capacity to mature and learn from experience. It remains relevant even where there has been a long history of offending: at [43]. Attributing "full weight" in every case is not to suggest that it has the same (mitigatory) relevance for all the purposes of punishment: *Bugmy v The Queen* at [43]. Social deprivation may impact on those purposes in different ways. The court in *Bugmy v The Queen* explained at [44]–[45]:

> An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.
>
> The point was made by Gleeson CJ in [*R v*] *Engert* [(1995) 84 A Crim R 67 at [68]] in the context of explaining the significance of an offender's mental condition in sentencing …

An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence: *Bugmy v The Queen* at [37].

Not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence: *Bugmy v The Queen* at [40].

In *Ingrey v R* [2016] NSWCCA 31 at [34]–[35], the court held that in using the word "may", the plurality in *Bugmy v The Queen* at [40] were not saying that a consideration of this factor is optional; it was a recognition that there may be countervailing factors, such as the protection of the community, which might reduce or eliminate its effect.

A deprived background is not, however, confined to that of violence and alcohol abuse in an immediate family context. The principle has been applied where an offender had a supportive immediate family background but he had an association with peers and extended family who were part of the criminal milieu: *Ingrey v R* at [38]–[39] (see further below).

In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that

background: *Bugmy v The Queen* at [41]. In *Tsiakas v R* [2015] NSWCCA 187, the court held that the offender's solicitor should have given consideration to obtaining a psychiatric or psychological report, which could have addressed the applicant's background. The sentence proceedings were, however, conducted on the premise of a background of disadvantage: *Tsiakas v R* at [74]. The failure to obtain a report did not occasion a miscarriage of justice in the circumstances of the case because "something of real significance was required to be presented … to be capable of materially affecting the outcome of the sentencing hearing": *Tsiakas v R* per Beech-Jones J at [67].

Specific applications of the principle of Bugmy v The Queen

In *Ingrey v R*, the offender's particular disadvantage was not the circumstances of his immediate upbringing by his mother and father, but his association with peers and extended family who were part of the criminal milieu. They regularly exposed the offender from a young age to criminal activity: *Ingrey v R* at [27]. Such circumstances would have compromised the offender's capacity to mature and learn from experience and amounted to social disadvantage of the kind envisaged in *Bugmy v The Queen*: *Ingrey v R* at [35]–[39].

In *Kentwell v R (No 2)* [2015] NSWCCA 96, the offender succeeded in establishing that he had a deprived background. He was removed from his Aboriginal parents at 12 months of age and adopted out to a non-Aboriginal family, where he grew up deprived of knowledge about his family and culture. The court applied *Bugmy v The Queen* and held that the offender's moral culpability was reduced, as the social exclusion he experienced was capable of constituting a background of deprivation explaining recourse to violence: *Kentwell v R (No 2)* at [90]–[93]. This was supported by a body of evidence demonstrating that social exclusion could cause high levels of aggression and anti-social behaviours.

In *IS v R* [2017] NSWCCA 116, evidence established that the offender had been exposed to parental substance abuse and familial violence before being placed under the care of the Minister at the age of seven, after which time he moved around considerably. The sentencing judge accepted that the principle in *Bugmy v The Queen* was engaged and also found that the offender had favourable rehabilitation prospects. However, it was implicit in the conclusions of the judge, concerning general deterrence and the need for community protection, that the judge failed to give any weight to the reduction in moral culpability made explicit in the earlier findings: *IS v R* at [58]. Campbell J said "… the weight that would ordinarily be given in offending of this serious nature to personal and general deterrence and the protection of society 'to be moderated in favour of other purposes of punishment' and, in particular, his 'rehabilitation': *Bugmy* at 596 [46]": *IS v R* at [65].

The court in *Kiernan v R* [2016] NSWCCA 12 held that the sentencing judge did not err in dealing with the offender's criminal history and subjective case notwithstanding the deprived and depraved circumstances of the latter's upbringing. Hoeben CJ at CL said at [60]: "the applicant's criminal history, together with the effect on him of his deprived and abusive childhood, meant that his Honour had to take into account the protection of the community …"

The plurality in *Bugmy v The Queen* did not talk in terms of general deterrence having no effect, but referred to that factor being "moderated in favour of other

purposes of punishment" depending upon the particular facts of the case: *Kiernan v R* at [63]. The CCA in *Kiernan v R* concluded (at [64]) the judge understood and applied *Bugmy v The Queen*.

In *Drew v R* [2016] NSWCCA 310, it was accepted that the offender suffered economic and social deprivation during childhood, both while residing with his family on an Aboriginal reserve until the age of 14 and then after being placed in a boys' home to learn a trade. However, limited weight could only be given to any allowance for the offender's deprived background under the principles in *Bugmy v The Queen* per Fagan J at [18] (Gleeson JA agreeing at [1]). Even having regard to his background of social disadvantage, the fact remained that the offender was a recidivist violent offender with convictions for matters of violence stretching over 35 years, committed against 13 separate victims, including domestic partners and the offender's son. The needs of specific deterrence and community protection loomed large: *Drew v R* at [1], [17], [125].

[10-480] Intoxication

Section 21A(5AA) *Crimes (Sentencing Procedure) Act* 1999 provides:

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

Section 21A(6) provides that self-induced intoxication has the same meaning as it has in Pt 11A *Crimes Act*.

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

Before the introduction of s 21A(5AA), an offender's intoxication, whether by alcohol or drugs, could explain an offence but ordinarily did not mitigate the penalty: *Bourke v R* [2010] NSWCCA 22 at [26]. The NSWCCA endorsed (in *GWM v R* [2012] NSWCCA 240 at [82] and *ZZ v R* [2013] NSWCCA 83 at [110]) the statement in *Hasan v The Queen* [2010] VSCA 352 at [21] that:

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

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

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

> The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence. As Wood J explained, drunkenness does not usually operate by way of excuse or to mitigate an offender's conduct. However, his Honour recognised that there are Aboriginal

> communities in which alcohol abuse and alcohol-related violence go hand in hand. His Honour considered that where an offender's abuse of alcohol is a reflection of the environment in which he or she was raised it should be taken into account as a mitigating factor. … [Footnotes excluded.]

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

As an equivocal or aggravating factor

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

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

Where intoxication involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence, it may also be an aggravating factor: *R v Fletcher-Jones* at 387; *Mendes v R* [2012] NSWCCA 103 at [73]–[75], [83]. In *R v Mitchell* [2007] NSWCCA 296 at [29], the court said that:

> violence on the streets especially by young men in company and under the influence of alcohol or drugs is all too common and needs to be addressed by sentences that carry a very significant degree of general deterrence.

The court in *GWM v R* [2012] NSWCCA 240 at [75] held that voluntary or self induced intoxication by an offender where he committed an aggravated child sexual assault was not relevant to assessing the gravity of the offence except as a possible aggravating factor.

See also **Assault, wounding and related offences** at [50-150].

Where the offender becomes intoxicated voluntarily and embarks on a course that is criminal conduct, such as dangerous driving, the reason that the offender was intoxicated is generally irrelevant: *Stanford v R* at [53]. This is due to the fact that "the offence is not concerned with punishing the drinking of alcohol but with the driving thereafter": *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305 at [142]; see also *R v Doyle* [2006] NSWCCA 118 at [30]. Subsequent offences will be treated more seriously: *Stanford v R* at [54].

Where intoxication is the basis upon which an aggravated version of dangerous driving is charged, it should not be double-counted as an aggravating factor: *R v Doyle*

at [25]. The same double counting problem would arise if a court took into account an offender's intoxication as an aggravating factor where it is an ingredient of the crime such as the offence of assault causing death while intoxicated under s 25A(2) *Crimes Act*. For intoxication and dangerous driving, see also [18-340] in **Dangerous driving and navigation**.

The approach of having regard to intoxication when applying the standard non-parole statutory scheme needs to be considered in light of the recently re-enacted s 54A(2) *Crimes (Sentencing Procedure) Act*. See further the discussion at **What is the standard non-parole period?** at [7-910].

[10-485] Drug addiction

Drug addiction is not a mitigating factor: *R v Valentini* (1989) 46 A Crim R 23 at 25. The observations in the armed robbery guideline case of *R v Henry* (1999) 46 NSWLR 346 at [273] as to the relevance of an offender's drug addiction in assessing the objective criminality of an offence and as being a relevant subjective circumstance (explained further below) do not appear to be directly affected by the enactment of s 21A(5AA).

Spigelman CJ made clear in *R v Henry* at [206] that an offender's drug addiction is not a matter in mitigation:

> I attach particular significance to the impact that acknowledgment of drug addiction as a mitigating factor would have on drug use in the community. Thesentencing practices of the courts are part of the anti-drug message, which the community as a whole has indicated that it wishes to give to actual and potential users of illegal drugs. Accepting drug addiction as a mitigating factor for the commission of crimes of violence would significantly attenuate that message. The concept that committing crimes in order to obtain moneys to buy an illegal substance is in some way less deserving of punishment than the commission of the same crime for the obtaining of monies for some other, but legal, purpose is perverse.

Addiction is "not an excuse" but a choice

Very many offences of armed robbery are committed because of an addiction to drugs. However, drug addiction is not an excuse: *R v Henry* per Wood CJ at CL at [236]; see also principle (a) at [273].

Self-induced addiction at an age of rational choice establishes moral culpability for the predictable consequences of that choice: *R v Henry* at [185]. Per Spigelman CJ at [197]:

> drug addicts who commit crime should not be added to the list of victims. Their degree of moral culpability will vary, just as it varies for individuals who are not affected by addiction.

Persons who choose a course of addiction must be treated as choosing its consequences: *R v Henry* per Spigelman CJ at [198]. Not all persons who suffer from addiction commit crime, therefore to do so involves a choice: per Spigelman CJ at [200]; per Wood CJ at CL at [250]. There is no warrant in assessing a crime that was induced by the need for funds to feed a drug addiction, as being at the lower end of the scale of moral culpability or lower than other perceived requirements for money (such as gambling):

R v Henry per Spigelman CJ at [202]. The proposition has been followed and applied repeatedly: *Toole v R* [2014] NSWCCA 318 at [4]; *R v SY* [2003] NSWCCA 291; *Jodeh v R* [2011] NSWCCA 194.

Further, the decision to persist with an addiction, rather than to seek assistance, is also a matter of choice: *R v Henry* per Spigelman CJ at [201]. Those who make such choices must accept the consequences: *R v Henry* per Wood CJ at CL at [257], with which Spigelman CJ agreed.

In *R v Henry*, Wood CJ at CL set down a number of general principles in relation to the sentencing of offenders with drug addictions: at [273].

To the extent that an offence is motivated by a need to acquire funds to support a drug habit, such a factor may be taken into account as a factor relevant to objective criminality. This may be done in so far as it assists the court to determine:

- the extent of any planning involved in the offence, and its impulsivity
- the existence (or otherwise) of an alternative reason in aggravation of the offence (for example whether it was motivated to fund some other serious criminal venture), and
- the state of mind (or capacity) of the offender to exercise judgment: *R v Henry* per Wood CJ at CL, principle (b) at [273].

The use of alcohol or drugs by an offender may be relevant in sentencing for one or more of a number of reasons. For example, it may be that a crime such as armed robbery has been committed in order to provide money for a drug addiction. The origin or extent of a drug addiction (or any attempts to overcome it) may be relevant subjective considerations where such an addiction might:

- impact upon the prospects of recidivism
- impact upon the prospects of rehabilitation
- suggest that the addiction was attributable to some other event for which the offender was not primarily responsible — thereby removing personal choice (for example, where it arose as the result of a medical prescription or where it occurred at a very young age, or in a person whose mental or intellectual capacity was impaired, so that their ability to exercise appropriate judgment or choice was incomplete); or
- justify special consideration in the case of offenders at the "cross-roads" (*R v Osenkowski* (1982) 30 SASR 212; (1982) 5 A Crim R 394): *R v Henry* per Wood CJ at CL, principle (c) at [273].

While it can be said that the objective of rehabilitation needs to be taken into account along with the other objectives of retribution and deterrence, it is but one aspect of sentencing. Such offenders should not be placed in a special category for sentencing: *R v Henry* per Wood CJ at CL at [268], [269] and [270].

Addiction attributable to some other event

Since *R v Henry* there have been instances where offenders have sought to bring their addiction within the third bullet point above.

Drug addiction at a very young age

Drug addiction may be a relevant as a subjective circumstance where the origin of the addiction might suggest that it was not a matter of personal choice but was attributable to some other event for which the offender was not primarily responsible, for example, where it occurred at a very young age or the person's mental or intellectual capacity was impaired: *R v Henry* per Wood CJ at CL at [273] with whom Spigelman CJ agreed at [201].

There is, however, no principle of law that a drug addiction that commenced when an offender was young will always operate as a mitigating factor: *Hayek v R* [2016] NSWCCA 126 at [75]. It may be a mitigating factor in the particular circumstances of an individual case: *Hayek v R* at [80].

In *Brown v R* [2014] NSWCCA 335, the offender became addicted to a number of drugs from the age of 9 or 10. The court held that this was an age at which his drug addiction could not be classified as a personal choice and the offender was entitled to some leniency. The court adopted the remarks of Simpson J in *R v Henry* at [336] and [344]. If the drug addiction has its origins in circumstances such as social disadvantage; poverty; emotional, financial or social deprivation; poor educational achievement; or, sexual assault, it is appropriate for rehabilitative aspects of sentencing to assume a more significant role than might otherwise be the case: see *Brown v R* at [26]–[29].

Similarly, in *SS v R* [2009] NSWCCA 114, the court held that the applicant's addiction to cannabis from 11 years of age could be regarded as a matter of mitigation: *SS v R* at [35], [103]. However, in *R v Gagalowicz* [2005] NSWCCA 452 at [33], the judge erred by treating the 16-year-old offender's drug addiction as a matter in mitigation. The offender's history did not suggest he became involved in drugs other than as a result of a choice he made as a teenager and he persisted with the addiction thereafter: *R v Gagalowicz* at [38] citing *R v Henry* at [201]. In *Fitzpatrick v R* [2010] NSWCCA 26 at [23], the sentencing judge acknowledged that the offender used drugs at a very young age. The CCA held that the factor was attributed sufficient weight in the sentencing exercise: *Fitzpatrick v R* at [25].

An addiction which commenced when the offender was 14 years of age because of peer pressure and in an attempt to "'look cool' to impress a girl" but which continued for three decades, did "nothing to mitigate the applicant's crime": *Hayek v R* per Wilson J at [83] and see [80]–[81], [41]. To the contrary, the "long term unaddressed addiction to prohibited drugs could have legitimately increased the sentence": *Hayek v R* at [84].

Self-medication

In some circumstances, an addiction to drugs used to overcome psychological or physical trauma may be a factor in mitigation. In *Turner v R* [2011] NSWCCA 189, the court held that an addiction to prescription opioid medication following an accident was a matter that mitigated the offence. The case fell squarely within the exception to the principle that drug dependence is not a mitigating factor: *Turner v R* at [58]. However, in many instances self-medication will not fall within the exception: *Bichar v R* [2006] NSWCCA 1 at [25]; *R v SY* [2003] NSWCCA 291 at [62]; *R v CJP* [2004] NSWCCA 188. In *Jodeh v R* [2011] NSWCCA 194, the court held that the

offender's illicit drug use to manage pain caused by a motorbike accident did not fall into the "rare category" of circumstances in which an addiction to drugs will be a mitigating factor: *Jodeh v R* at [28]–[29]. Similarly, in *Bichar v R*, the court observed at [23]–[24]:

> It is very often the case that there will be some life experience or some psychological or psychiatric state that causes, or at least contributes to, the use of drugs. One will almost always be able to assume that without that experience or without the disturbed psychological or psychiatric state the person would have been unlikely to have resorted to illegal drugs.
>
> … the fact that some traumatic or injurious event results in a person using drugs does not mean that drug addiction is a matter of mitigation …

Compulsory Drug Treatment Correctional Centre Act 2004

The *Compulsory Drug Treatment Correctional Centre Act* 2004 amended the *Drug Court Act* 1998, the *Crimes (Sentencing Procedure) Act* 1999 and the *Crimes (Administration of Sentences) Act* 1999 to provide for imprisonment by way of compulsory treatment detention for drug-dependent recidivist offenders. The courts listed under the *Drug Court Regulation* have a duty to ascertain whether an offender sentenced to imprisonment might be eligible and, if so, to refer the offender to the Drug Court: s 18B *Drug Court Act* 1998. See R Dive, "Compulsory drug treatment in gaol — a new sentencing issue" (2006) 18(7) *JOB* 51.

The Drug Court determines eligibility, makes compulsory drug treatment orders and supervises participants.

[10-490] Hardship to family/dependants

The general principle is that hardship to family and dependants is an unavoidable consequence of a custodial sentence and is not a mitigating consideration, unless such hardship is "wholly", "highly" or "truly" exceptional. In *R v Edwards* (1996) 90 A Crim R 510, Gleeson CJ said at 515:

> There is nothing unusual about a situation in which the sentencing of an offender to a term of imprisonment would impose hardship upon some other person. Indeed, as senior counsel for the respondent acknowledged in argument, it may be taken that sending a person to prison will more often than not cause hardship, sometimes serious hardship, and sometimes extreme hardship, to another person. It requires no imagination to understand why this is so. Sentencing judges and magistrates are routinely obliged, in the course of their duties, to sentence offenders who may be breadwinners of families, carers, paid or unpaid, of the disabled, parents of children, protectors of persons who are weak or vulnerable, employers upon whom workers depend for their livelihood, and many others, in a variety of circumstances bound to result in hardship to third parties if such an offender is sentenced to a term of full-time imprisonment.

The passage was quoted with approval in *Hoskins v R* [2016] NSWCCA 157 at [63].

It is not uncommon for hardship to be caused to third parties by sentencing a person to prison. Judges and magistrates are required in the course of their duty to sentence offenders to imprisonment where incarceration will cause hardship to third parties: *R v Scott* (unrep, 27/11/96, NSWCCA).

It is only where circumstances are "highly exceptional" — and where it would be inhumane to refuse to do so — that hardship to others in sentencing can be taken into account: *R v Edwards*. Hardship to employees did not justify the suspension of a sentence in *R v MacLeod* [2013] NSWCCA 108 at [49] where full-time imprisonment should have been imposed. The evidence neither established "extreme hardship" nor extraordinary circumstances: *R v MacLeod* at [50]–[52], [55].

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

As a matter of logic or even mercy, hardship to a member of an offender's family does not have a lesser claim upon a court's attention than hardship to a person for whom the offender was a paid carer. A case does not become "wholly exceptional" simply because the person affected by the hardship was not a member of the offender's family: *R v Edwards* (1996) 90 A Crim R 510 at 516 per Gleeson CJ; *R v Chan* [1999] NSWCCA 103 at [39].

If a custodial sentence is required but there is evidence of extreme hardship, a court may take into account the extraordinary features of the case by suspending the sentence of imprisonment, shortening the term of sentence and/or reducing the non-parole period: *Dipangkear v R* [2010] NSWCCA 156 at [34]; *R v MacLeod* at [49]. Each case will depend on the seriousness of the crime, whether there is a need for deterrence and the nature and degree of the impact of the sentence upon the third person: *Dipangkear v R* at [34].

Pregnancy, young babies

The fact that a person to be sentenced is pregnant or the mother of young baby is a relevant factor to be taken into account: *R v Togias* (2001) 127 A Crim R 23; *R v SLR* [2000] NSWCCA 436; *HJ v R* [2014] NSWCCA 21 at [67], [73].

R v Togias involved the application of s 16A(2)(p) *Crimes Act* 1914 (Cth), which requires a court to have regard to "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants": *HJ v R* at [69].

In NSW, there are no facilities for mothers and babies to live together whilst an offender is in any juvenile detention facility. However, in the adult correctional system, there is a facility at Jacaranda House where mothers in custody can have their baby with them: *HJ v R* at [63]. Accordingly, in an appropriate case where a juvenile offender is pregnant at the time of sentence, a court may make an order with the effect that the offender be transferred to an adult correctional facility: *R v SLR*.

A court is required to have regard to the fact that an offender is the mother of a young baby, the effect of separation on her and the degree to which it may impact upon the hardship of her custody: *HJ v R* at [76]. If exceptional circumstances can be shown, it is relevant to have regard to any effect of full time custody on the offender's child: *HJ v R* at [76]. Evidence of hardship and/or increased risk to the offender should she be imprisoned was lacking: *R v Togias* at [11]–[13], [57]–[58].

Where an offender has a young baby a court may consider declining to make an order that the offender serve her term of imprisonment in juvenile detention: *HJ v R* at [76].

[10-500] Hardship of custody

Protective custody

The hardship that will be suffered by a prisoner in gaol because he or she will be in protective custody, is a matter to be taken into account in sentencing. Protective custody can only be taken into account in mitigation in the determination of the sentence or in the finding of special circumstances where there is evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21]. See further discussion in **Mitigating factors** at [17-570].

It was well recognised in Australia that every year in protective custody is equivalent to a longer loss of liberty under the ordinary conditions of imprisonment: *AB v The Queen* (1999) 198 CLR 111 per Kirby J at [105]; *R v Howard* [2001] NSWCCA 309; *R v Rose* [2004] NSWCCA 326; *R v Patison* [2003] NSWCCA 171 at 136–137. However, these authorities must give way to the evidence based approach of the more recent authorities beginning with *R v Durocher-Yvon* (2003) 58 NSWLR 581. It was held in *Clinton v R* [2009] NSWCCA 276 per Howie J at [25] that it is not:

> appropriate for a court to adopt a mathematical formula to convert time spent in protection to an equivalent period spent in the general prison population. There are too many variables and there is not always a significant difference between being on protection and being part of the normal prison population. There may well be benefits derived from being on protection that offset some of the deprivations.

It was held in *R v Chishimba* [2011] NSWCCA 212 at [13]–[14] that it was erroneous for the sentencing judge to take a mathematical approach to the issue of protective custody and to accept that every year in protective custody should be regarded as equivalent to 18 months in general custody.

Safety of prisoners

In *York v The Queen* (2005) 225 CLR 466, the High Court set aside a partially suspended sentence of imprisonment that had been substituted by the Court of Appeal of the Supreme Court of Queensland and reinstated a wholly suspended sentence that had been imposed by the sentencing judge. The majority of the court had held that it would be bowing to pressure from criminals if the offender were able to avoid a custodial sentence because of the risk to her safety while in prison. However, the High Court made it clear that the safety of a prisoner is a relevant consideration in determining an appropriate sentence. In the particular circumstances of this case, there was persuasive evidence before the sentencing judge that the prisoner could not be protected in the Queensland prison system. McHugh J said at [31] that:

> the duty of sentencing judges is to ensure, so far as they can, that they do not impose sentences that will bring about the death of or injury to the person sentenced.

At [32] McHugh J further said:

> Where a threat exists — as it often does in the case of informers and sex offenders — recommendations that the sentence be served in protective custody will usually discharge the judge's duty. Here the learned sentencing judge concluded on persuasive evidence that no part of the Queensland prison system could be made safe for Mrs York. That created a dilemma for the sentencing judge. She had to balance the safety of Mrs York against the powerful indicators that her crimes required a custodial sentence. In wholly suspending Mrs York's sentence, Atkinson J appropriately balanced the relevant, even

> if conflicting, considerations of ensuring the sentence protected society from the risk of Mrs York re-offending and inflicting condign punishment on her on the one side and ensuring the sentence protected her from the risk of her fellow inmates committing serious offences against her on the other side. In suspending the sentence, the learned judge made no error of principle. Nor was the suspended sentence manifestly inadequate.

It is the responsibility of the authorities, not the courts, to ensure the safety of prisoners in custody. The fact that prisoners will have to serve their sentences in protection is a very important consideration to be taken into account in fixing the length of the sentence but it should not usually be permitted to dictate that the custody should not be full time: *R v Burchell* (1987) 34 A Crim R 148 at 151; *R v King* (unrep, 20/8/91, NSWCCA).

Former police

In *R v Jones* (1985) 20 A Crim R 142, Street CJ said at 153:

> In view of his past work in the Police Force, it is also to be recognised that the time that he must necessarily spend in custody will involve a greater degree of hardship than might otherwise be the case. It is well-known that a period of imprisonment for a former member of the Police Force can at times be fraught with a considerable degree of harassment being directed against the prisoner by his fellow prisoners. This can lead, as it has in this case, to the need for the prisoner being held in protection in conditions inferior to those affecting the general prison population.

See also *R v Patison* [2003] NSWCCA 171 at [38].

It cannot be assumed that an offender who is a police officer will serve his or her imprisonment in protective custody: *Hughes v R* [2014] NSWCCA 15 at [54]. It is necessary to point to evidence to that effect: *Hughes v R* at [54].

Foreign nationals

Any person who comes to Australia specifically to commit a serious crime has no justifiable cause for complaint when he or she is incarcerated in this country where the language is foreign to him or her and he or she is isolated from outside contact: *R v Chu* (unrep, 16/10/98, NSWCCA) per Spigelman CJ. See also *R v Faneite* (unrep, 1/5/98, NSWCCA) per Studdert J and *R v Sugahara* (unrep, 16/10/98, NSWCCA) per McInerney J.

The fact that the prisoner is a foreigner with limited English and has no friends or family who are able to visit will make their imprisonment harsher than would be the case for the ordinary prisoner. This requires some, though not much recognition: *R v Huang* [2000] NSWCCA 238 per Adams J at [19]. A failure to have regard to this factor does not mean the sentence(s) exhibit error: *Yang v R* [2007] NSWCCA 37. However, if there is no evidence before the sentencing judge as to the offender's experience as a prisoner, it is not a consideration that requires substantial recognition but it is relevant to the question whether a sentence is manifestly excessive: *Nguyen v R* [2009] NSWCCA 181 at [27].

[10-510] Entrapment

Many of the commonly quoted cases in this area of the law occurred prior to the High Court judgment of *Ridgeway v The Queen* (1995) 184 CLR 19. Legislation that permits and regulates controlled operations by the police has been enacted at both the State and federal levels.

Entrapment is not a defence in Australia. At sentence it involves the idea that an accused person has been induced to commit a crime which he or she would not have committed, or would have been unlikely to commit: *R v Sloane* (1990) 49 A Crim R 270 per Gleeson CJ at 272–273.

In *R v Taouk* (1992) 65 A Crim R 387 at 404, Badgery-Parker J, Clarke JA and Abadee J agreeing, said that, when it comes to sentence, the question is not whether the accused can show that but for the involvement, encouragement or incitement by police, he or she would not have committed the crime; but, rather, whether, in all circumstances of the case, the involvement of the police was such as to diminish the culpability of the accused.

Similarly, in *R v Leung* (unrep, 21/7/94, NSWCCA) per Hunt CJ at CL, the court echoed the principle that entrapment is relevant to mitigation of penalty, but each case must be judged on its own facts. The prisoner's culpability will be regarded as diminished if the offence may not have been committed had the police not facilitated it. There is no entrapment if the prisoner was prepared to sell drugs to whomever asked for them.

It is legitimate to discount a sentence by reason of the circumstances in which the offender was led to commit the offence, including dealings with an undercover police officer acting as agent provocateur. This may be a ground for mitigation, but each case must be judged on its own facts: *R v Scott* (unrep, 30/6/83, NSWCCA) per Lee J; *R v Rahme* (1991) 53 A Crim R 8 at 13; *R v Reppucci* (1994) 74 A Crim R 353.

It is permissible for a sentencing judge to regard, as a mitigating factor, the fact that an offender engaged in criminal acts to a greater extent than would have happened if no assistance was provided by the authorities. This principle applies to a case where it is likely that, without assistance, the offender would have made little progress in carrying out the enterprise: *R v Thomson* [2000] NSWCCA 294 per James J at [80].

On the other hand, the fact that authorities have allowed criminal conduct to continue is not a circumstance of mitigation: *R v Thomson* per James J at [84].

Role of undercover police officers

Similarly, in *R v Anderson* (1987) 32 A Crim R 146, Kirby P was of the view that in assessing the culpability of an offender, the role played by undercover police may be relevant to the sentence to be imposed. His Honour observed that there is a fine line between the passive yet properly inquisitive conduct of an undercover police agent approached by a drug dealer to become involved in an illegal drug offence and a positive inducement by that agent to such an offence or an encouragement which lifts the offence from a minor category to a major one.

[10-520] Extra-curial punishment

A court can take into account "extra-curial punishment", that is, "loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his [or her] offence or at least by reason of the offender having committed the offence": *Silvano v R* [2008] NSWCCA 118 at [29]. It is "punishment that is inflicted upon an offender otherwise than by a court of law": *R v Wilhelm* [2010] NSWSC 378 per Howie J at [21]. The court in *Silvano v R*

at [26]–[33] collected several authorities on the subject. The weight to be given to any extra-curial punishment will depend on all the circumstances of the case and in some cases, extra-judicial punishment attracts little or no weight: *R v Daetz* (2003) 139 A Crim R 398 at [62].

A court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property, or persons extracting retribution or revenge for the commission of an offence: *R v Daetz* at [62]; *R v Allpass* (1993) 72 A Crim R 561 at 566–567.

A failure by the judge to take into account the injury suffered by the offender when the injuries did not result in "a serious loss or detriment" was held not to be erroneous in *Mackey v R* [2006] NSWCCA 254 at [23]. Where injuries inflicted on an offender in prison by other prisoners were not inflicted for the purpose of punishing the offender for having committed the offence(s), they could not be considered extra-curial punishment: *Silvano v R* at [34]. A sufficient nexus is not established by simply asserting that the injuries inflicted in prison would not have been suffered had the offender not been arrested and remanded in custody as a result of having committed the offences: *Silvano v R* at [35].

See further **Dangerous Driving** at [18-380]. Registration on the Child Protection Offender Register is not extra-curial punishment: see **Sexual Offences Against Children** at [17-570].

Self-inflicted injuries

The sentencing principles concerning extra-curial punishment extend to unintentional self-inflicted injuries received in the course of the offence but not if an offender deliberately self-inflicts injuries: *Christodoulou v R* [2008] NSWCCA 102 at [41]–[42]. In *Cvetkovic v R* [2013] NSWCCA 66, the court held the sentencing judge did not err by following *Christodoulou v R* and in not placing much weight on the harm the offender had done to himself. In dismissing an application for special leave to the High Court, Bell and Gageler JJ stated that leave to appeal was not warranted on the basis that *Christodoulou v R* was wrongly decided. The ground had "insufficient prospects of success" in the circumstances of the case: *Cvetkovic v The Queen* [2013] HCASL 131 at [5]. Note, however, that reasons for refusing an application for special leave create no precedent and are not binding on other courts: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [112], [119].

Similarly, in *Betts v R* [2015] NSWCCA 39 at [35], the court held the injuries suffered by the offender were either deliberately self-inflicted, or inflicted by the victim at the offender's instigation and intimately bound up with his criminal conduct. Therefore, the injuries could not be considered extra-curial punishment for the purposes of sentencing.

Public humiliation

The High Court, in *Ryan v The Queen* (2001) 206 CLR 267, expressed conflicting views on the question of whether public humiliation may be considered as a mitigating factor on sentence. Kirby and Callinan JJ were each of the view that adverse publicity and public opprobrium suffered by a paedophile priest could properly be taken into account: *Ryan v The Queen* at [123] and [177] respectively. Hayne J disagreed with

Kirby and Callinan JJ: *Ryan v The Queen* at [157]. McHugh J expressed the view that public opprobrium and stigma did not entitle a convicted person to leniency, as such an approach would be "an impossible exercise" and appear to favour the powerful: *Ryan v The Queen* at [52]–[53]. McHugh J also considered it incongruous that the worse the crime, and the greater the public opprobrium, the greater the reduction might have to be: *Ryan v The Queen* at [55].

It is accepted in NSW that where public opprobrium reaches such a proportion that it has a physical or psychological effect on the person, it may properly be considered by the sentencing court: *R v Allpass* (1993) 72 A Crim R 561; *Kenny v R* [2010] NSWCCA 6; *Duncan v R* [2012] NSWCCA 78 at [28]; *BJS v R* [2013] NSWCCA 123 at [228]–[231].

In *R v Obeid (No 12)* [2016] NSWSC 1815, no such physical or psychological effect was shown: at [102].

In upholding a Crown appeal, the court in *R v King* [2009] NSWCCA 117 took into account a degree of extra-curial punishment the offender suffered as a result of the manifestly inadequate sentence (at [71]), acknowledging that "[p]ublic outrage at the sentence was turned upon the offender … Had a sentence that appropriately denounced his conduct been imposed on him, he would have been spared further public humiliation and anger": at [69].

Media coverage

The proceedings in *R v Wran* [2016] NSWSC 1015, according to the sentencing judge, attracted significant public attention and inaccurate reporting. Harrison J said "the publication of [the] egregious articles warrants the imposition of a sentence that takes account of Ms Wran's continuing exposure to the risk of custodial retribution, the unavoidable spectre of enduring damage to her reputation and an impeded recovery from her ongoing mental health and drug related problems": *R v Wran* at [79].

Very limited weight was nonetheless attributed to extensive media coverage as a form of extra-curial punishment in *R v Obeid (No 12)* at [103]. This was because the offending involved the abuse of a public position; the media reports did not sensationalise facts; and, the case concerned an issue of public importance (political corruption). Therefore, it seemed "incongruous that the consequential public humiliation should mitigate the sentence": *R v Obeid (No 12)* at [101]. *R v Obeid (No 12)* can be contrasted with *R v Wilhelm* [2010] NSWSC 378 per Howie J at [16], where the offender's reputation was "destroyed by the allegations made against him and the reporting of those allegations in the media".

Professional ramifications

There is a divergence of authority on the question of whether the professional ramifications experienced by an offender as a result of their offending can be taken into account as extra-curial punishment.

Wood J (as he then was) said in *R v Hilder* (unrep, 13/5/93, NSWCCA) that a court could "take into account the loss of reputation, and employment and also where appropriate, the loss of a pension or superannuation benefits". This statement cannot apply to Members of Parliament to the extent that s 24C applies: see **Section 24C — disqualification of parliamentary pension** at [11-355]. In *Ryan v The Queen* (2001)

206 CLR 267 at [54], McHugh J expressed the view that "[i]t is legitimate … to take into account that the conviction will result in the offender losing his or her employment or profession or that he or she will forfeit benefits such as superannuation". None of the other Justices directly addressed the issue.

In *Einfeld v R* [2010] NSWCCA 87, the court noted there was an element of uncertainty as to whether the concept of extra-curial punishment "includes legal consequences of a kind which flow directly from the conviction or the sentence, such as disqualification from holding an office, remaining in an occupation or holding a licence": *Einfeld v R* at [86]. However, their Honours found that the fact the offender would lose his practising certificate and be struck off the roll of solicitors could be taken into account: *Einfeld v R* at [95]. Such a conclusion was consistent with earlier authority: *Oudomvilay v R* [2006] NSWCCA 275 at [19]; *R (Cth) v Poynder* (2007) 171 A Crim R 544 at [86].

In *R v Zerafa* [2013] NSWCCA 222, the court accepted the professional ramifications of the offending were a mitigating factor, but found them to be of limited effect because the respondent "must have … anticipated … that an inevitable consequence, if his offending [defrauding the Commonwealth] were discovered … would be that he would be struck off the role of chartered accountants": *R v Zerafa* at [92]. See also *Kenny v R* [2010] NSWCCA 6 at [48]–[50]. This was similar to the approach taken in *FB v R* [2011] NSWCCA 217, which concerned a high school teacher convicted of aggravated sexual assault of a student. The court noted at [156] that the "respondent must have known that his sexual pursuit of pupils in his care would sooner or later bring his professional career to an end". In *DPP v Klep* [2006] VSCA 98 at [18], the Victorian Court of Appeal accepted that the loss of either a profession, office or trade as a direct result of the offending was a factor to be borne in mind but it was not a substitute for the punishment required by law.

Other authorities have declined to find professional ramifications were sufficient to constitute extra-curial punishment. In *Greenwood v R* [2014] NSWCCA 64 at [35], Hoeben CJ at CL (Bathurst CJ and Adams J agreeing) held that "[l]oss of employment, no matter what the employment, would be an inevitable consequence in almost every circumstance where a person was convicted of an offence of this kind [sexual and indecent assault]". In *Kearsley v R* [2017] NSWCCA 28 at [76], the court held that extra-curial punishment cannot arise when the loss of employment is a natural consequence of a conviction. The applicant's irrevocable loss of his medical career and good standing in the community were not "the superadded or unexpected result of something that is not reasonably associated with the fact of his conviction and sentence": *Kearsley v R* at [77].

The relevance and/or weight to be given to professional ramifications as extra-curial punishment may be influenced by whether the offence was connected to, or committed in the course of, the offender's occupation. The Victorian Court of Appeal has endorsed such an approach, observing in *R v Talia* [2009] VSCA 260, that "[t]here seems … to be a distinct difference between a disqualification resulting from criminal conduct in the course of the employment … and criminal conduct remote from that employment but having that consequence … [i]n the latter class of case there might be a considerably stronger argument in favour of the incidental loss of employment being treated as a circumstance of mitigation": *R v Talia* at [28].

[10-530] Delay

Delay by itself is not mitigatory but it may be in combination with other relevant sentencing factors favourable to the offender: *R v Donald* [2013] NSWCCA 238 at [49] citing *Scook v R* [2008] WASCA 114. Each case depends on its own circumstances: *R v V* (1998) 99 A Crim R 297. Street CJ's statement, in *R v Todd* [1982] 2 NSWLR 517 at 519, is the starting point:

> Moreover, where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course he comes up for sentence on subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

R v Todd was endorsed in *Mill v The Queen* (1988) 166 CLR 59 (at 66) as being a just and principled approach.

For a discussion of delay as a mitigating factor in the specific context of child sexual assault offences, see **Mitigating factors** at [17-570].

Rehabilitation during a period of delay

Rehabilitation undertaken by an offender during a period of delay may effect the sentencing exercise by lessening the significance of general deterrence: *PH v R* [2009] NSWCCA 161 per Howie J at [32]. For example, in *Thorn v R* [2009] NSWCCA 294 at [57], the court found that during the delay of 7 years between the commission of 55 fraud offences and the sentence "the applicant has not only completely reformed but he has also matured from a misguided youth with a compulsion to gamble into a well-respected citizen with honest and steady employment on the threshold of marriage". Similarly, in *R v Ware* (unrep, 9/7/97, NSWCCA), Gleeson CJ said evidence of substantial rehabilitation might be regarded as mitigating. See also the discussion in *R v Pickard* [2011] SASCFC 134 at [95].

The cause of delay is relevant to determining the weight to be given to rehabilitation. Genuine rehabilitation undertaken during a period of delay caused by the offender absconding is not to be entirely ignored, but cannot be given the same significance as in a case where the delay was due to circumstances outside the offender's control: *R v Shore* (1992) 66 A Crim R 37 at 47. In comparison, in *Thorn v R*, the offender had admitted the offences in 2003 and prosecution was not commenced until late 2008, with no explanation for the period of delay, which was in no way the fault of the offender.

Rehabilitation undertaken by an offender during a period of delay may also be a factor weighing in favour of the exercise of an appellate court's residual discretion to dismiss a Crown appeal: see also **The residual discretion to intervene** at [70-100].

Delay — state of uncertain suspense

The "state of uncertain suspense" (Street CJ in *R v Todd* at 519) — where an offender experiences a delay following the initial intervention of the authorities — is a matter

which can entitle an offender to an added element of leniency: *R v Blanco* [1999] NSWCCA 121 at [11], [16] and *Mill v The Queen* at 64–66). Where an offender relies on such a mitigating factor, they must establish it on the balance of probabilities: *Sabra v R* [2015] NSWCCA 38 at [47], applying *The Queen v Olbrich* (1999) 199 CLR 270. In *Sabra v R*, the court held that the sentencing judge had erred in tending to the view that although the offender had evidently suffered anxiety and concern over the delay, greater consequences needed to be established before the delay could be taken into account: *Sabra v R* at [44]–[46].

An additional consideration is the desirability for prosecuting authorities to act promptly where there is evidence of serious criminality. It is in the public interest that those who are suspected of serious crime be brought to justice quickly, particularly where there is a strong case against them: *R v Blanco* at [17]. However, it is not permissible to reduce a sentence merely as a means of expressing disapproval at neglectful or dilatory conduct by the State. The focus is overwhelmingly on the consequences of the delay on the offender, no matter what the explanation for it: *R v Donald* at [49].

However, the principle does *not* apply to a state of suspense or uncertainty experienced by an offender who remains silent and hopes that his or her offending will remain undetected: *R v Spiers* [2008] NSWCCA 107 at [37]–[38] (applying *R v Hathaway* [2005] NSWCCA 368 at [43]; *R v Shorten* [2005] NSWCCA 106 at [19]). An offender should not be rewarded for his successful concealment of his offending: *R v Kay* [2004] NSWCCA 130 at [33].

Relevance of onerous bail conditions during delay

Lapse of time on bail brought about as a consequence of the proceedings, such as a delay of three years during which time the offender had been subject to restrictions on liberty, may properly be regarded as a penal consequence that can be taken into account in sentencing: *R v Keyte* (unrep, 26/3/86, NSWCCA) per Street CJ. What weight is to be given to such a matter will vary from case to case, depending upon what other factors need to be considered and what sentence is required in the particular case to address the purpose of punishment: *R v Fowler* [2003] NSWCCA 321 at [242]. See also *R v Khamas* [1999] NSWCCA 436 and *R v Jajou* [2009] NSWCCA 167 concerning delay and the relevance of onerous reporting requirements while on bail.

Circumstances in which delay may not entitle an offender to leniency

Delay will not usually be a mitigating factor where it is caused by the problems associated with detecting, investigating or proving the offences and the period of the delay is reasonable in the circumstances: *Scook v R* per Buss JA quoted with approval in *R v Donald* [2013] NSWCCA 238 at [49].

Delay will not operate to the benefit of an offender where advantage is taken of the opportunity afforded by his/her liberty during that period to reoffend: *R v DKL* [2013] NSWCCA 233 at [46]. Nor does it apply to the sentencing for murder where there was no uncertainty as to the sentence the prisoner would receive if found guilty because of the provisions of s 19 *Crimes Act* 1900, as it then stood: *R v King* (1998) 99 A Crim R 288. It is the fact of imprisonment, rather than the length of the sentence, which will be of greatest significance in punishing the offender and denouncing his conduct: *R v Moon* [2000] NSWCCA 534 per Howie J at [81].

Sentencing practice after long delay

Section 21B *Crimes (Sentencing Procedure) Act* 1999 provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied *at the time the offence was committed*, not at the time of sentencing: s 21B(2). These provisions apply to proceedings commenced on or after 18 October 2022: see *Crimes (Sentencing Procedure) Amendment Act* 2022. Prior to the insertion of s 21B, unless the offence was a child sexual offence (see s 25AA(1) (rep)), the court was required to sentence in accordance with the sentencing patterns and practices existing *at the time of the offence*: *R v MJR* (2002) 54 NSWLR 368. Section 25AA(1) continues to apply to proceedings commenced from 31 August 2018 to 17 October 2022.

However, s 21B(3) provides that a court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the *time the offence was committed* if:

(a) the offence is not a child sexual offence; and

(b) the offender establishes that there are exceptional circumstances.

Section 21B(3) has not yet been judicially considered however, where it applies, reference to the common law that had developed prior to the insertion of s 21B may provide some guidance. Where an offender is exposed to a harsher punishment and sentencing regime than that which existed at the time of the offence, and if an authentic and credible body of statistical material exists that is capable of reconstructing what would have been done previously, then the approach outlined in *R v Shore* (1992) 66 A Crim R 37 should be adopted: *R v MJR* (2002) 54 NSWLR 368. In *R v Shore* Badgery-Parker J (with whom Mahoney JA and Hunt CJ at CL agreed) at [42] approved the trial judge's statement of his approach as follows:

> In my opinion I should, so far as I am able to do so, seek to impose upon the offender, a sentence appropriate not only to then applicable statutory maxima but also to then appropriate sentencing patterns. That is by no means easy, but in my view I must endeavour to do so.

In the absence of such statistical material, the court is constrained to take the non-statistical approach, as described by Howie J in *R v Moon* [2000] NSWCCA 534 at [70], and approved by Sully J in *R v MJR* at [107]:

> The nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence are crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed. Even after taking into account the subjective features of the offender and all the other matters relevant to sentencing, such as individual and general deterrence, the sentence imposed should reflect the objective seriousness of the offence … and be proportional to the criminality involved in the offence committed … Whether the sentence to be imposed meets these criteria will be determined principally by a consideration of the nature of the criminal conduct as viewed against the maximum penalty prescribed for the offence.
>
> When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the Court

> will by approaching the sentencing task in this way effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time.

This view was endorsed by Spigelman CJ, who held that the sentencing practice at the time of the commission of the offences should be applied, rather than the higher severity that had been adopted since that time. According to Spigelman CJ, the propositions he put forward in *R v PLV* (2001) 51 NSWLR 736 at [94], concerning the difficulty in determining what the court would have done many years before, and in making such an artificial and inappropriate distinction, were incorrect. Instead, he found at [31]:

> it is "out of keeping" with the provisions of s 19 of the *Crimes (Sentencing Procedure) Act* 1999, for this court to refuse to take into account the sentencing practice as at the date of the commission of an offence when sentencing practice has moved adversely to an offender.

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

[10-540] Restitution

It is usual for the court to have regard to whether, and the extent to which, there has been restitution to those affected by the crime, but this will not carry much weight in the way of mitigation if the prospects of adequate compensation for loss is remote: see, for example, *R v Kilpatrick* [2005] NSWCCA 351 at [37]. There is an extensive discussion of the authorities in *Job v R* [2011] NSWCCA 267 at [32]–[49]. See further, in the context of fraud offences, in **Mitigating factors** at [20-000].

There should be evidence of any claims that restitution has been effected if such a consideration is to be taken into account as a mitigating factor. In *R v Johnstone* [2004] NSWCCA 307 at [37]–[38].

The principal restitution power is found in s 43 *Criminal Procedure Act* 1986, and relates to all offences and all courts: s 3 Sch 2 *Crimes Act* 1900. Section 43 provides:

> **43 Restitution of property**
>
> (1) In any criminal proceedings in which it is alleged that the accused person has unlawfully acquired or disposed of property, the court may order that the property be restored to such person as appears to the court to be lawfully entitled to its possession.
>
> (2) Such an order may be made whether or not the court finds the person guilty of any offence with respect to the acquisition or disposal of the property.
>
> (3) Such an order may not be made in respect of:
>
> (a) any valuable security given by the accused person in payment of a liability to which the person was subject when the payment was made, or
>
> (b) any negotiable instrument accepted by the accused person as valuable consideration in circumstances in which the person had no notice, or cause to suspect, that the instrument had been dishonestly come by.

Availability

Pursuant to s 43, a court may order property to be restored to the person lawfully entitled to possession, where a person is accused under the *Crimes Act* of unlawfully acquiring or disposing of property: s 43(1) *Criminal Procedure Act* 1986.

Restitution orders may not be made in respect of certain valuable securities or negotiable instruments: s 43(3).

Any order under s 10 *Crimes (Sentencing Procedure) Act* 1999 has the effect of a conviction for a restitution order: s 10(4) *Crimes (Sentencing Procedure) Act* 1999.

As to restitution in respect of an offence taken into account, see below.

Effect of acquittal

Restitution orders may be made irrespective of whether or not the person is found guilty of an offence with respect to the acquisition or disposal of the property in question: s 43(2) *Criminal Procedure Act* 1986.

Subject matter

The section does not expressly deal with the proceeds of the original property where those proceeds are in the hands of the defendant. However, it has been held, in *R v Justices of the Central Criminal Court* (1860) 18 QBD, that when examining similar legislation, proceeds are capable of being the subject of orders for restitution. The court in that case also said that a restitution order could be made against an agent, where the agent holds the proceeds on behalf of the defendant. It has been held that a court can make an order for restitution against the property or proceeds, but it cannot do both: *R v London County Justices* (1908) 72 JP 513.

Where an offender is charged with offences in relation to certain goods, and all those goods have been recovered, it is an incorrect exercise of judicial discretion to order the offender to make restitution out of money taken from him or her at the time of apprehension that relates to other offences with which the offender is not charged.

Restitution for offences taken into account

Where a person is found guilty of an offence, the sentencer may, with the consent of the person, take into account other offences to which guilt is admitted under s 33 *Crimes (Sentencing Procedure) Act* 1999: see **Taking Further Offences into Account (Form 1 Offences)** at [13-200].

A restitution order may be made in respect of such offences as though the person had been convicted: s 34 *Crimes (Sentencing Procedure) Act* 1999.

Third party interests

Where any valuable security has been paid by a person liable to payment thereof, or, being a negotiable instrument, has been taken for a valuable consideration without notice or cause to suspect that the same had been dishonestly come by, a court may not order restitution: s 43(3) *Criminal Procedure Act* 1986.

Beyond this provision, civil law regulates the rights of third parties.

There is a general principle that restitution orders should only be made in very clear cases: *Stamp v United Dominions Trust (Commercial) Ltd* [1967] 1 QB 418.

Where third party interests are affected, the third party is entitled to be heard before the restitution order is made: *R v Macklin* (1850) 5 Cox CC 216; *Barclays Bank Ltd v Milne* [1963] 1 WLR 1241.

It seems settled that, where there are serious competing claims between third parties, then criminal courts should not exercise their discretion to make restitution orders.

Good behaviour bonds and restitution

For the power of the court to impose restitution in addition to orders under s 10 *Crimes (Sentencing Procedure) Act* 1999 (which include good behaviour bonds), see **Availability**, above.

As to the power to impose restitution as a condition of either a s 10 dismissal or a s 12 suspended sentence, both those provisions are silent.

Victims Rights and Support Act 2013

The Victims Support Scheme was established by the *Victims Rights and Support Act* 2013 for the provision of support for victims of acts of violence: see Pt 4. Concerning the eligibility for support, see Pt 4 Div 2. Provision for restitution by offenders is covered by Pt 5 Div 2. The Commissioner of Victims Rights has a discretion to make a provisional order for restitution by an offender: s 59.

Children's Court

The Children's Court has such power as magistrates generally to award restitution: *Children (Criminal Proceedings) Act* 1987, s 27. Specifically, nothing in the list of penalties which the court may impose limits its power to make orders for restitution under s 43 *Criminal Procedure Act* 1986: s 33(5)(c) *Children (Criminal Proceedings) Act* 1987.

[10-550] Conditional liberty

See also commentary for **Section 21A(2)(j) — the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence** at [11-150].

The courts have long recognised that the commission of an offence whilst the offender is subject to a form of conditional liberty is an aggravating factor at sentence: *Porter v R* [2008] NSWCCA 145 at [86]; *Maxwell v R* [2007] NSWCCA 304 at [27]; *RC v DPP* [2016] NSWSC 665 at [39]; *R v Tran* [1999] NSWCCA 109 at [15]; *Kerr v R* [2016] NSWCCA 218 at [71]–[72]. It is not necessary that the offence(s) committed is similar to the one that curtails the offender's liberty: *Frigiani v R* [2007] NSWCCA 81 at [26].

Whilst it is an aggravating subjective factor it is not to be considered as part of the objective seriousness of the crime: *Simkhada v R* [2010] NSWCCA 284 at [25]; *Martin v R* [2011] NSWCCA 188 at [7], [17]. See [7-910] **What is the standard non-parole period?** under the subheading "Other factors".

It is considered an abuse of freedom "by taking the opportunity to commit further crimes": *R v Richards* (1981) 2 NSWLR 464 at 465. Where the offender breaches a non-custodial sentencing option there is a "very real risk that the whole regimen of non-custodial sentencing options will be discredited": *R v Morris* (unrep, 14/7/95, NSWCCA), where the offender had committed offences which amounted to a breach of the recognizance.

Impact on rehabilitation

The commission of an offence whilst an offender is subject to conditional liberty can cast doubt on an offender's rehabilitation and has been described as a "[b]etrayal of the opportunity for rehabilitation" which should be "regarded very seriously": *R v Tran* [1999] NSWCCA 109 at [15] citing *R v Vranic* (unrep, 7/5/91, NSWCCA) and *R v McMahon* (unrep, 4/4/96, NSWCCA); *R v Cicekdag* [2004] NSWCCA 357 at [53]; *R v Fernando* [2002] NSWCCA 28 at [42].

Status of an escapee

It has been held that a person who commits offences while an escapee from lawful custody is, in terms of offence seriousness, in a scale above that of a person who commits offences while on conditional liberty on bail or parole: *R v King* [2003] NSWCCA 352 at [38].

On appeal

A failure of the Crown to draw the sentencing judge's attention to the fact that the offender was on conditional liberty (parole) at the time of committing the offence makes it difficult for the Crown to rely on that fact on an appeal against sentence: *R v Amohanga* [2005] NSWCCA 249 at [119].

As to the consequences of breaching various forms of conditional liberty, see further **Variation and revocation of CRO conditions** at [4-730] and **Breaches of non-custodial community-based orders** at [6-600]ff.

[10-560] Ameliorative conduct or voluntary rectification

A court may take into account the post-crime ameliorative conduct of the offender as a matter in mitigation of sentence: *Thewlis v R* [2008] NSWCCA 176 at [4]–[5], [40], [43]. The conduct is not relevant to the assessment of the objective gravity of the offence since by that time the offence is complete: at [38]. Simpson J said at [43]:

> it ought now be accepted that, in an appropriate case … conduct of the kind engaged in by the applicant warrants some consideration in mitigation of sentence. (I stress that I have twice referred to "mitigation of sentence". That is different from, and not to be confused with, mitigation of the offence: the latter concept is concerned with the evaluation of objective gravity.).

After two knife attacks, Thewlis immediately disclosed to neighbours what he had done, arranged for an ambulance to be called, and waited for police to arrive. Prompt medical attention played a role in saving the life of one of the victims: at [4], [33]. Simpson J also said ameliorative conduct does not come within s 21A(3)(i) *Crimes (Sentencing Procedure) Act* 1999 (remorse shown by the offender for the offence) and is different from voluntary disclosure of guilt (*R v Ellis* (1986) 6 NSWLR 603).

Spigelman CJ in *Thewlis v R* relied upon the judgment of Hunt CJ at CL in *R v Phelan* (1993) 66 A Crim R 446. Spigelman CJ said at [4]–[5]:

> The reasons in *Phelan* were clearly appropriate in the context of a crime involving the loss of money. They, however, emphasise that something special is required for ameliorative conduct to result in mitigation of sentence. Merely taking a step to redress the effect of a crime on victims is not of itself enough.

> In the present case that special additional element is to be found in the fact that it does appear that the applicant's immediate recognition of his wrongful act played a significant, and quite possibly decisive role, in saving the victim's life.

Price J said at [46]: "I agree with Simpson J. I also agree with the observations made by Spigelman CJ".

[10-570] Deportation

Under the *Migration Act* 1958 (Cth) an offender who is not an Australian citizen (non-citizen offender) may be deported for various reasons, including as a consequence of a sentence imposed for an offence. The impact of potential or actual deportation on non-citizen offenders varies, with some only being in Australia to commit an offence, while others are permanent residents with significant family, financial and community ties in Australia.

The Minister has a broad discretion to cancel a non-citizen offender's visa on character grounds but in some cases must cancel their visa:

1. **Discretionary cancellation provisions**: the Minister may cancel a non-citizen offender's visa, if they suspect the person does not pass the character test and it is in the national interest to do so: s 501(2). There are a number of reasons why someone may not pass the character test, including that they have a substantial criminal record: ss 501(6), (7). The offender may seek a merit review of any such decision: s 500(1)(b).
2. **Mandatory cancellation provisions**: the Minister must cancel a non-citizen offender's visa if they are serving a full-time sentence of imprisonment in a custodial institution and have been sentenced to at least 12 months imprisonment or have a conviction for a child sexual offence: s 501(3A) (mandatory cancellation). The offender may make an application to the Minister to revoke a mandatory cancellation: s 501CA(4).

In NSW, the long-standing position is that actual or potential deportation is a matter for the Executive government and is not relevant to sentencing: *R v Pham* [2005] NSWCCA 94 at [13]–[14]; *Kristensen v R* [2018] NSWCCA 189 at [34].

Sentencing structure including setting a non-parole period

A court cannot alter an otherwise appropriate sentence to avoid or facilitate a non-citizen offender's deportation: *Hanna v EPA* [2019] NSWCCA 299 at [65]; *R v Fati* [2021] SASCA 99 at 61. In *R v MAO; ex parte A-G* [2006] QCA 99 at [16]–[18], the Queensland Court of Appeal found the judge erred in imposing a sentence of 11 months 3 weeks for child sexual offences so the sentence did not "endanger" the offender's residency status. In *R v Fati* the judge found there was "no doubt" a sentence of imprisonment was required, but fully suspended the sentence to facilitate the offender's immediate deportation. The South Australian Court of Appeal found it was wrong in principle to impose a "lesser sentence than is appropriate": at [61]–[69].

Deportation is also not generally a relevant consideration in determining whether or not to fix a non-parole period: *The Queen v Shrestha* (1991) 173 CLR 48 at 71; see also *He v R* [2016] NSWCCA 220 at [23]; *R v Calica* [2021] NTSCFC 2 at [77]–[78], [140].

A primary benefit of parole is the offender's rehabilitation. A non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole. Deane, Dawson and Toohey JJ said at 71:

> This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country.

It is also impermissible to consider potential deportation in determining the length of the non-parole period even though deportation means the offender will not be supervised: *R v Pham* at [14]; *He v R* at [23]; *AC v R* [2016] NSWCCA 107 at [79]. Similarly, an offender who is likely to be deported should not be denied a finding of special circumstances if they would otherwise qualify for such a finding: *R v Mirzaee* [2004] NSWCCA 315 at [21].

Deportation as a matter in mitigation

There are two lines of conflicting authority in Australia as to whether the prospect of deportation can be taken into account as a factor in mitigation.

In NSW and Western Australia the longstanding approach is that it is an error to take the prospect of deportation into account as a mitigating factor. As previously noted, deportation is a matter for the Commonwealth Executive government, and as "the product of an entirely separate legislative and policy area of the regulation of our society" cannot be taken into account on sentence: *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311; *R v Pham* at [13]–[14]; *Khanchitanon v R* [2014] NSWCCA 204 at [28]; *Kristensen v R* at [35]. This includes taking deportation into account as extra-curial punishment: *Khanchitanon v R* at [28].

This approach has not changed since the mandatory cancellation provisions were introduced in 2014. In *Kristensen v R*, Payne JA (RA Hulme and Button JJ agreeing) said at [34]–[35]:

> I see no reason based on the … [mandatory cancellation] provisions … to adopt any different approach to sentencing in New South Wales... True it is that the statute now has an automatic application, subject to safeguards and ultimately to review. The possibility of deportation was not, in *Mirzaee*, *Pham* and *AC*, a relevant consideration on sentence, even in fixing the offender's non-parole period. Deportation was a live issue in cases such as the present under the migration law prior to 2014. After the amendment, deportation remains a matter for the Commonwealth Executive government, subject to review within the Constitutional structure.

Further, the migration status of a non-citizen offender who has been residing in Australia is often unresolved until well after imposing the sentence so there may be practical difficulties quantifying the prospects of deportation: *Hanna v EPA* at [97]. If the longstanding position in NSW is to be challenged, the evidence about the applicant's likely deportation needs to be more than a speculative possibility: *Kristensen v R* at [35]. In *Kristensen v R* potential deportation was considered speculative because the mandatory cancellation of the offender's visa was subject to the offender applying to have it revoked. See also *R v Calica* at [157].

In NSW, there appears to be some divergence of views about taking deportation into account where it gives rise to exceptional circumstances due to the impact on

non-citizen offenders' family and dependents: *Hanna v EPA* at [85]–[88]; see also **Hardship to family/dependents** at **[10-490]**. In *R v Kwon* [2004] NSWCCA 456 at [48] (which predates *R v Pham*) and *R v Hull* [2016] NSWSC 634 at [130]–[131], Supreme Court judges, at first instance, took the prospect of deportation into account in such circumstances. *R v Hull* was referred to with approval in the dissenting judgment in *R v Shortland* [2018] NSWCCA 34 at [124] (Hidden AJ), but in *Hanna v EPA* at [85]–[87] doubt was cast on the correctness of these decisions.

In Victoria, Queensland, South Australia and the Northern Territory, the prospect of deportation may be taken into account in mitigation as a personal circumstance of a non-citizen offender if there is an assessable risk of deportation and evidence it would cause hardship. This is on the basis that either the prospect of deportation may make incarceration more burdensome or, upon release the offender may lose an opportunity to settle in Australia: *Guden v R* (2010) 28 VR 288 at [25]–[29]; *Da Costa Junior v R* [2016] VSCA 49 at [24]–[25], [52]–[53]; *R v UE* [2016] QCA 58 at [16]; *R v Schelvis* [2016] QCA 294 at [72]; *R v Norris* [2018] 3 Qd R 420 at [31]–[45]; see also *Kroni v The Queen* [2021] SASCFC 15 at [227]–[229]; *R v Calica* at [156].

These different "state-based" approaches have been followed regardless of whether the offences are State or Commonwealth offences: *Sentencing of federal offenders in Australia — a guide for practitioners*, Commonwealth Director of Public Prosecutions, February 2021, at [371]ff. See for example, *Kristensen v R*. However, in obiter remarks, the five-judge Bench in *R v Calica* said deportation should be able to be taken into account in mitigation in appropriate Commonwealth cases: at [155].

Cases involving non-citizen offenders may give rise to issues of hardship in custody due to isolation: see further **Hardship in Custody**, **Foreign Nationals** at **[10-500]**.

Structuring a sentence

Actual or potential deportation is irrelevant to structuring a sentence: *R v Pham* at [13].

A court cannot alter an otherwise appropriate sentence to avoid the effect of the *Migration Act*: *Hanna v EPA* at [65]. In *R v MAO; ex parte A-G* at [16]–[18], the Queensland Court of Appeal found the judge erred in imposing a sentence of 11 months 3 weeks for serious child sexual offences so the sentence did not "endanger" the offender's residency status.

Nor should a court discriminate against non-citizen offenders in determining whether they can be eligible for release on parole: *The Queen v Shrestha* (1991) 173 CLR 48 at 71; see also *He v R* at [23]. A primary benefit of parole is the rehabilitation of an offender. A non-citizen offender who is likely to be deported should also receive this benefit by being eligible for release on parole. Deane, Dawson and Toohey JJ said at 71:

> This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country.

It is also impermissible to consider potential deportation in determining the length of the non-parole period even though deportation means the offender will not be supervised by NSW Community Corrections: *R v Pham* at [14]; *He v R* at [23]; *AC v R* at [79].

Similarly, an offender who is likely to be deported should not be denied a finding of special circumstances if they would otherwise qualify for such a finding: *R v Mirzaee* at [21].

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

[11-000] Section 21A — aggravating and mitigating factors

Section 21A(1)–(5C) *Crimes (Sentencing Procedure) Act* 1999 (NSW) provides as follows:

21A Aggravating, mitigating and other factors in sentencing

(1) **General**

In determining the appropriate sentence for an offence, the court is to take into account the following matters:

(a) the aggravating factors referred to in subsection (2) that are relevant and known to the court,

(b) the mitigating factors referred to in subsection (3) that are relevant and known to the court,

(c) any other objective or subjective factor that affects the relative seriousness of the offence.

The matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

(2) **Aggravating factors**

The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the victim was a police officer, emergency services worker, correctional officer, judicial officer, council law enforcement officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work,

(b) the offence involved the actual or threatened use of violence,

(c) the offence involved the actual or threatened use of a weapon,

(ca) the offence involved the actual or threatened use of explosives or a chemical or biological agent,

(cb) the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance,

(d) the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences),

(e) the offence was committed in company,

(ea) the offence was committed in the presence of a child under 18 years of age,

(eb) the offence was committed in the home of the victim or any other person,

(f) the offence involved gratuitous cruelty,

(g) the injury, emotional harm, loss or damage caused by the offence was substantial,

(h) the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

(i) the offence was committed without regard for public safety,

(ia) the actions of the offender were a risk to national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 of the Commonwealth),

(ib) the offence involved a grave risk of death to another person or persons,

(j) the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

(k) the offender abused a position of trust or authority in relation to the victim,

(l) the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim’s occupation (such as a person working at a hospital (other than a health worker), taxi driver, bus driver or other public transport worker, bank teller or service station attendant),

(m) the offence involved multiple victims or a series of criminal acts,

(n) the offence was part of a planned or organised criminal activity,

(o) the offence was committed for financial gain,

(p) without limiting paragraph (ea), the offence was a prescribed traffic offence and was committed while a child under 16 years of age was a passenger in the offender’s vehicle.

The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.

(3) **Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

(a) the injury, emotional harm, loss or damage caused by the offence was not substantial,

(b) the offence was not part of a planned or organised criminal activity,

(c) the offender was provoked by the victim,

(d) the offender was acting under duress,

(e) the offender does not have any record (or any significant record) of previous convictions,

(f) the offender was a person of good character,

(g) the offender is unlikely to re-offend,

(h) the offender has good prospects of rehabilitation, whether by reason of the offender’s age or otherwise,

(i) the remorse shown by the offender for the offence, but only if:

(i) the offender has provided evidence that he or she has accepted responsibility for his or her actions, and

(ii) the offender has acknowledged any injury, loss or damage caused by his or her actions or made reparation for such injury, loss or damage (or both),

(j) the offender was not fully aware of the consequences of his or her actions because of the offender’s age or any disability,

(k) a plea of guilty by the offender (as provided by section 22),

(l) the degree of pre-trial disclosure by the defence (as provided by section 22A),

(m) assistance by the offender to law enforcement authorities (as provided by section 23).

(4) The court is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so.

(5) The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.

(5A) **Special rules for child sexual offences**

In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

(5AA) **Special rule for self-induced intoxication**

In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

(5B) Subsections (5A) and (5AA) have effect despite any Act or rule of law to the contrary.

(5C) For the purpose of subsection (2)(p), an offence under any of the following provisions is taken to have been committed while a child under 16 years of age was a passenger in the offender’s vehicle if the offence was part of a series of events that involved the driving of the vehicle while the child was a passenger in the vehicle:

(a) section 13(2), 15(4), 18B(2), 18D(2), 22(2), 24D(1) or 29(2) of the *Road Transport (Safety and Traffic Management) Act* 1999

(b) clause 16(1)(a), (b) or (c), 17(1) or 18(1) of Schedule 3 to the *Road Transport Act* 2013.

[11-010] Legislative background and purpose of s 21A

When it was originally enacted, s 21A did not separately list aggravating and mitigating factors.

Section 21A does not purport to codify the law in the area of the aggravating and mitigating factors that can be taken into account at sentence: *Porter v R* [2008] NSWCCA 145 at [87].

Section 21A(1)(c) — any other objective or subjective factors

Section 21A(1)(c) provides that in determining an appropriate sentence for an offence the court is to take into account "any other objective or subjective factor that affects the relative seriousness of the offence". The language employed is very broad: *R v Jammeh* [2004] NSWCCA 327 at [23].

A judge can, therefore, take account of the effect of the crime on the victim via ss 3A(g) and 21A(1)(c): *R v Jammeh* [2004] NSWCCA 327 at [23]. This is separate and different from applying s 21A(2)(g), which requires "the injury, emotional harm, loss or damage caused by the offence" to be "substantial" (discussed below): *R v Jammeh* at [23]. The "matters" referred to in s 21A(1) extend beyond the aggravating and mitigating factors tabled in s 21A(2) and s 21A(3): *Van Can Ha v R* [2008] NSWCCA 141 at [4].

[11-020] General observations about s 21A(2)

The aggravating factors set out in s 21A(2) are intended to encompass both subjective and objective considerations, as that distinction has been developed at common law: *R v McNaughton* (2006) 66 NSWLR 566 at [34]. Parliament has not used the word "aggravation" in its narrow common law sense. The text of s 21A(1)(c) ("any other objective or subjective factor") and ss 21A(2)(h) and (j) support that interpretation.

Successfully applying s 21A(2) requires a great degree of care akin to surgery. Howie J outlined some general observations about the section in an article entitled "Section 21A and the Sentencing Exercise" (2005) 17(6) *JOB* 43. These observations include:

- Many sentencing judges are concentrating too much on s 21A as a separate and discrete part of the sentencing discretion rather than considering it, where necessary, because of some particular submission made to the court, or as a guide to ensuring that relevant matters are taken into account.
- If the sentencing judge is taking into account a matter as an aggravating factor under s 21A(2), which would not have been taken into account before the enactment of the section, there is a real risk that the section is being misapplied.
- A judge who goes through the aggravating factors in s 21A(2) at the end of sentencing remarks as a kind of checklist is likely to fall into error by either double counting aggravating factors or by taking into account matters that have no real application to the particular case before the court.
- The risk of error increases if a judge feels obliged to go through those factors as a task that is independent from the general sentencing exercise of identifying objective and subjective features that are relevant to the sentencing discretion.

- If the Crown does not assert an aggravating feature is present under s 21A(2), the judge should be cautious about independently attempting to identify such a feature, without receiving assistance from counsel during addresses. Judges should make it clear in their sentencing remarks if the Crown does not assert that there is an aggravating feature present, so a failure to take into account an aggravating factor would be difficult to argue on a Crown appeal against adequacy of the sentence.
- Section 21A(2) has a limited role to play where there is a guideline judgment for a particular offence (at 44):

> 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.

Sentencing now more prone to error

Section 21A has made the task of sentencing courts “more difficult, or at least more prone to error”: *Elyard v R* [2006] NSWCCA 43 at [39]. In *Elyard v R*, Howie J stated at [39] that “if sentencing judges simply take into account the relevant sentencing factors that were taken into account before the introduction of the section, they will inevitably comply with the section’s demands”.

[11-030] Procedural rules and findings under s 21A(2)

The Court of Criminal Appeal has developed specific approaches as to how s 21A should and should not be applied in a given case. They are designed to encourage transparency, ensure procedural fairness and avoid double counting.

Section 21A should be raised during addresses

It is important that sentencing courts give careful consideration to the factors of aggravation in s 21A(2) to determine not only whether they are available as a matter of law but also whether they arise on the facts of the case: *R v Holten* [2005] NSWCCA 408 at [42]. In fairness to the offender, the judge should indicate to the offender’s legal representative that he or she is considering taking that matter into account so that counsel have the opportunity to persuade the judge that the aggravating feature is not present or should not be taken into account in the circumstances of the case: *R v Tadrosse* (2005) 65 NSWLR 740 at [19].

See further **Opportunity of addressing the court on issues** at [1-040].

Clear findings must be made

The mandatory language used in s 21A(1) “the court is to take into account”, and ss 21A(2) and 21A(3) “to be taken into account”, does not require a court to engage in a ritual analysis of the possible s 21A factors. What is required is for the court to making findings about the factor in accordance with the evidence: *Van Can Ha v R* [2008] NSWCCA 141 at [4]. The obligation to give reasons requires a sentencing judge to identify which matters have been taken into account: *DBW v R* [2007] NSWCCA 236 at [33], [36].

It is not necessary for a sentencing judge to refer to each of the factors, both aggravating and mitigating, to which s 21A directs attention, but it is necessary to take them into account to the extent that they are relevant to the case before the court:

R v Wickham [2004] NSWCCA 193; *R v Lilley* (2004) 150 A Crim R 591 at [41], [53]. This involves addressing the s 21A matters by reference to the circumstances of the actual offence: *R v King* (2004) 150 A Crim R 409 at [139]–[141].

It is also important to give reasons why aggravating factors adverse to the offender have been made: *Doolan v R* [2006] NSWCCA 29 at [20]; *Thorne v R* [2007] NSWCCA 10 at [68]. It "enlightens the sentencing process" and informs the offender, the Crown and the community how the sentencing judge has applied the particular factor: *R v Walker* [2005] NSWCCA 109 at [32].

More than mere lip service to s 21A is required. The judge has to clearly identify "the relevant factors, the weight given to them, and their role": *R v Mills* [2005] NSWCCA 175 at [49]. In *R v Dougan* [2006] NSWCCA 34 at [30], the judge erred by failing to make clear precisely how the aggravating factor of threatened use of violence (s 21A(2)(b)) was taken into account in sentencing for the armed robbery offence. The need for an explanation is not limited to situations where a judge may double count aggravating features, where a feature is an element of an offence and an aggravating factor under s 21A(2).

The court should be careful to make clear in its remarks whether it rejects or accepts matters of aggravation in s 21A(2) relied on by the Crown. It was said in *R v Wilson* (2005) 62 NSWLR 346 at [42] that if a judge does not expressly reject matters raised by the Crown, it will be taken on appeal that the judge accepted them.

On the other hand, if a judge makes only a general reference to s 21A it may however indicate no more than that he or she had considered the whole list of aggravating and mitigating factors but had given weight to those identified in his remarks on sentence: *DBW v R* at [33]. The court in *DBW v R* (at [37]) did not follow the approach in *R v Wilson* at [42]. It is incumbent upon a court, however, to express whether a factor has actually been taken into account: *R v McNamara* [2005] NSWCCA 195 at [37].

It is erroneous to identify a precise amount which is added or deducted for each s 21A factor: *R v Johnson* [2005] NSWCCA 186 at [27]; *R v Taylor* [2005] NSWCCA 242 at [10].

Applying s 21A where multiple offences committed

Where there are multiple offences, s 21A must be applied to individual offences and not in a general or global way. Where an aggravating factor is found to apply to one or more offences, but not all, it must be indicated in respect of which offence or offences the aggravating factor is taken into account: *R v Tadrosse* at [22]; *Aslett v R* [2006] NSWCCA 49 at [119]–[120]; and *RJA v R* [2008] NSWCCA 137 at [20].

A general or overall reference to which aggravating factors apply may lead to error where some of the factors do not apply to all of the offences for which the offender is being sentenced: *TS v R* [2007] NSWCCA 194 at [21]; *R v Tadrosse*.

[11-040] Limitations on the use of s 21A(2) factors

The common law and s 21A(2)

Whatever the meaning of the subsections in s 21A(2), parliament did not intend to alter the common law: *Cvitan v R* [2009] NSWCCA 156 at [60]. Section 21A(4) provides that "the court is not to have regard to any such aggravating or mitigating factor in

sentencing if it would be contrary to any Act or rule of law to do so." A sentencing principle, established by common law, and not abrogated by the Act is a rule of law: *R v Johnson* [2004] NSWCCA 76 at [33].

Section 21A(2) was not intended to extend the categories of aggravating factors recognised by the common law at the time the section was created: *Suleman v R* [2009] NSWCCA 70 at [26]. The court should always give attention to the words used to describe any aggravating factor, the policy rationale behind it and the fact that the Crown is to prove a matter of aggravation beyond reasonable doubt: *Gore v R* [2010] NSWCCA 330 at [105].

Double counting

Section 21A(2) provides that "the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence." That provision prohibits double counting of aggravating features of an offence. The importance of the inclusion of s 21A(2) is to remind judges, who use s 21A as a "check list" for all offences, to ensure that any particular matter listed as an aggravating factor is not already an element of the offence: *R v Johnson* [2005] NSWCCA 186 at [22]. In *Kassoua v R* [2017] NSWCCA 307, Basten JA identified a general risk involved in counting aggravating factors by reference to paragraphs of s 21A(2) because those factors are often not independent of each other and attempting to give weight to a particular factor "will result in double counting, or worse": *Kassoua v R* at [14].

In cases where the aggravating factor is an element of the offence or may be thought to be an inherent characteristic of offences of the kind for which sentence is being passed the judge should explain why the factor is present in the particular case before the court: *Ward v R* [2007] NSWCCA 22 at [29]. An absence of an explanation of how the aggravating factor has been taken into account creates a risk that there has been "double counting" by increasing punishment for a factor that has already been taken into account as an element of offence, and may constitute error: *Andrews v R* [2006] NSWCCA 42 at [18].

Direct double counting of an element of the offence

There are numerous cases to illustrate direct double counting. They are discussed in the **Particular offences** section, under the tab card of that name, beginning at [17-000]. In *R v Davis* [2004] NSWCCA 310, for example, the judge erroneously took into account the fact that the victim sustained actual bodily harm under s 21A(2)(b) when it was an element of the offence of taking and detaining in company with intent to obtain advantage and occasion actual bodily harm: s 86(3) *Crimes Act*.

The "nature and extent" of the element

The prohibition in s 21A(2) does not prevent the court from considering the nature and seriousness of the facts of the offence: *Bou-Antoun v R* [2008] NSWCCA 1 at [14]. In *R v Way* (2004) 60 NSWLR 168 at [106]–[107] the court addressed the question of double counting the fact that the offence was committed in company. It was held that the fact that an offence was committed in company (s 21A(2)(e)), where that is an element of the offence, cannot have an additional effect. However, a court is entitled to have regard to the nature and extent of the company and the manner in which the presence and behaviour add to the menace of the occasion. These matters are relevant to the seriousness of the offence charged.

Similarly, in *Hamze v R* [2006] NSWCCA 36 at [29] it was held that it is permissible for a court to take into account the fact of the threatened use of violence as an element of the offence of robbery and then have regard to the nature of the threat of violence under s 21A(2)(b) in considering the seriousness of the offence. Double counting occurs if the judge takes into account the fact of the threatened use of violence twice; that is, first as an element of the offence and then under s 21A(2)(b) (see further discussion below). Suffice to state, it is only possible to achieve a correct result if clear findings are made by the sentencer.

Double counting elements where the policy underlying the offence is given expression as a s 21A(2) factor

An element of an offence should not be treated as aggravating factor if it merely reflects the policy underlying the offence: *Elyard v R* [2006] NSWCCA 43 at [9]–[10]. The task involves identifying the purpose underlying the inclusion of an element of a particular offence against the matters listed in s 21A(2). The court must consider any differences in the language used to describe the element of an offence and the description of the particular aggravating factor in question: *Elyard v R* at [9]–[10].

For offences of aggravated dangerous driving causing grievous bodily harm or death "it will almost inevitably be the case that it is an inherent characteristic of the class of offence that it is committed without regard for public safety [s 21A(2)(i)]": *Elyard v R* at [12], [43].

Where an offender has been convicted of an aggravated form of an offence it is not an error for the sentencing judge to consider other s 21A(2) aggravating factors that were not charged (for example, breach of trust) on the indictment under s 21A(2): *Ivimy v R* [2008] NSWCCA 25 at [28].

Double counting an inherent characteristic of an offence

The court cannot take into account an aggravating feature in s 21A(2) where it would be expected to result from the commission of the offence: *R v Youkhana* [2004] NSWCCA 412 applied in *R v Solomon* [2005] NSWCCA 158 at [20]; *Elyard v R* at [39]. However, where the lack of regard for public safety is so heinous that it "transcends that which would be regarded as an inherent characteristic of the offence", it may be given additional effect as an aggravating factor: *Elyard v R* at [10], [43].

The court must find beyond reasonable doubt that the element exceeds that which would ordinarily be expected of the crime before taking it into account under s 21A: *R v Yildiz* [2006] NSWCCA 97 at [39].

For the application of this subsection to specific offences see: **Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999** at [19-890] and **Robbery** at [20-260] (armed robbery).

[11-050] Section 21A(2) and the De Simoni principle

The provision in s 21A(2) does no more than reflect the common law and therefore an aggravating factor in s 21A(2) cannot be taken into account if doing so would breach the *De Simoni* principle: *R v Johnson* [2005] NSWCCA 186 at [22]; *R v Wickham* [2004] NSWCCA 193 at [26]; *Huntingdon v R* [2007] NSWCCA 196 at [9]; *Rend v R* [2006] NSWCCA 41; and *JAH v R* [2006] NSWCCA 250.

R v Newham [2005] NSWCCA 325 is a good example of the principle. The sentencing judge erred by taking into account as an aggravating factor pursuant to s 21A(2)(e) that the indecent assault was committed in company. Section 61M(1) *Crimes Act* provides for a separate offence of greater seriousness, of which one of the available circumstances of aggravation is that the offence is committed in company. The applicant was not charged with the more serious offence and the sentencing judge was required to limit his consideration of the surrounding circumstances so as not to punish the applicant as if he had committed the more serious offence.

[11-060] Section 21A(2)(a) — victims who exercise public or community functions

Section 21A(2)(a) is directed at offences committed against victims who exercise public or community functions and the offence arose because of the victim’s occupation.

The common law has long recognised that people in certain occupations work under a degree of risk. The fact that the victim is a police officer is treated as an aggravating factor: *R v Penisini* [2004] NSWCCA 339 at [20].

Since there is provision for a higher standard non-parole period for the murder of certain categories of persons (see Table of Standard non-parole periods under s 54D *Crimes (Sentencing Procedure) Act* 1999) care needs to be taken to ensure there is no double counting of aggravating circumstances when consideration is being given to the sentencing of this class of persons.

[11-070] Section 21A(2)(b) — the offence involved the actual or threatened use of violence

For the application of this subsection to specific offences see: **Break and enter offences** at [17-070]; **Robbery** at [20-260] (s 97 armed robbery), [20-270] (s 98 robbery with wounding) and [20-230] (s 95(1) robbery in circumstances of aggravation); **Detain for advantage/kidnapping** at [18-720]; **Assault, wounding and related offences** at [50-140].

[11-080] Section 21A(2)(c) — the offence involved the actual or threatened use of a weapon

For the application of this subsection to specific offences see: **Break and enter offences** at [17-070]; **Robbery** at [20-260] (s 97 armed robbery); [20-270] (s 98 robbery with wounding).

The absence of a weapon is not a matter of mitigation: *Versluys v R* [2008] NSWCCA 76 at [37]. Where the assailant has used his or her hands instead of a weapon it does not follow that the offence is necessarily less serious than if a weapon was used: *Versluys v R* at [37].

[11-090] Section 21A(2)(d) — the offender has a record of previous convictions (particularly if the offender is being sentenced for a serious personal violence offence and has a record of previous convictions for serious personal violence offences)

This subsection is discussed extensively in **Subjective matters taken into account** at [10-400].

This subsection was amended by the *Crimes (Sentencing Procedure) Amendment Act* 2007, providing the additional text in parentheses. Under s 21A(6), a "serious personal violence offence" is a personal violence offence within the meaning of s 4 *Crimes (Domestic and Personal Violence) Act* 2007 that is punishable by imprisonment for life or a term of 5 years or more. The definition includes serious sexual offences.

[11-100] Section 21A(2)(e) — the offence was committed in company

Section 21A(2)(e) "relates to the presence of one or more persons with the offender in order to convey a threat of violence to the victim by the combined presence of more than one person": *Gore v R* (2010) 208 A Crim R 353 at [101]. It has no application to an offender who happens to use his wife to assist in his drug trade: *Gore v R* at [101]. The words "in company" in s 21A(2)(e) have the same meaning as they have at common law and where the fact the offence was in company is an element of an aggravated offence: *White v R* [2016] NSWCCA 190 at [2]–[4], [93]–[94]; *Gore v R* at [100]–[101]. Where "in company" is an element of an offence, it is an error to consider s 21A(2)(e) as an aggravating factor: *Stevens v R* [2007] NSWCCA 152 at [35].

The words are used to aggravate the gravity of the offence and the circumstance must be proved beyond reasonable doubt: *White v R* at [92]. The decisions concerning the construction to be placed on the element of an offence being committed in company are relevant to the construction to be given to s 21A(2)(e). However, statements in those decisions are not exhaustive of what might be held to be "in company". Each case will depend upon its own facts: *White v R* at [94]. In *White v R*, Simpson JA at [94] set out three questions to focus on:

(i) whether the presence of the other person is such as to have a potential effect on the victim, by way of coercion, intimidation, or otherwise;

(ii) whether the presence of the other person is such as to have a potential effect on the offender, by offering support or encouragement, or "emboldening" that person;

(iii) whether the evidence establishes that the other person is present, sharing a common purpose with the offender.

After reviewing relevant authorities, Simpson JA's analysis in *White v R* [2016] NSWCCA 190 at [94] was applied in *IS v R* [2017] NSWCCA 116 at [50]. There was no error in finding the robbery was aggravated by its commission in company: *IS v R* at [51]. The two other offenders were in sufficient proximity to support the offender and intimidate the victim; one actively assisted the offender and the offender's own evidence established the other offenders present shared a common purpose with him: *IS v R* at [50].

In *R v Way* (2004) 60 NSWLR 168 at [106]–[107], the court held that the fact that an offence was committed in company, where that is an element of the offence, cannot have an additional or cumulative effect on sentence. This, however, does not prevent the nature and extent of the company being taken into account when the court assesses the seriousness of the offence and the moral culpability of the offender. The presence of a "large number of overbearing and powerful companions can dramatically increase the objective seriousness, and moral culpability, of those who engage in a sexual assault of a lone victim" and s 21A(2)(e) does not exclude reference to such a consideration: *R v Way* at [107].

For the application of this subsection to specific offences see: **Application of s 21A to break and enter offences** at [17-070]; **Robbery** at [20-260] (armed robbery) and [20-270] (robbery with wounding); and **Common aggravating factors under s 21A and the common law** at [50-140].

[11-101] Section 21A(2)(ea) — the offence committed in the presence of a child under 18

Section 21A(2)(ea) “is principally aimed at the deleterious effect that the commission of a crime, particularly one of violence, might have on the emotional well-being of a child. The commission of the offence may also be deleterious to the child’s moral values”: *Gore v R* [2010] NSWCCA 330, per Howie AJ at [104]. The supply of drugs in the presence of a child is a factor of aggravation”: *Gore v R* at [104]. It is not necessary that the offender is a parent of the child but if he or she is that will be an aggravating factor: *Gore v R* at [104]. This factor can also apply even if the offender is themselves a child: *Lloyd v R* [2017] NSWCCA 303 at [71]–[72].

The “generalised presence” of a child is not sufficient to constitute an aggravating factor. In *McLaughlin v R* [2013] NSWCCA 152, the court held it was an error to find two domestic assault offences were aggravated under s 21A(2)(ea) where the judge made no finding that the child was actually present or witnessed the offences: *McLaughlin v R* at [31]–[32]. Similarly, in *Alesbhi v R* [2018] NSWCCA 30, there was no basis for the sentencing judge to conclude an offence of affray was aggravated by the presence of children when the affray occurred outside and there was no evidence the children witnessed the offence or knew what was happening: *Alesbhi v R* at [55]–[56].

[11-105] Section 21A(2)(eb) — the offence was committed in the home of the victim or any other person

This factor is directed towards offences committed in the sanctity of the home. The text of s 21A(2)(eb) does not impose a pre-condition for its operation that the offender is an intruder in the victim’s home: *Jonson v R* [2016] NSWCCA 286. The five-judge bench in *Jonson v R* held that decisions, such as *R v Comert* [2004] NSWCCA 125, which stated that s 21A(2)(eb) is restricted to cases where the offender was an intruder were plainly wrong and should be overruled. Accordingly, there is no “rule of law” within the meaning of s 21A(4) to restrict the scope of s 21A(2)(eb) in the manner suggested in the such cases: *Jonson v R* at [50].

A literal construction therefore includes a home in which the offender is lawfully present, including one in which the offender resides with the victim: *Jonson v R* at [40].

The fact the provision can extend beyond offences committed by an intruder does not mean that in all cases the fact the offence occurred in a home will be an aggravating factor. The court must conclude, having regard to ordinary sentencing principles, that it actually aggravates the offence in question: *Jonson v R* at [52]; citing *Gore v R* [2010] NSWCCA 330 at [29]. *Jonson v R* was applied in the five-judge bench decision of *R v Lulham* [2016] NSWCCA 287 at [25] where the court held that the judge was correct to find the offence was aggravated on account of the fact the victim was attacked in his own home, despite the fact the offender was not an intruder. The reason given for the aggravating factor is that an offence involves a violation of the victim’s reasonable expectation of safety and security in his or her own home: *R v Lulham* at [5].

Bathurst CJ (Beazley P agreeing) opined that, despite the fact that the attack occurred on the driveway rather than in the home, this expectation of safety may extend beyond the actual residence to "the area on the same premises, at least reasonably adjacent to that building": *R v Lulham* at [5]. Whether the offence is aggravated by the fact the offence occurs on the premises in question remains a matter for the sentencing judge's discretion: *R v Lulham* at [6].

See further [17-070] **Application of s 21A to break and enter offences**.

[11-110] Section 21A(2)(f) — the offence involved gratuitous cruelty

Gratuitous cruelty suggests that the infliction of pain is an end in itself: *McCullough v R* [2009] NSWCCA 94 at [30]. "It is needless yet intentional violence committed simply to make the victim suffer": *McCullough v R* at [30]. The application of s 21A(2)(f) depends upon matters of fact and degree: *R v Atonio* [2005] NSWCCA 200 at [23].

Gratuitous cruelty under s 21A(2)(f) requires more than an offence being committed without justification and causing great pain. For offences that are by their nature violent, there needs to be something more than the offender merely having no justification for causing the victim pain: *McCullough v R* at [30]. For instance, the factor may be present in a case of malicious wounding if the nature and purpose of the wounding involved torture: *McCullough v R* at [31]. A finding of gratuitous cruelty was made in *R v King* [2004] NSWCCA 444 at [139], where the offence of malicious wounding with intent included kicking a pregnant woman. Gratuitous cruelty was also established in *R v Hoerler* [2004] NSWCCA 184 at [43], [64], and [80], a manslaughter case which involved a prolonged and violent assault on a defenceless infant.

An offender's good character does not preclude a finding of gratuitous cruelty: *TMTW v R* [2008] NSWCCA 50 at [43]. The subsection was not applied in *Curtis v R* [2007] NSWCCA 11 at [62] (stabbing of a police dog) or *Stevens v R* [2007] NSWCCA 152 at [32] (cruelty exhibited by the applicant towards the victims' animals during a home invasion). The latter act of cruelty was not related to the offence and there was no mention of the issue in the agreed facts.

For the application of this subsection to **Child pornography** see [17-541].

[11-120] Section 21A(2)(g) — the injury, emotional harm, loss or damage caused by the offence is substantial

Section 21A(2)(g) provides that an aggravating factor that is to be taken into account is whether "the injury, emotional harm, loss or damage caused by the offences is substantial". The section must be understood through the prism of the common law. At common law, the court may have regard to the harm done to the victim by the commission of the crime: *Signato v The Queen* (1998) 194 CLR 656 at [29].

This is subject to the qualification that it cannot take into account harm that would effectively punish the offender for a more serious offence than the one charged: *The Queen v De Simoni* (1981) 147 CLR 383 at 389. A court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen: *Josefski v R* [2010] NSWCCA 41 at [4], [38]–[39]. The application of s 3A(g) of the Act ("harm done to the victim of the crime and the community") and s 21A(2)(g) of the

Act in a given case is limited by this common law rule. Neither provision was intended to alter the common law principles of sentencing: *Muldrock v The Queen* (2011) 244 CLR 120 at [15], [18]. Therefore it is an error, as well as unfair, to take into account as an additional aggravating factor harm, under s 21A(2)(g), harm that is not expected or could not have been reasonably foreseen to result from the commission of the crime: *R v Wickham* [2004] NSWCCA 193 at [25]; *Josefski v R* at [4], [38]–[39].

As s 21A(2)(g) does not alter the common law a court is not permitted to take account of the effect upon persons of the death of a victim as an aggravating feature of an offence: *R v Wickham*. This is so notwithstanding the equivocal comments by Spigelman CJ in *R v Berg* [2004] NSWCCA 300: *Josefski v R* [36]–[39].

There must be evidence before the court to warrant a finding that the injury and emotional harm caused by the offence was substantial within the terms of s 21A(2)(g). As to the use of victim impact statements and s 21A(2)(g) see **Victims and victim impact statements** at [12-810].

Emotional harm in the context of s 21A(2)(g), qualified by the adjective *substantial* may be taken to be a reference to an appreciable psychological injury whether permanent or not: *Huynh v R* [2015] NSWCCA 179 at [29]. It refers to something more than the transient, or temporary, shock or fright that anyone would suffer who felt his or her safety was in peril, but which passes within a relatively short time leaving no lasting ill-effects: *Huynh v R* at [29]. A finding of substantial emotional fear of a transient type leaving no lasting ill-effects may amount to substantial emotional fear depending on the nature of the offending, informed by the common understanding of life shared by all adults: *Huynh v R* at [29].

Where there is no evidence directed to the issue of emotional harm suffered by the victim and no victim impact statement, it is not open to the sentencing judge to make a finding that offences have been aggravated on the basis of substantial emotional harm to the victim: *R v Ross* [2006] NSWCCA 65 at [27].

In the armed robbery case of *R v Solomon* [2005] NSWCCA 158, it was clear from the victim impact statements that it was open to the sentencing judge to find that the offences were aggravated by the effect that they had upon each victim. There was ample evidence to justify an additional finding that the injury or emotional harm occasioned to each of the victims was substantial.

As was explained in *R v Solomon*, because the court makes such an assumption, it would be unfair to take the psychological injury or emotional harm into account as an aggravating factor under s 21A(2)(g) in the absence of evidence that, in the particular case, it exceeded that which is already presumed: at [19], [53].

Sentencing judges are entitled to proceed on the basis that serious sexual assaults can be expected to have adverse psychological consequences. Because of that entitlement, care needs to be taken to avoid double counting with regard to the aggravating feature of substantial emotional harm in s 21A(2)(g): *Stewart v R* [2012] NSWCCA 183 at [61]. Judges should make findings of fact founded on the evidence tendered rather than general observations: *Stewart v R* at [62].

Section 21A(2)(g) is not limited to injury, harm, loss or damage to the victim, but potentially extends to that suffered by the victim’s spouses and dependents: *Aslett v R* [2006] NSWCCA 360 at [37].

In cases where injury is an element of the offence for which the offender is being sentenced, the extent and nature of the injuries inflicted are relevant in assessing whether the aggravating factor applies: *Taylor v R* [2006] NSWCCA 7 at [40]. The nature of the injury, loss or damage in such a case must be such as to take it outside that which was necessary to establish the element of the offence: *Heron v R* [2006] NSWCCA 215 at [49]. Findings of substantial harm under s 21A(2)(g) must be based on what actually occurred rather than what might have occurred: *Heron v R* at [49].

For the application of this subsection to specific offences see: **Break and enter offences** at [17-070]; **Dangerous driving** at [18-390]; **Robbery** at [20-260] (armed robbery) and [20-270] (robbery with wounding); and **Sexual assault** at [20-810]. See also H Donnelly "Assessing harm to the victim in sentencing proceedings" (2012) 24(6) *JOB* 45.

[11-130] Section 21A(2)(h) — offences motivated by hatred and/or prejudice against a group of people

Section 21A(2)(h) is directed towards offences motivated by hatred for, or prejudice against, a group of people (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability), with the offender carrying out the offence because he or she believed the victim belonged to that particular group.

In *Aslett v R* [2006] NSWCCA 49, at [124], it was held there was no evidence to establish that the offence was motivated by hatred towards Asian people.

In *Holloway v R* [2011] NSWCCA 23 at [32] the court accepted that the assaults were racially motivated. Hall J said at [32]:

> In any multi-cultural society, criminal acts involving racial violence ought to be strongly deterred and this fact taken into account in a case such as the present when sentencing an offender in respect of such conduct: *Crimes (Sentencing Procedure) Act*1999, s.21A(2)(h).

The examples in parentheses listed in s 21A(2)(h) — people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability — do not comprise an exhaustive list of the grounds envisaged by the subsection: *Dunn v R* [2007] NSWCCA 312 at [32]. In *Dunn v R*, paedophiles were held to be a "group of people" under s 21A(2)(h).

[11-140] Section 21A(2)(i) — the offence was committed without regard for public safety

Section 21A(2)(i) provides that it is an aggravating feature of an offence if it is committed "without regard for public safety". It is arguable that the elements of many offences (such as, for example, dangerous driving and, possibly, firearms offences) already take into account the "regard for public safety". In *Elyard v R* [2006] NSWCCA 43 at [12] Basten JA opined:

> Where the offence is of a kind which, objectively or abstractly, reflects a policy of prohibiting conduct which disregards public safety, it will be necessary, in order to engage the aggravating factor, to find some aspect of the specific conduct in question which goes beyond the objective element or underlying policy.

This subsection is not directed to the specific victim of any offence, but to the danger caused to other members of the public by reason of the offence: *R v Chisari* [2006] NSWCCA 19 at [22].

It is the risk to public safety that falls to be assessed under s 21A(2)(i) and not what actually transpired: *R v Fryar* [2008] NSWCCA 171 at [34].

For the application of s 21A(2)(i) to specific offences see **Dangerous driving** at [18-390]; **Drug Misuse and Trafficking Act 1985 (NSW) offences** at [19-890]; **Assault, wounding and related offences** at [50-140]; **Firearms and prohibited weapons offences** at [60-040]–[60-050]; and **Damage by fire and related offences** at [63-020].

[11-145] Section 21A(2)(ib) — the offence involved grave risk of death

Section 21A(2)(ib) provides that it is an aggravating feature if an offence "involved a grave risk of death to another person or persons". Even where there is no actual injury, discharging a firearm directly at another person carries a grave risk of death and may, in an appropriate case, amount to an aggravating factor under s 21A(2)(ib): *Z v R* [2015] NSWCCA 274 at [77]. In *Colomer v R* [2014] NSWCCA 51 at [38]–[40], the court held there was a grave risk of death by pointing a firearm at another person, with a bullet in the chamber, even where the firearm was not actually discharged.

In *Wallace v R* [2014] NSWCCA 54, the court found that while the offender's act of rescuing the victim after setting fire to a house knowing he was inside, warranted amelioration of the sentence, the judge was entitled to give some weight to the aggravating circumstance of the grave risk of death to the victim: *Wallace v R* at [78]–[81].

A cut to the throat, being potentially life-threatening, may also be an aggravating factor within s 21A(2)(ib): *R v Dennis* [2015] NSWCCA 297 at [31]; *Kiernan v R* [2016] NSWCCA 12.

[11-150] Section 21A(2)(j) — the offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence

Conditional liberty is discussed at [10-550].

When an offence is committed whilst being on conditional liberty, this may amount to an aggravating factor. The purpose of s 21A(2)(j) is to "capture the common law principle that an offence committed whilst a person is subject to conditional liberty, whether on bail or whilst subject to a good behaviour bond or a community service order or periodic detention or parole, constitutes an aggravating factor for the purpose of sentence": *Porter v R* [2008] NSWCCA 145 at [86]. The term "conditional liberty" in s 21A(2)(j) is not confined to circumstances where the foundational offence giving rise to the conditional liberty is one which itself must be punishable by imprisonment: *Porter v R* at [86].

Section 21A(2)(j) is a relevant consideration if the offender was on conditional liberty at the time of committing the offence, even though the charge in respect of which they were on conditional liberty for was later withdrawn: *R v Deng* [2007] [2007] NSWCCA 216 at [64].

In *Frigiani v R* [2007] NSWCCA 81, the offender was subject to a s 10 good behaviour bond for assaulting his wife. The offence he committed involved a further assault on the same person. The court held that the fact he was subject to the bond was an aggravating factor under s 21A(2)(j), irrespective of the conduct for which the bond was imposed: at [23]–[24]. It is more aggravating when the conduct is similar to that for which the offender is being sentenced: at [24].

In *Archer v R* [2017] NSWCCA 151, the court concluded that it was not double counting to take into account as distinct aggravating factors that the offence was committed in breach of an AVO and while the offender was on bail: *Archer v R* at [89]. Breach of bail and being subject to an AVO are two different concepts: *Archer v R* at [85].

[11-160] Section 21A(2)(k) — abuse of a position of trust or authority

It is clear both from the language of s 21A(2) and the decided cases that the section was not intended to extend the concept of breach of trust beyond the common law as it was understood at the time that the section was created: *Suleman v R* [2009] NSWCCA 70 at [26], approving *R v Wickham* [2004] NSWCCA 193 and *R v Johnson* [2005] NSWCCA 186. See also *Mol v R* [2017] NSWCCA 76 at [107]. For a relationship of trust to exist, there must have been a special relationship between the victim and offender at the time of the offending "which transcends the usual duty of care arising between persons in the community in their everyday contact or their business and social dealings": *Suleman v R* at [22]. Examples of such special relationships are parent and child, doctor and patient, priest and penitent and teacher and student: at [23]–[24]. In *R v Stanbouli* [2003] NSWCCA 355, Hulme J, with whom Spigelman CJ agreed, elaborated on the concept at [34]:

> The cases where, traditionally, breach of trust has been regarded as exacerbating criminality are where it is the victim of the offence who has imposed that trust — an employer defrauded by his employee, a solicitor who appropriates trust funds to his own use — or where the criminality involves a breach of that which the offender was engaged or undertook to do, eg a teacher or baby-sitter who indecently deals with the subject of his or her charge. Another example is afforded by the case of *R v McLean* (unreported, CCA, 31 March 1989) where a customs officer employed in the investigations section of the department had conspired to import heroin and cannabis. The offence there was in direct contravention of what the offender had been employed to do.

The court in *Suleman v R* [2009] NSWCCA 70 at [28] found that the sentencing judge erred by finding that the s 21A(2)(k) applied by virtue of the applicant's dealings with investors and the fact that he was a successful businessman in the Assyrian community. The common law would not have recognised that these things involved a breach of trust. On the other hand, in *Mol v R*, there was no error in applying s 21A(2)(k) against an offender who had represented himself as a professional artist and had indecently assaulted young women who had agreed to pose nude or partially nude as models. There was a "special or peculiar relationship" of trust which the offender had breached: *Mol v R* at [108].

A breach of trust is heightened substantially where a registered health practitioner commits offences of indecent assault against his patients in the course of treatment: *Jung v R* [2017] NSWCCA 24 at [60]; and, see *Kearsley v R* [2017] NSWCCA 28

at [15] where the offence was committed against a person the offender mentored. Additional considerations apply when a registered health professional commits sexual offences against patients: general and personal deterrence are important elements of the sentence: *Jung v R* at [63]; *R v Arvind* (unrep, 8/3/96, NSWCCA); see also *Panda v State of Western Australia* [2017] WASCA 5 at [126]. Nothing said by the High Court in *Reeves v The Queen* (2013) 88 ALJR 215, which overturned *Reeves v R* [2013] NSWCCA 3 at [205] where the principles in *R v Arvind* were applied, affects the application of the principles in *R v Arvind* to this case: *Jung v R* at [64].

In *KJH v R* [2006] NSWCCA 189 at [29] the judge erred by stating that breach of trust is an element of the offence under s 66A *Crimes Act*. Not all offences of sexual intercourse with a child under 10 years of age involve abuse of trust. The gross abuse of trust perpetrated by the applicant was an aggravating factor in the circumstances of this case and had to be taken into account on sentence under s 21A(2)(k). The offender in *MRW v R* [2011] NSWCCA 260 was convicted under s 66C(2) *Crimes Act* of sexual intercourse with a person between 10 and 16 years and who was under the authority of the offender. It was open to the trial judge to take abuse of trust under s 21A(2)(k) into account as an aggravating feature notwithstanding the ingredients of the offence under s 66C(2): *MRW* at [77]. Abuse of trust and authority in s 21A(2)(k) are distinct concepts, although often arising out of the same facts: *MRW* at [77]. However, a sentencing judge should be cautious in giving undue weight to an abuse of a position of trust where abuse of authority is an aggravating factor to avoid double counting: *MRW* at [78].

See further, **Sexual offences against children** at [17-560] and **Fraud** at [19-990].

[11-170] Section 21A(2)(l) — the victim was vulnerable

Section 21A(2)(l) provides that it is an aggravating feature of an offence if:

> the victim was vulnerable, for example, because the victim was very young or very old or had a disability, because of the geographical isolation of the victim or because of the victim’s occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

Section 21A(2)(l) is concerned with the vulnerability of a particular class of victim who need to be especially protected because they are vulnerable to criminal offences: *R v Tadrosse* (2006) 65 NSWLR 740 at [24]–[26]. It is the fact of a victim’s vulnerability which aggravates the offence: *Sumpton v R* [2016] NSWCCA 162 at [147]. In *R v Tadrosse*, the court held that the judge erred in applying the section to fraud victims on the basis that persons generally in the community would be vulnerable to a proficient fraudster armed with forged documents. The provision is concerned with the weakness of a particular class of victim, not the threat posed by a class of offender: *R v Tadrosse* at [26].

The court has subsequently reiterated the need for the victim to be part of a certain class of persons who need to be especially protected: *Doolan v R* [2006] NSWCCA 29 at [25]–[26]; *Betts v R* [2015] NSWCCA 39 at [29]. The fact that a victim is unarmed and unable to protect himself is not the sort of vulnerability that s 21A(2)(l) is concerned with: at [28]. Where a victim is not armed in a like manner to the assailant, this does not ordinarily mean that the victim is vulnerable: *Morris v R* [2007] NSWCCA 127 at [15].

In *Sumpton v R*, that the deceased was of a slight build, walked with a limp and was intoxicated at the time of the offence founded the sentencing judge's conclusion that she was vulnerable. The engagement of s 21A(2)(l) does not depend on there being a causal connection (in a case of murder) between vulnerability and death: *Sumpton v R* at [147].

The *Rural Crime Legislation Amendment Act* 2017, which commenced on 23 November 2017, amended s 21A(2)(l) to include "the geographical isolation of the victim" as an example of a vulnerable victim. Previously, in *Stevens v R* [2007] NSWCCA 152 at [33], the court had held the fact the victims lived in a rural and isolated location may provide the basis for a finding of vulnerability within s 21A(2)(l).

Section 21A(2)(l) may still play a role in sentencing an offender in the context of an offence which contains the age of the victim as part of the offence. The younger the age of the victim, the more serious the offence: *RJA v R* [2008] NSWCCA 137 at [13].

In *Veale v R* [2008] NSWCCA 23, Hulme J said at [18]:

> The examples given seem to indicate that persons engaged in occupations that involve having access to, or being in charge of, significant sums of cash are intended by Parliament to be characterised as vulnerable.

However, it should be noted that the examples given in s 21A(2)(l) do not amount to an exhaustive list: *Perrin v R* [2006] NSWCCA 64 at [35]; *Ollis v R* [2011] NSWCCA 155 at [96]; *Longworth v R* [2017] NSWCCA 119 at [17].

In *R v Williams* [2005] NSWCCA 99, the court held that the sentencing judge was in error for taking into account as an aggravating factor under the section that the victim of a manslaughter offence was vulnerable because they were not powerful or aggressive like the perpetrator. Howie J remarked at [27] in *R v Tadrosse* that, although the matter was relevant to an assessment of the gravity of the offence, it should not have been treated as a further aggravating factor, since "s 21A(2)(l) is not directed to vulnerability in that generalized sense … it is vulnerability of a particular kind that attracts its operation".

Section 21A(2)(l) is not concerned with the threat posed by a particular class of offender. The fact that a victim does not have the characteristics of a powerful offender with violent tendencies does not make the victim vulnerable within the meaning of subsec (l). The sub-section looks to the circumstances of groups or classes of victims inherent in their situation or characteristics as such divorced from any actions of an offender: *Betts v R* at [29]. For example, in *Katsis v R* [2018] NSWCCA 9, the court found an elderly victim who lived alone was vulnerable on account of age, social isolation and frailty: *Katsis v R* at [62].

In *Ollis v R*, the court held that the judge was correct to find, as an aggravating factor under s 21A(2)(l), that the victim was vulnerable: at [94]. The victim was an adolescent travelling alone on public transport in a foreign land and she trusted the applicant, who spoke some Japanese and offered assistance: at [97].

Taxi drivers (see text of the sub-section) and taxi passengers have been held to be a relevant class of vulnerable victim for the purposes of s 21A(2)(l): *Ali v R* [2010] NSWCCA 35 at [28], [35]. So have security guards working late at night at

licensed premises because they face a significant risk of being subjected to aggressive intoxicated/disorderly people and may be outnumbered or isolated from others who could come to their assistance: *Longworth v R*, above, at [18].

Child sexual assault

Fine distinctions have been drawn regarding the application of s 21A(2)(l) in the context of child sexual assault. In *R v JDB* [2005] NSWCCA 102 the court held at [46] that the judge contravened s 21A(2) by finding, as an aggravating factor, that the offence was committed against a vulnerable victim (aged eight years) when it was already an element of the offence of sexual intercourse with a child under 10 years of age. Again, in *R v Boulad* [2005] NSWCCA 289 at [21], the sentencing judge erred in saying that the victim was vulnerable "because she was young" where the charge was sexual intercourse with a person who was of, or above, the age of 14 and under the age of 16.

In *R v Pearson* [2005] NSWCCA 116 the offender was convicted of aggravated indecent assault. The circumstance of aggravation was that the victim was under 16. She was actually 13 years of age. The court held that the judge was entitled to take into account the fact that the victim was vulnerable (having regard to her age) as an aggravating feature without contravening s 21A(2).

R v Pearson was applied in *R v JTAC* [2005] NSWCCA 345. There the offender was convicted of sexual intercourse with a child under 10 years of age, under s 66A *Crimes Act,* and aggravated indecent assault of a child under 10 years of age, under s 61M(2) *Crimes Act*. The circumstance of aggravation was that the victims, who were aged five and seven, were under 10 years of age. The court held that the judge was entitled to take account of the vulnerability of the victims, having regard to their ages, without contravening s 21A(2).

In *Shannon v R* [2006] NSWCCA 39 the court confirmed that s 21A(2) does not preclude a sentencing judge taking into account as an aggravating factor the vulnerability of the victim for offences committed under s 66C *Crimes Act*, despite the fact that s 66C is concerned to protect the vulnerable.

The fact that a victim is vulnerable because of limited intellectual functioning has been considered an aggravating circumstance under s 21A(2)(l): *Corby v R* [2010] NSWCCA 146 at [73].

For the application of s 21A(2)(l) to specific offences see **Drug Misuse and Trafficking Act 1985 (NSW) offences** at [19-890]; **Robbery** at [20-290]; and **Sexual assault** at [20-810].

[11-180] Section 21A(2)(m) — the offence involved multiple victims or a series of criminal acts

Section 21A(2)(m) provides the court can take into account the fact that the offence involved multiple victims or a series of criminal acts. In *R v Tadrosse* (2006) 65 NSWLR 740 at [29] Howie J explained the purpose of the subsection:

> … the aggravating factor in s 21A(2)(m) is concerned with the situation where a single offence contains a number of allegations of criminal acts that are part and parcel of a single course of criminal conduct. A charge of this nature will be frequently found

> in cases of fraud or dishonesty perpetrated against a single victim such as a charge of embezzlement or larceny as a servant. It is also common to charge multiple instances of supplying drugs over a lengthy period of time as one offence under s 25 of the *Drug Misuse and Trafficking Act*. Of course there are offences that have, as an element of the offence, multiple acts of criminality, such as an offence of ongoing drug supply under s 25A of the *Drug Misuse and Trafficking Act* or an offence of persistent sexual abuse of a child under s 66EA of the *Crimes Act*. When sentencing for such an offence, the court must bear in mind the prohibition against taking into account as a matter of aggravation that which is an element of the offence charged.

The sentencing judge erred in *R v Tadrosse* since, while there were clearly multiple offences with multiple victims and acts of criminality before the court, the applicant was sentenced for *each* of them in accordance with the principle of totality. Similarly in *R v Tzanis* [2005] NSWCCA 274 at [19] the judge erred by applying s 21A(2)(m) where the applicant was sentenced for two separate offences of dangerous driving occasioning death and dangerous driving occasioning grievous bodily harm.

The error was repeated in *R v Janceski* [2005] NSWCCA 288, where the offender was sentenced to two counts of dangerous driving occasioning death. The court held that it was completely contrary to principle to aggravate each of those sentences on the basis that each offence involved multiple victims.

In *Clinton v R* [2018] NSWCCA 66, the court held the judge erred by taking into account various uncharged criminal acts set out in the agreed facts but not particularised in the fraud offences to which the offender pleaded guilty. While what was in the facts was relevant to determining the objective seriousness of the offences and the offender's moral culpability, the uncharged criminal acts could not also be taken into account as an aggravating factor under s 21A(2)(m): *Clinton v R* at [37]–[39].

The term "offence" in s 21A(2)(m) does not include Form 1 matters: *Hawkins v R* [2006] NSWCCA 91 at [28]–[29]. In *Aslett v R* [2006] NSWCCA 360, the court indicated that s 21A(2)(m) is directed to "the offence" which is one involving multiple victims or a series of criminal acts: at [38].

In *Hockey v R* [2006] NSWCCA 146, Adams J considered the term "involved" at [16]:

> "Involved", to my mind, means those actually injured by the particular offence for which the offender is sentenced. This interpretation is fortified by the coupling of the notion of multiple victims with the notion of multiple offences: the point being made is that one offence may have multiple victims, as also may a series of offences. I do not think that anything in *R v Tadrosse* (2006) 65 NSWLR 740 suggests otherwise.

Where an offender is charged with multiple offences, in which the victims are the same for each offence, there are not, in relation to each offence, multiple victims: *McCabe v R* [2006] NSWCCA 220 at [10].

[11-190] Section 21A(2)(n) — the offence was part of a planned or organised criminal activity

It is prudent for a sentencing judge to raise with the parties his or her intention to take this aggravating factor into account: *Stokes v R* [2008] NSWCCA 123 at [14].

The scope of s 21A(2)(n) was considered in *Hewitt v R* [2007] NSWCCA 353. Hall J derived several general propositions from prior cases about the operation of the provisions at [25]. These are set out below:

(a) The wording of the provision conveys more than simply that the offence was planned: *Fahs v Regina* …

(b) In a case where an offender has been charged with multiple drug trafficking offences, a conclusion may be drawn that it is part of a planned or organised criminal activity …

(c) The expression "*organised criminal activity*" may embrace the activities of several people or it may involve activity carried out by one person. In *NCR Australia v Credit Connection* [2005] NSWSC 1118, Campbell J observed at [72]:

> "In deciding whether the aggravating factor in para (n) is present, there is first a question of construction about what is meant by 'organised criminal activity'. In one sense, 'organised criminal activity' involves the activities of several people that are planned or co-ordinated to carry out the crime. That is the sense involved in media discussion about whether organised crime is on the increase. In another sense, however, it can include activity that is carried out by just one person, concerning which that person engages in planning or preparation."

His Honour also observed:

> "… as a matter of ordinary English, to think that 'planned criminal activity' has any necessary element in it of there being more than one person involved … For these reasons, I conclude that the factor in para (n) can be present if there is planned organised criminal activity engaged in by just one person." (at [74] and [75]).

(d) Offences committed over a period of time may involve sufficient repetition and system to lead to the conclusion that they were organised within the meaning of paragraph (n): *NCR Australia* (supra) at [76].

(e) In determining whether the facts give rise to "planning" as an aggravating factor, it is necessary to consider and refer to both the evidence that may affirm, and the evidence that may negative the drawing of such a conclusion. This Court in *Regina v Reynolds* [2004] NSWCCA 51, in determining on the facts of that case that evidence of planning was very limited but that it did exist and was of greater significance than that considered by the sentencing judge, observed at [39]:

> "It may be that, had he considered the evidence in detail, his Honour would nevertheless have reached a factual finding similar to that which he did. The error lies in his failing to make reference to evidence pointing to a contrary conclusion. In particular, the list of businesses was, in my view, quite strong evidence of a degree of planning. The absence of a disguise is only one factor pointing in the other direction, or pointing to poor, rather than no, planning."

(f) Planning that is "… *somewhat haphazard, clumsy in many respects and bound to fail* …" may nevertheless be sufficient so as to enliven the application of s 21A(2)(n): *Regina v Willard* [2005] NSWSC 402 per Whealy J at [32]. [Emphasis in original.]

The fact that there are several offences revealing some broad pattern of behaviour does not mean there is relevant "planning" for the purposes of s 21A(2)(n): *RL v R* [2015] NSWCCA 106 at [36]–[37]. In *RL v R*, a child sexual assault case, the court held that the applicant's offences committed over a five-year period, did not involve planning but rather demonstrated opportunistic behaviour.

Section 21A(2)(n) can only be applied to the cultivation of a large commercial quantity of cannabis plant if its nature or extent in the particular case is unusual: *Ta and Nguyen v R* [2011] NSWCCA 32 at [126]. It is unclear whether planning under s 21A(2)(n) applies only where the offender has been involved in the planning of the offence, or whether it is sufficient that the offence itself was planned to take planning into account as an aggravating factor. The court has taken two different approaches on this matter as follows. Simpson J in *Legge v R* [2007] NSWCCA 244 said at [34]:

> S 21A(2)(n) was not, in my opinion, intended to be used to aggravate an offence where the offender being sentenced was not involved in, or part of, the planning and organisation.

However, in *DPP (NSW) v Cornwall* [2007] NSWCCA 359, Latham J said at [56]:

> Section 21A(2)(n) fixes upon this characteristic of the offence, not the degree to which an individual offender contributes to the planning.

The apparent differences of approach were raised in *SS v R* [2009] NSWCCA 114 at [97]–[99], but due to a concession by the Crown, the issue was not resolved.

For the offence of supply of a large commercial quantity of a prohibited drug, it is almost inevitably the case that inherent characteristics of that class of offence involve a level of planning and financial gain: *Wat v R* [2017] NSWCCA 62 at [44]. These inherent characteristics are not to be treated as aggravating factors unless such financial gain and planning is significant, that is, more than might be expected in the lowest level of offending for this type of offence: *Wat v R* at [44] applying *Prculovski v R* [2010] NSWCCA 274 at [43]; *Farkas v R* [2014] NSWCCA 141 at [62].

In *Wat v R*, the level of planning was elaborate; the whole operation was sophisticated, well-organised and conducted by a transnational crime syndicate. Both the level of planning and financial gain went well beyond that which might be expected in the lowest level of an offence of this type: *Wat v R* at [48].

For the application of this subsection to drug offences, see **Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999** at [19-890].

[11-192] Section 21A(2)(o) — the offence was committed for financial gain

Where financial gain is an inherent characteristic of the offence, such as fraud, financial gain cannot be taken into account as an aggravating factor under s 21A(2)(o) unless its nature or extent is unusual: *Clinton v R* [2018] NSWCCA 66 at [20]. It is well established that a factor should not be taken into account as an aggravating factor under s 21A(2), if it is either an element of the offence or an inherent characteristic of that kind of offence: *Mansour v R* [2011] NSWCCA 28 at [46]. Doing so would contravene the requirement in s 21A(2) that the court is not to have additional regard to any of the aggravating factors identified "if it is an element of the offence". In *Clinton v R*, the court held the judge erred by finding the offences were aggravated under s 21A(2)(o) because there was nothing unusual about the offending which would have permitted the pursuit of financial gain to be taken into account as an aggravating factor: *Clinton v R* at [21]–[22].

For the application of this section to drug supply offences, see **Drug offences and s 21A Crimes (Sentencing Procedure) Act 1999** at [19-890].

[11-195] Section 21A(2)(p) — prescribed traffic offence committed while child under 16 years was passenger in offender's vehicle

Section 21A(2)(p) was inserted on 16 November 2011 (s 2, LW 16.11.11) by the *Crimes (Sentencing Procedure) Amendment (Children in Vehicles) Act* 2011 to provide that it is an aggravating factor for a prescribed traffic offence if it is committed while a child under 16 years of age was a passenger in the offender's vehicle. A "prescribed traffic offence" is defined in s 21A(6).

[11-200] General observations about s 21A(3)

Some of the mitigating factors set out under s 21A(3) reciprocally mirror the aggravating factors set out in s 21A(2). For example, the circumstance that the injury, emotional harm, loss or damage caused by the offence was substantial is an aggravating factor; while the circumstance that the injury, emotional harm, loss or damage caused by the offence was not substantial is a mitigating factor.

[11-210] Section 21A(3)(a) — the injury, emotional harm, loss or damage caused by the offence was not substantial

This factor operates so as to mitigate the objective seriousness of the offence and is the converse of the aggravating factor set out under s 21A(2)(g).

When considering the mitigating factor in s 21A(3)(a), a court should not assume there is no lasting impact on a victim. The court should assume that the effect upon a victim of an armed robbery is substantial and this is taken into account in the penalty to be imposed. If there is evidence of a long lasting effect on the victim, this might be a matter of aggravation: *R v Bichar* [2006] NSWCCA 1 at [22], applying *R v Solomon* (2005) 153 A Crim R 32.

The fact that there is no substantial loss or damage that results from the offence does not necessarily diminish the offender's criminality. "Although it is calculated to reduce the demands of retribution, it does not impact on the weight to be given to most of the purposes of sentencing": *Van Can Ha v R* [2008] NSWCCA 141 at [43].

[11-220] Section 21A(3)(b) — the offence was not part of a planned or organised criminal activity

This factor, when present, will detract from the objective seriousness of offence and may be contrasted with offences that are planned or organised prior to their commission: see s 21A(2)(n). A claim of spontaneity under s 21A(3)(b) was rejected in the malicious damage of property by fire case of *Porter v R* [2008] NSWCCA 145 at [46].

[11-230] Section 21A(3)(c) — the offender was provoked by the victim

This provision gives statutory recognition to the principle that, where offences are committed under provocation, the provocation mitigates the seriousness of the offence: *R v Engert* (1995) 84 A Crim R 67 at 68 and 71; *R v Cioban* [2003] NSWCCA 304.

However, not in every case does the explanation of an offender's conduct, whether characterised as provocation or not, operate as a mitigating factor. The motive must

impinge on the offender's moral culpability. The degree to which motive can be seen as pertinent depends on all the circumstances, the most significant of which is the nature of the offence: *R v White* (unrep, 23/6/98, NSWCCA). An offender cannot simply take the law into his or her own hands: *R v Buddle* [2005] NSWCCA 82 at [11].

Where provocation is established such that it is a mitigating factor under s 21A(3)(c), it is a fundamental quality of the offending which may reduce its objective seriousness. There cannot be a realistic assessment of the objective seriousness of the offence unless the provocation is taken into account: *Williams v R* [2012] NSWCCA 172 at [42]. The absence of provocation is not a factor in aggravation and does not increase the objective seriousness of the offence: *Williams v R* at [43]. In *Pitt v R* [2014] NSWCCA 70 at [57], [65], the extreme provocation of the deceased and his brother towards the applicant was one of the bases upon which the court intervened and reduced the sentence for manslaughter.

Evidence of "relationship tension and general enmity … leading up to the offence", while part of the overall circumstances in which the offence occurred, "does not constitute evidence of provocation such as to amount to mitigation": *Shaw v R* [2008] NSWCCA 58 at [26].

[11-240] Section 21A(3)(d) — the offender was acting under duress

In ordinary language, duress implies forcible restraint and compulsion: *R v N* [1999] NSWCCA 187 per Adams J at [35].

Section 21A(3)(d) must be interpreted in light of the common law on the subject. Where an offender commits a crime while acting under duress which falls short of a complete defence to the charge, this "non-exculpatory duress" is capable of being a mitigating factor at sentence: *Tiknius v R* [2011] NSWCCA 215 (although the case concerned a Commonwealth offence the court declared the common law on the subject). Non-exculpatory duress may be taken into account as a mitigating factor for two reasons: it may affect the degree of the offender's subjective or moral culpability and prospects of rehabilitation: *Tiknius v R* at [41]. It is relevant to the assessment of objective gravity if an offence is committed because of threats and fear of harm to oneself or others rather than financial profit or greed. These matters bear upon the moral or true culpability of an offender: *R v Z* (2005) 2 AC 467 at [22]. Where the source of duress is conduct of persons in another country a court is entitled to approach such claims with a significant degree of circumspection as claims may be easily made: *Tiknius v R* at [45].

Where the offender satisfies the court that the commission of the offence was affected by duress, the weight given to that factor involves the court considering, inter alia, the form and duration of the offender's criminal conduct, the nature of the threats made, and opportunities available to the offender to report the matter to relevant authorities: *Tiknius v R* at [49]. Johnson J said at [51]:

> General deterrence has a very substantial role on sentence in cases where non-exculpatory duress is relied upon by the offender … The grooming and pressuring of persons to become involved in drug importation offences have been said to be "unremarkable features of many importation offences" … At times, the persons targeted by those recruiting them are said to have submissive or compliant personalities … [Case citations omitted.]

The Court of Criminal Appeal has continued to apply *Tiknius v R* notwithstanding the decision of *Muldrock v The Queen* (2011) 244 CLR 120: *Giang v R* [2017] NSWCCA 25 at [32]–[33]. *Muldrock v The Queen* did not place duress, provocation, mental state and mental illness outside the scope of objective features, or confine duress to a purely subjective consideration: *Giang v R* at [33]. As to decisions since *Muldrock v The Queen*, see *Kuti v R* [2012] NSWCCA 43; *Lindsay v R* [2012] NSWCCA 124; *Cherdchoochatri v R* [2013] NSWCCA 118; *RCW v R (No 2)* (2014) 244 A Crim R 541: *Giang v R* at [33].

In *Kuti v R*, duress was a mitigating factor to some extent, but not such as to remove the need for deterrence. In *Lindsay v R*, the judge was not convinced that pressure from the offender's "creditors" was "pressing on him as a motivation to commit [the] crime".

In *R v Ceissman* [2004] NSWCCA 466 at [24] Wood CJ at CL considered "economic duress" as a motive for participation in the offence of aggravated break enter and steal in company, contrary to s 112(2) *Crimes Act*, and held that it did not mitigate the respondent's objective criminality. The respondent's participation in the offence stemmed from independent criminal conduct arising out of his continued association with career criminals: at [24].

This principle was applied by Spigelman CJ in *R v N* at [57]–[59].

[11-250] Section 21A(3)(e) — the offender does not have any record (or any significant record) of previous convictions

At common law offenders without prior convictions may generally expect to be treated more leniently than those with previous convictions. The presence of relevant priors is an aggravating factor: see s 21A(2)(d).

See discussion of this factor in **Prior record** at [10-400].

Where the offender has a record of previous convictions at the time of appearing for sentencing of an offence, but the record is in relation to offences which were committed after the offence before the court, it is an error to consider the absence of a prior record as a mitigating factor: *R v MAK & MSK* [2006] NSWCCA 381 at [59]–[60].

[11-260] Section 21A(3)(f) — the offender was a person of good character

See discussion in **Subjective Matters Taken into Account** at [10-410].

The reference to "good character" in s 21A(3)(f) relates to the character of the offender prior to the commission of the offence: *Lozanovski v R* [2006] NSWCCA 143 at [12]. This was confirmed in *Aoun v R* [2007] NSWCCA 292 at [22] where it was explained that s 21A(3)(f) deals with previous good character due to the presence of the word "was" in the provision.

In *R v PGM* [2008] NSWCCA 172, Fullerton J considered that where there is a pattern of re-offending over an extended period in the course of an ongoing relationship fostered for the commission of the offence, "a finding that the criminal conduct is out of character fails to recognise that a determined and conscious course of offending … diminishes the mitigating impact of a finding of good character": at [44].

Section 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence (as defined in s 21A(6)), an offender's good character or lack of previous

convictions is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.

It was observed by Hodgson JA in *Aoun v R* [2007] NSWCCA 292 at [23] that:

> if there is evidence suggesting criminal conduct other than that for which an offender is being punished, that may be taken into account by a sentencing judge in deciding whether or not the accused has shown previous good character on the balance of probabilities …

For s 21A(5A) to apply, the sentencing judge should make an express finding specific to the offender that good character or lack of previous convictions assisted the offender in the commission of the offence: *NLR v R* [2011] NSWCCA 246.

See further *Special rule for child sexual offences* in **Good character** at [10-410].

[11-270] Section 21A(3)(g) — the offender is unlikely to re-offend

This mitigating factor involves a favourable assessment or prediction relating to an offender's future offending behaviour. It is commonly linked to a positive finding that the offender has good prospects for rehabilitation and, accordingly, will often influence the selection of the dominant purpose of sentencing. Its influence is particularly noticeable in borderline cases of imprisonment, where the sentencing court resolves not to impose a full-time custodial sentence on the basis that neither the principle of general deterrence nor concern for protection of society from the offender appear justified.

[11-280] Section 21A(3)(h) — the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise

In *Elyard v R* [2006] NSWCCA 43 the court held that the judge failed to take into account the applicant's good prospects of rehabilitation, per s 21A(3)(h). The judge found that the applicant had poor prospects of rehabilitation without providing a cogent basis for rejecting the psychologist's report, which referred to the applicant's objective progress in terms of a significant and measurable improvement in attitudes to drugs and alcohol abuse. Basten JA and Hall J, in separate judgments, found that his Honour failed to give proper weight to the psychologist's opinions: Basten JA at [27], Hall J at [92].

In the circumstances of a case, it may be that even though someone is unlikely to re-offend, their prospects of rehabilitation are not so favourable: *Barlow v R* [2008] NSWCCA 96 at [91]. It was possible to reconcile these seemingly inconsistent findings on the facts in *Barlow v R*.

[11-290] Section 21A(3)(i) — remorse shown by the offender

For an explanation of remorse at common law see *Alvares v R* (2011) 209 A Crim R 297 at [44] extracted at **Subjective matters taken into account** at [10-420]. In essence remorse means regret for the wrongdoing the offender's actions caused and, as a feature of post offence conduct, may be relied upon to mitigate penalty: *Windle v R* [2011] NSWCCA 277 at [44].

The section was amended to provide that remorse may be taken into account, "but only" if the offender has provided evidence that he or she has accepted responsibility for his or her actions, *and* has acknowledged any injury, loss or damage caused by his or her actions, or made reparation (or both). The impact of this provision (if any) on the common law (given the terms of s 21A(4): see [11-040]) is yet to be decided, and it is worth noting that there is no equivalent provision which states that s 21A(3)(i) has "effect despite any Act or rule of law to the contrary" as there is for the special rules for child sexual offences in s 21A(5A), (5B). Ultimately, so far as this statutory form of remorse is concerned, the question will turn on whether "evidence" has been *provided*. This requirement in s 21A(3)(i) to *provide* evidence of remorse does not equate with a requirement that an offender *give* evidence of remorse: *Butters v R* [2010] NSWCCA 1 at [17]; *Alvares v R* at [65]; *Doumit v R* [2011] NSWCCA 134 at [19]; *Sun v R* [2011] NSWCCA 99 at [25], [31].

The court should not simply disregard evidence of remorse because the offender does not go into the witness box and give evidence. It is, however, relevant to the weight of the evidence: *Butters v R* at [18]; *Mun v R* [2015] NSWCCA 234 at [37]; *Van Zwam v R* [2017] NSWCCA 127 at [6], [110]. These cases can be contrasted with *Imbornone v R* [2017] NSWCCA 144 and *R v Harrison* [2002] NSWCCA 79 where the sentencing judge, in each case, did not err by rejecting the offender's self-serving untested statements as evidence of remorse. In *R v Harrison*, Spigelman CJ said at [44]:

> The affidavit consists of self-interested assertions of a character which makes them almost impossible to check or test, particularly when served the day before the hearing. In the absence of any independent verification of her alleged behaviour, state of mind or of tangible expression of contrition, (there is not even an expression of remorse, albeit such would often appear glib), to treat this evidence with anything but scepticism would represent a triumph of hope over experience.

This approach is consistent with the court cautioning against uncritical reliance on material contained in tendered reports where an offender does not give evidence: *R v Qutami* [2001] NSWCCA 353.

McClellan CJ at CL said in *Pfitzner v R* [2010] NSWCCA 314 at [33]:

> it does not follow that if an offender does not give evidence and accordingly is not exposed to cross-examination that the sentencing judge may not give significant weight to the lack of evidence from the offender when determining whether a finding of remorse should be made.

The practice of offenders relying on hearsay statements for findings of fact in their favour is not uncommon, however, this practice is to be discouraged: *Halac v R* [2015] NSWCCA 121 at [106]. In *Imbornone v R*, there was no error in the sentencing judge concluding the offender's untested hearsay expressions of remorse to his psychiatrist were not sufficient to prove, on the balance of probabilities, the offender was remorseful under s 21A(3)(i): *Imbornone v R* at [55], [59]. Wilson J at [57] set out a number of principles to be applied when a sentencing judge is asked to take into account an untested statement made to a third party: see **Untested self-serving statements** at [1-490].

An assessment of the genuineness of remorse is likely to be better informed when expressed directly, that is, face to face because it is intrinsically a subjective matter: *Alvares v R* at [65]; *Mun v R* at [39]. The evidence before the judge in *Windle v R*

at [54] did not satisfy the section since there was no evidence showing the applicant accepted responsibility for his actions; nor did he acknowledge or pay any reparation for the loss caused.

A judge is not obliged to accept assertions of contrition made by an offender: *R v Stafrace* (1997) 96 A Crim R 452 per Hunt CJ at CL, followed in *R v Nguyen* [2004] NSWCCA 438 at [21].

It is an error for a judge to look for evidence of contrition (or lack of contrition) only at the time of the commission of the offence, without regard to evidence of contrition at a later point in time: *R v Johnston* [2005] NSWCCA 80 at [28]. Later evidence of contrition — which appeared genuine and indicated the beginning of progress towards rehabilitation — should be taken into account by the sentencer.

The strength of the Crown case is a relevant consideration in relation to the evaluation of remorse: *R v Sutton* [2004] NSWCCA 225 at [12]; *R v Thomson* (2000) 49 NSWLR 383 at [137].

The court should not quantify the reduction for remorse either separately or as part of the utilitarian discount for the plea: *R v Borkowski* [2009] NSWCCA 102 at [32]. Given that s 21A makes specific provision for remorse to be considered as a separate mitigating factor, to include it as a factor contributing to the percentage discount for the plea of guilty can give rise to a perception of double counting: *Kite v R* [2009] NSWCCA 12 at [12].

Remorse is a major factor in determining whether an offender is unlikely to re-offend (s 21A(3)(g)) and has good prospects of rehabilitation (s 21A(3)(h)). "Without true remorse it is difficult to see how either finding could be made": *R v MAK & MSK* [2006] NSWCCA 381 at [41].

The reference in s 21A(3)(i)(ii) to reparation as a mitigating factor requires that before this factor comes into play, there must be evidence that the reparation has already been made at the time of sentence: *R v Cage* [2006] NSWCCA 304 at [34]. Repayment of the proceeds of crime is not necessarily evidence of genuine remorse: *Chahal v R* [2017] NSWCCA 203 at [39].

[11-300] Section 21A(3)(j) — the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability

It has not been judicially determined just how the expression "not fully aware of the consequences of his or her actions because of the offender's age" is to be applied or whether it adds anything to the common law on the subject. A narrow reading would suggest that the subsection would apply to very young offenders. The common law recognises "the potential for the cognitive, emotional and/or psychological immaturity of a young person to contribute to their breach of the law": *KT v R* [2008] NSWCCA 51 at [23]. Similarly, it is doubtful whether the subsection adds to the common law in relation to the relevance of the offender's mental condition at sentence as expressed in *Muldrock v The Queen* (2011) 244 CLR 120 at [54]. In *Taylor v R* [2006] NSWCCA 7 the sentencing judge should have found that the applicant suffered from a "disability" and that his mental condition was a mitigating factor under s 21A(3)(j).

See further, **Subjective matters taken into account** at [10-460] and **Relevance of youth at sentence** at [15-015].

[11-310] Section 21A(3)(k) — a plea of guilty by the offender

See **Guilty plea to be taken into account** at [11-500].

[11-320] Section 21A(3)(l) — the degree of pre-trial disclosure by the defence

The *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001 was assented to on 18 April 2001 and commenced on 19 November 2001. It introduced procedures whereby the court could, on a case by case basis, impose pre-trial disclosure requirements on both the prosecution and the defence, in order to reduce delays in complex criminal trials. Now see Ch 3 Pt 3 Div 3 *Criminal Procedure Act* 1986.

Although s 22A *Crimes (Sentencing Procedure) Act* provides that a court may take into account the degree to which the offender cooperates with the court in making pre-trial disclosures, and may impose a lesser penalty than it would otherwise (s 22A(1)), any such lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence (s 22A(2)).

See **Power to reduce penalties for pre-trial disclosure** at [11-910].

[11-330] Section 21A(3)(m) — assistance by the offender to law enforcement authorities

See **Power to reduce penalties for assistance to authorities** at [12-200].

[11-335] Section 21A(5AA) — special rule for intoxication

Section 21A(5AA) provides:

> In determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into account as a mitigating factor.

For a discussion of the effect this subsection has on the common law, see **Subjective matters taken into account** at [10-480]ff and **Special Bulletin No 6 — Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014**. It has effect despite any Act or rule of law to the contrary.

[11-337] Section 21B — sentencing patterns and practices

Section 21B *Crimes (Sentencing Procedure) Act* 1999 provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied *at the time the offence was committed*, not at the time of sentencing: s 21B(2). These provisions apply to proceedings commenced on or after 18 October 2022: see *Crimes (Sentencing Procedure) Amendment Act* 2022. Prior to the insertion of s 21B, unless the offence was a child sexual offence (see s 25AA(1) (rep)), the court was required to sentence in accordance with the sentencing patterns and practices existing *at the time of the offence*: *R v MJR* (2002) 54 NSWLR 368; see also **Sentencing practice after long delay** in [10-530] **Delay**. Section 25AA(1) continues to apply to proceedings commenced from 31 August 2018 to 17 October 2022.

Exceptions to s 21B(1)

Section 21B(3) provides that a court may sentence an offender for an offence in accordance with the sentencing patterns and practices at the *time the offence was committed* if:

(a) the offence is not a child sexual offence; and

(b) the offender establishes that there are exceptional circumstances.

(See also **Sentencing for historical child sexual offences** at [17-410]).

Further, s 21B(4) provides that a court, when varying or substituting a sentence, must do so in accordance with the sentencing patterns and practices *at the time of the original sentencing*.

[11-340] Section 24A — mandatory requirements for supervision of sex offenders and prohibitions against child-related employment to be disregarded in sentencing

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted s 24A (effective 1 January 2009). Section 24A(1) provides that, in sentencing an offender, the court must not take into account as a mitigating factor the fact that the offender has or may become a registrable person under the *Child Protection (Offenders Registration) Act* 2000 as a consequence of the offence.

Section 24A was amended by the *Crimes (Sentencing Procedure) Amendment Act* 2010 to further provide that the court must not take into account, as a mitigating factor, the fact the offender is prohibited from engaging in child-related employment under the *Commission for Children and Young People Act* 1998 because of their conviction for a serious sex offence, the murder of a child or a child-related personal violence offence. Such an offender's status as a "prohibited person" is not extra-curial punishment.

Section 24A was further amended by the *Crimes (Serious Sex Offenders) Amendment Act* 2013, which commenced on 19 March 2013. Section 24A(1)(d) was inserted to provide that the fact that an offender is subject to an order under the *Crimes (High Risk Offenders) Act* 2006 must not be taken into account as a mitigating factor. The amendments were a consequence of renaming the *Crimes (Serious Sex Offenders) Act* as the *Crimes (High Risk Offenders) Act* 2006 which extended the application of the Act to high risk violent offenders as well as serious sex offenders.

See further discussion of extra-curial punishment in **Sexual offences against children** at [17-570].

[11-350] Section 24B — confiscation of assets and forfeiture of proceeds of crime to be disregarded in sentencing

Section 24B prevents a court from taking into account, as a mitigating factor, the consequences of any confiscation or forfeiture order imposed on the offender because of the offence. See *R v Hall* [2013] NSWCCA 47 for an approach to a drug proceeds order.

[11-355] Section 24C — disqualification of parliamentary pension

The *Parliamentary Contributory Superannuation Amendment (Criminal Charges and Convictions) Act* 2017 inserted s 24C into the *Crimes (Sentencing Procedure) Act*

1999 to preclude consideration of loss of parliamentary pension as mitigating factor in sentencing. The amendments have a retrospective effect in the sense that they do not only apply to Members of Parliament convicted forthwith: Sch 1, cl 11A *Parliamentary Contributory Superannuation Act* 1971. Section 24C was first applied in *R v Macdonald* [2017] NSWSC 638 at [262].

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Power to reduce penalties for assistance to authorities

In *York v The Queen* (2005) 225 CLR 466, Gleeson CJ at [3] observed:

> It is common sentencing practice to extend leniency, sometimes very substantial leniency, to an offender who has assisted the authorities, and, in so doing, to take account of any threat to the offender's safety, the conditions under which the offender will have to serve a sentence in order to reduce the risk of reprisals, and the steps that will need to be taken to protect the offender when released. The relevant principles are discussed, for example, in *R v Cartwright* (1989) 17 NSWLR 243; *R v Gallagher* (1991) 23 NSWLR 220.

The basis of a court's power to discount any sentence for a State offence where the offender has provided assistance to law enforcement authorities is found in s 23(1) *Crimes (Sentencing Procedure) Act* 1999.

For the statutory provisions and principles applicable to sentencing Commonwealth offenders who have provided assistance, see **General sentencing principles applicable** at [16-010].

[12-200] Statutory provision

Section 23 *Crimes (Sentencing Procedure) Act* 1999 provides as follows:

> **23 Power to reduce penalties for assistance provided to law enforcement authorities**
>
> (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.
>
> (2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:
>
> (a) (repealed)
>
> (b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,
>
> (c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,
>
> (d) the nature and extent of the offender's assistance or promised assistance,
>
> (e) the timeliness of the assistance or undertaking to assist,
>
> (f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,
>
> (g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,
>
> (h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,
>
> (i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,

(j) (repealed)

(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:

(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and

(b) state the penalty that it would otherwise have imposed, and

(c) where the lesser penalty is being imposed for both reasons — state the amount by which the penalty has been reduced for each reason.

(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.

[12-205] Rationale

Frequently the only source of information about an actual or contemplated crime comes from other criminals, and it is in the public interest to encourage offenders to supply such information to authorities, including the police, and to give evidence against other offenders. Section 23 is the statutory expression of the policy to encourage the supply of full and frank information to authorities by granting an offender an appropriate reward regardless of whether the assistance was motivated by genuine remorse or self-interest: see *R v Cartwright* (1989) 17 NSWLR 243 per Hunt and Badgery-Parker JJ at 252; endorsed in *R v XX* [2017] NSWCCA 90 at [46].

If the giving of assistance is motivated by genuine remorse or contrition, then even greater leniency may be extended to the offender under normal sentencing principles and as to these, and other considerations relevant to the rationale for the discount, in *R v Cartwright* at 252, their Honours said:

> It is clearly in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice, and to give evidence against those other offenders in relation to whom they have given such information.
>
> In order to ensure that such encouragement is given, an appropriate reward for providing assistance should be granted whatever the offender's motive may have been in giving it, be it genuine remorse (or contrition) or simply self-interest. What has to be encouraged is a full and frank co-operation on the part of the offender, whatever be his motive. The extent of the discount will depend to a large extent upon the willingness with which the disclosure is made. The offender will not receive any discount at all where he tailors his disclosure so as to reveal only the information which he knows is already in the possession of the authorities. The discount will rarely be substantial unless an offender discloses everything which he knows. To this extent, the enquiry is into the subjective nature of the offender's co-operation. If, of course, the motive with which the information is given is one of genuine remorse or contrition on the part of the offender, that is a circumstance which may well warrant even greater leniency being extended to him, but that is because of normal sentencing principles and practice. The contrition is not a necessary ingredient which must be shown in order to obtain the discount for giving assistance to the authorities.

> Again, in order to ensure such encouragement is given, the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as *could* significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities as comprehended by the offender himself. [emphasis in original]

The rationale for the discount as explained in *R v Cartwright* remains valid, despite the enactment of s 23: *AGF v R* [2016] NSWCCA 236 at [35]–[36].

[12-210] Procedure

Presenting evidence of assistance

It is incumbent on the offender to establish that a discount for assistance should be provided: *R v SS* [2021] NSWCCA 56 at [74]; *Ahmad v R* [2021] NSWCCA 30 at [36]. However, the Crown has an obligation to assist the offender discharge this burden as a matter of public interest and practicality because it may be difficult for an offender to adduce such evidence: *R v Cartwright* (1989) 17 NSWLR 243 at 254–255; *R v Bourchas* [2002] NSWCCA 373 at [99].

Evidence of assistance is typically in the form of an affidavit, or letter, of assistance by a senior law enforcement officer who identifies the assistance provided and makes an assessment as to its value. A statement taken from an offender provided on the basis the evidence contained in it will not be used against them (an induced statement) may also be tendered to demonstrate to the sentencing court the extent of their assistance for the purpose of mitigation. When the offender's statement is tendered it is encumbent on the parties to identify for the sentencing court any limitations on its use: *Macallister (a pseudonym) v R* [2020] NSWCCA 306 at [39]–[41].

A statement of assistance is tendered for the sole purpose of s 23. As is the case when an offender's induced statement is tendered, the basis for tendering an affidavit, or letter, of assistance should be agreed and clearly stated and the question of whether there is any restriction on its use identified: *Neil Harris (a pseudonym) v R* [2019] NSWCCA 236 at [61]. The same caution used when considering an induced statement should also be exercised when a letter of assistance is tendered for the sole purpose of s 23: *Neil Harris (a pseudonym) v R* at [61] applying the principles in *R v Bourchas* at [99]. See further **Offender's induced statement cannot be used adversely** below.

Maintaining confidentiality of material

Evidence of assistance relied on in sentence proceedings must be dealt with carefully to maintain its confidentiality. It is prudent to raise with the parties the approach to be taken in an individual case.

Appropriate non-publication orders should be tailored to ensure the offender has the opportunity to consider and test the accuracy of the evidence and to make submissions. Depending on the nature of the material, this may require providing an offender's counsel with access to the material on certain terms: *HT v The Queen* (2019) 269 CLR 403 at [45]–[46], [57], [66]–[67]. In *HT v The Queen* the High Court concluded the appellant was denied procedural fairness during the Crown sentence appeal because she was not provided with access to the affidavit of assistance provided by police. The

fact the affidavit was not adverse to her was irrelevant: *HT v The Queen* at [25]. See also [1-349] **Closed court, suppression and non-publication orders** in the *Criminal Trial Courts Bench Book*.

There is a tension in s 23 between the obligation to provide reasons in open court and the need to protect confidentiality. Revealing the fact or detail of assistance may put an offender or their family at risk, and undermine or destroy the benefits law enforcement authorities may obtain from that assistance. In a sentencing judgment it is preferable to do no more than indicate that consideration has been given to the material and draw conclusions about its utility. Providing a detailed exposition of the factors in s 23(2) may defeat the purpose of the statutory provision: *Greentree v R* [2018] NSWCCA 227 at [55]–[56]. For example, in *Greentree v R* the court found it was not an error for the judge to refer to the "significance and the usefulness" of the assistance without elaboration. Such an approach appropriately balanced the obligation to provide reasons with the need to protect confidentiality: at [56].

Offender's induced statement cannot be used adversely

An offender's induced statement, while it may be admitted in the offender's sentence proceedings, cannot be used against them: *R v Bourchas* at [99].

In *R v Bourchas*, the appellant entered a guilty plea at the earliest opportunity and provided significant assistance to the authorities. On sentence, the Crown tendered, over objection, his long and detailed statement, which was made following a promise that it would not be used against him. The sentencing judge admitted the statement and took information in it into account when sentencing the appellant, including information unfavourable to him, which was not otherwise in evidence.

The court held that the judge erred in taking into account the appellant's statement otherwise than as evidence of his assistance to authorities: at [100]. Giles JA, at [99], summarised his findings in relation to the issue as follows:

1. The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation.
2. The Crown should assist the offender in the discharge of that burden.
3. The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender.
4. A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly.
5. When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way.
6. In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.

See also *JMS v R* [2010] NSWCCA 229 at [29]; *Govindaraju v R* [2011] NSWCCA 55 at [66].

[12-215] Broad scope of s 23(1) — "any other offence"

Section 23 takes an expansive approach to what constitutes "assistance": *R v XX* [2017] NSWCCA 90 at [53].

Assistance to authorities most commonly occurs in the form of implicating accomplices and/or giving evidence as a Crown witness: see for example, *Abbas v R* [2013] NSWCCA 115; *R v DW* [2012] NSWCCA 66. However, voluntary disclosure to law enforcement authorities of otherwise unknown guilt also falls within the ambit of s 23: *CMB v Attorney General for NSW* (2015) 256 CLR 346 at [41], [71]; *Panetta v R* [2016] NSWCCA 85 at [33]–[34]; *Le v R* [2019] NSWCCA 181 at [50]–[52]; *Ahmad v R* [2021] NSWCCA 30 at [24]. A discount granted for this type of assistance is commonly referred to as an *Ellis* discount (from *R v Ellis* (1986) 6 NSWLR 603 discussed further below at [12-218] **Voluntary disclosure of unknown guilt — Ellis discounts**.

Another situation where a discount was afforded arose in *RJT v R* [2012] NSWCCA 280 where an offender being sentenced for two child sexual assault offences told police he was sexually assaulted by his grandfather as a child. It was held that while s 23 extended to assistance of this kind the level of discount should be more limited than otherwise applied (10% was found to be appropriate): at [9]–[10].

However, not all information provided by an offender amounts to assistance for the purposes of s 23. For example, the mere fact an offender participates in a recorded interview and makes admissions about the offence does not amount to assistance within the meaning of s 23(1): *Le v R* [2019] NSWCCA 181 at [53]–[54], [56]; *Browning v R* [2015] NSWCCA 147 at [123].

The court in *R v XX* [2017] NSWCCA 90 made the following observations (at [32]–[35]) about s 23(1) in light of the text of the provision and the historic and extrinsic materials:

- "Assistance" is not defined in the provision and the meaning should be approached as being relatively expansive. The only limitations are that the assistance be given to "law enforcement authorities" in the "prevention, detection or investigation, or in proceedings relating to" an offence;
- The reference to "any other offence" in the text of the provision clearly contemplates that the assistance may have been provided in relation to an offence other than the one for which the offender is being sentenced;
- Nothing in s 23(1) suggests that the assistance must have been provided after the offender's arrest; past assistance, provided prior to arrest or even the offender's commission of the subject offence, is therefore capable of falling within the provision.

The court went on to note that not all conduct of an offender which helps the authorities falls within s 23(1), citing unwitting assistance (*R v Calderoni* [2000] NSWCCA 511 at [9]) and pre-trial disclosure (s 22A *Crimes (Sentencing Procedure) Act 1999*) as examples: at [32], [39].

Section 23(1) confers a discretion and not an obligation on a sentencing judge to proffer a discount when assistance has been provided: *R v XX* at [31]. The factors listed under s 23(2) are relevant not only to an assessment of the level of discount that must be provided, they must also be considered as part of the assessment of whether any discount should be provided: *R v XX* at [61]; *Le v R* at [55].

In noting the example given by RA Hulme J in his dissent in *RJT v R* at [40], of where an offender seeks a discount on the basis that he reported a home burglary to police many years before, the court stated that even if that situation fell within s 23(1), a proper application of the criteria in s 23(2) would compel the conclusion that no lesser penalty should be imposed: *R v XX* at [53].

The sentencing judge in *R v XX* erred by allowing the respondent a 15% discount under s 23 in circumstances where, six or seven years before his arrest for child sexual offences, he had assisted in the prosecution of a conspiracy to murder charge: *R v XX* at [63]. Although that assistance was within the scope of s 23(1), the proper exercise of the discretion could only have led to a refusal to impose a lesser sentence. The assistance and the subject offence were entirely unrelated, there was no ongoing risk of reprisals and the respondent had already derived a benefit ($17,000) from providing that assistance (all matters under s 23(2)(i), 23(2)(g) and 23(2)(f) respectively): *R v XX* at [62].

Because s 23 applies to *Ellis* discounts, it follows that a sentencing court must also consider the factors in s 23(2) when determining whether to proffer the discount: *R v AA* [2017] NSWCCA 84 at [45]. The sentencing judge in that case erred by failing to do so before stating he was granting the offender a "further *Ellis* type discount": at [49].

[12-218] Voluntary disclosure of unknown guilt — the Ellis principle

In *R v Ellis* (1986) 6 NSWLR 603, decided before the enactment of s 23, the court held that an offender who voluntarily discloses their involvement in serious crime about which the police had no knowledge was entitled to a "significant added element of leniency". In *R v Ellis*, not only did the respondent plead guilty, but he voluntarily disclosed to police for the first time his involvement in seven armed robberies. The degree of leniency afforded to an offender in cases of this kind will vary depending on the likelihood of discovery of the offence: *R v Ellis*, per Street CJ at 604.

Although since at least *CMB v Attorney General for NSW* (2015) 256 CLR 346, it has been accepted that assistance of this kind may entitle an offender to a reduced sentence under s 23, *R v Ellis* and the cases which have considered it provide guidance as to why such assistance may justify a sentence discount under s 23: see *R v SS* [2021] NSWCCA 56 at [43]–[44], and the discussion at [59]–[65].

In *Ryan v The Queen* (2001) 206 CLR 267, McHugh J discussed the extent to which leniency may be extended pursuant to *R v Ellis*, saying at [15], that:

> The statement in *Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency" is a statement of a general principle or perhaps more accurately of a factor to be taken into account. It is not the statement of a rule to be quantitatively, rigidly or mechanically applied. It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case.

In *R v GLB* [2003] NSWCCA 210, the court held at [33] that, although some discount should be allowed:

> a sentencing judge is not required, in every case in which there has been a voluntary disclosure of guilt by the offender, to allow a considerable or significant discount because of the voluntary disclosure of guilt or to say in the judge's remarks on sentence that the judge has allowed a considerable or significant discount on this ground.

Howie J said in *Lewins v R* [2007] NSWCCA 189 at [18]:

> Although the leniency referred to in these decisions extends to those cases where the offender volunteers additional criminality otherwise unknown to the police, the extent of the leniency will obviously not be of the same significance as in those cases where the police are unaware of any criminal offences committed by the offender. It is a matter of degree. In some cases the known criminality might be so great that little leniency can be shown for the further offences revealed by the offender.

In *Panetta v R* [2016] NSWCCA 85, the applicant was entitled to considerable leniency for his confession in circumstances where there was no prospect of the offence (murder) or the offender's involvement in it coming to light: at [70]. On the other hand, in *R v SS*, the offender was not entitled to leniency for assistance because of his admissions as there was independent evidence of his guilt: at [83].

The entitlement to a discount applies, albeit to a lesser extent, where (precipitated by the co-offender) the police are close to identifying the offender and then the offender voluntarily surrenders and confesses: see *R v Hasan* [2005] NSWCCA 21 at [23].

Relevance to remorse and contrition

The voluntary confession of criminality will also be relevant to other, more general considerations such as remorse, the prospects of rehabilitation and the likelihood of further offending: *Lewins v R* at [18]; see also [10-420] **Contrition** and [11-290] **Section 21A(3)(i) — remorse shown by the offender**. In *R v SS*, although the applicant was not entitled to a discount for assistance, his admission supported a finding of genuine remorse: at [85]. The court can also take into account that there has been a long delay between the commission of the crime and sentencing, and that the offender had since been rehabilitated. On the other hand, a lengthy period of concealment and lying to the police are factors not to be ignored: *R v Baldacchino* (unrep, 3/11/98, NSWCCA).

[12-220] "Unreasonably disproportionate" penalty — s 23(3)

A court is required to consider all the matters listed under s 23(2) *Crimes (Sentencing Procedure) Act* 1999 and must not reduce a sentence so that it becomes unreasonably disproportionate to the nature and circumstances of the offence: s 23(3). Hence, there is a limit to the value provided by assistance to authorities. In *R v Chaaban* [2006] NSWCCA 107 at [3] Hunt AJA said:

> In *Regina v Gallagher* (1991) 23 NSWLR 220 at 232 — well before s 23(3) was enacted — Gleeson CJ (with whom I expressly agreed on this issue, at 234), after pointing out that discounts of this kind are for the benefit of both the Crown and the offender, and that there is usually no-one to put an opposing or qualifying point of view, said:
>
> > "Public confidence in the administration of criminal justice would be diminished if courts were to give uncritical assent to arguments for leniency, which are being

> jointly urged by both the prosecution and the defence, in circumstances which may call for a close examination of the alleged assistance. *Care must also be taken to ensure that the ultimate sentencing result that is produced is not one that is so far out of touch with the circumstances of the particular offence and the particular offender that, even understood in the light of the considerations of policy which supports [the discounts given], it constitutes an affront to community standards.* If sentencing principles are capable of producing an outcome of that kind, then that calls into question their legitimacy." [emphasis added in Hunt AJA's judgment.]

Section 23(3) is the statutory enactment of this principle from *R v Gallagher*. The term "unreasonably" in s 23(3) is given a wide operation: *CMB v Attorney General of NSW* (2015) 256 CLR 346 at [78].

It is inappropriate to apply a discount for assistance to the authorities "wholly to the non-parole period [as such] an approach [is] only likely to skew the whole sentencing exercise, particularly after a large discount has been given for the guilty pleas when fixing the head sentences": *R v MacDonnell* [2002] NSWCCA 34 at [48]. Where an aggregate sentence is imposed the discount must be applied to each indicative sentence, not the aggregate sentence: *TL v R* [2017] NSWCCA 308 at [102]–[103].

Necessity of court to scrutinise the information

It is common in cases where leniency is being sought on behalf of a person who has co-operated with the authorities that the argument in favour of such leniency comes from the Crown as well as the offender.

The prosecuting authorities themselves have gained, or hope to gain, from the assistance in question, and it is understandable that they regard it as advancing the interests which they represent to see that such assistance is suitably and publicly rewarded. There is, however, usually no-one to put an opposing or qualifying point of view. This raises the need for special care on the part of the court, which must be astute to ensure it is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it: *R v Gallagher* at 232; *R v Fisk* (unrep, 21/7/98, NSWCCA).

An inquiry relating to the quality of the assistance should be dealt with in a broad and general way and not descend into minute detail lest it subvert the benefit otherwise afforded to the public interest: *R v Cartwright* (1989) 17 NSWLR 243 at 253. Where information given to assist authorities is only partly true and does in fact assist the authorities, the fact it was partly false does not itself disentitle the offender from a reduction in sentence: *R v Downey* (unrep, 3/10/97, NSWCCA).

Resolving assertions on appeal that sentence unreasonably disproportionate

In a Crown appeal against sentence where a lesser sentence has been imposed to take into account the offender's assistance to law enforcement authorities, the issue for the Court of Criminal Appeal is not whether it regards the sentence as "unreasonably disproportionate" within the meaning of s 23(3), but whether it was open to the sentencing judge to decide that the sentence actually imposed was not unreasonably disproportionate. The focus is on whether the primary judge's conclusion was open. Whether a sentence is unreasonably disproportionate is a judgment about which reasonable minds may differ: *CMB v Attorney General (NSW)* at [78].

See also **Appeals** at [70-000]ff.

[12-225] Requirement to indicate reduction for assistance — s 23(4)

Section 23(4) requires a court, which imposes a lesser penalty because the offender has assisted or has undertaken to assist, to indicate that a lesser penalty is being imposed. The court must state the penalty that otherwise would have been imposed and the amount by which the sentence is reduced.

The text of s 23(4)(b) — that the court is to "state the penalty that it would otherwise have imposed" — refers to the appropriate penalty disregarding only the assistance to the authorities: *R v Ehrlich* [2012] NSWCCA 38 per Basten JA at [11] and Adams J at [33]. Where full time imprisonment is imposed, compliance with s 23(4) will generally, if not invariably, permit the discount to be identified, even if not expressly stated, by calculating the proportion of the sentence imposed of that which would otherwise have been imposed, each of which are to be stated: *R v Ehrlich* at [9]. Where the court imposes a more lenient sentencing option because of the offender's assistance, the court should state what the harsher option would have been had the offender not assisted.

Because s 23 also applies to *Ellis* discounts, the court is required under s 23(4) to state the nature and extent of any reduction of the sentence which would otherwise have been imposed absent that disclosure of guilt and quantify the discount separately: *Panetta v R* [2016] NSWCCA 85 at [1], [33]–[34], [60]; *R v AA* [2017] NSWCCA 84 at [43].

Where a discount is given for a guilty plea, and past and future assistance, in most cases the court will be required to indicate the discount for all three to comply with s 23(4): *LB v R* [2013] NSWCCA 70 at [44]. Compliance with ss 23(3) and 23(4) cannot be fulfilled by a statement of individual discounts followed by a process of "compression" to achieve a result that does not contravene s 23(3): *LB v R* at [45].

In *R v AA*, the court considered the impact of a failure to comply with s 23(4), noting that while s 23(6) provides that the failure to comply with s 23(4) does not "invalidate the sentence", s 101A of the Act provides that a "failure to comply with a provision of this Act may be considered by an appeal court in any appeal against sentence even if this Act declares that the failure to comply does not invalidate the sentence". The combined effect of the provisions is therefore that a failure to comply with s 23(4) is not a jurisdictional error but complaints about such failures fall to be considered as part of the appellate process: *R v AA* at [44].

A court must also avoid double counting an element on sentence, for example when assistance also reflects contrition: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see [10-420] **Contrition**.

[12-230] Applying the discount

The factors in s 23(2) are relevant not only to an assessment of the level of discount that must be provided. They must also be considered as part of the assessment of whether any discount should be provided: *R v XX* [2017] NSWCCA 90 at [61]; *Le v R* [2019] NSWCCA 181 at [55]. If a sentencing court is to reduce a sentence because of an offender's assistance, regard must be paid to the mandatory considerations in s 23(2) and the discount must be specified: *Ahmad v R* [2021] NSWCCA 30 at [36], [41].

Even if a court chooses not to impose a lesser penalty for the assistance given regard must still be had to the matters identified in s 23(2): *Ahmad v R* at [41]; *R v AA* [2017] NSWCCA 84 at [45].

Method of calculation of discount — combined or separate?

Section 23(4) does not prescribe a method or manner in which the discounting is to be achieved: *R v Ehrlich* [2012] NSWCCA 38 at [7]. Although Gleeson CJ's remarks in *R v Gallagher* (1991) 23 NSWLR 220 are qualified by s 23(4) their "tenor is not diminished": *R v Ehrlich* per Basten JA at [7]. Gleeson CJ said in *R v Gallagher* at 230:

> … it is essential to bear in mind that what is involved is not a rigid or mathematical exercise, to be governed by "tariffs" derived from other or different cases but, rather, one of a number of matters to be taken into account in a discretionary exercise that must display due sensitivity towards all the considerations of policy which govern sentencing as an aspect of the administration of justice.

Different approaches have been taken to discounting: *R v Ehrlich* per Basten JA at [11]; Adams J at [33]. There is authority which permits discounts to be separately identified and then applied consecutively: *R v Ehrlich* at [11]. Another commonplace approach is to identify individual discounts and add them so as to achieve a single global figure: *R v Ehrlich* at [11]–[12].

Neither approach is erroneous because s 23(4) "says nothing as to the manner in which the discounting is to be achieved. Indeed, on one view, the manner in which it is achieved is irrelevant: the selected reduction can be expressed in a number of different ways, none of which is prohibited": *R v Ehrlich* per Basten JA at [11]. The real issue with respect to the allowance of a discount on two bases is to avoid double counting of a particular element: *R v Ehrlich* per Basten JA at [13]–[14]; *Hamzy v R* [2014] NSWCCA 223 at [73]. While the discount for assistance must be quantified, the discount for contrition is generally not quantified: s 23(4); see [10-420] **Contrition**.

The court in *CM v R* [2013] NSWCCA 341 at [45] held that there was no reason for the judge to confine the discount to just one of the five sentences. Rather, the judge should have discounted each sentence which should have had a modest bearing on the overall term: *CM v R* at [48]. When there is a degree of accumulation of multiple sentences it is necessary to ensure that any discount is not eroded by the process of accumulating sentences: *CM v R* at [44]. Discounts applied to individual sentences need not be reflected with mathematical precision in the overall or effective term. There is, however, a need for some proportionality: *CM v R* at [48].

Level of discount

It is not helpful to speak of a level of discount as being generally available: *R v Ehrlich* per Basten JA at [11]; *Hamzy v R* at [74]. It makes assumptions about the matters to which the court must have regard in s 23(2) and runs the risk of selective reliance on authorities to the exclusion of others. There are decisions such as *R v NP* [2003] NSWCCA 195 at [29] and *Z v R* [2014] NSWCCA 323 at [43] which permitted a discount for assistance of up to 50%. As Gleeson CJ said in *R v Gallagher* at 230 "what is involved is not a rigid or mathematical exercise, to be governed by 'tariffs' derived from other and different cases": *R v Ehrlich* at [6]; see also *Buckley v R* [2021] NSWCCA 6 at [1]. The process embarked upon in reducing a sentence for assistance

is not one of arithmetic calculation or the blind application of percentage discounts: *Haouchar v R* [2014] NSWCCA 227 per Rothman J at [39]. Beazley JA said in *R v Z* [2006] NSWCCA 342 at [88]:

> the focus should not be so much upon the precise numerical value of the discount but rather upon the question whether, after all relevant matters have been taken into account, the sentence imposed is appropriate.

The relevant restraint derives from the requirement in s 23(3) that the sentence not be disproportionate to the nature and circumstances of the offence: *Buckley v R* at [1]; [87].

In *SZ v R* [2007] NSWCCA 19 at [44], the court held that generally only a single, combined discount for both a guilty plea and assistance should be given because applying two discrete discounts may lead to error "unless the court is conscious of the overall discount being given and considers whether a discount of that degree can result in a sentence that does not infringe s 23(3): at [11], [44]. This approach was confirmed in *Panetta v R* [2016] NSWCCA 85.

Some guidance about the constraint in s 23(3), that the sentence not be unreasonably disproportionate to the nature and circumstances of the offence as it applies to a combined discount for a plea of guilty and assistance, may be obtained from:

- Generally, a combined discount of more than 50% will not comply with s 23(3) and rarely will a discount of more than 60% be appropriate: *SZ v R* at [11]; *Z v R* at [33]; *Panetta v R* at [75], [7].
- A combined discount of 50% incorporates an offender serving their sentence in more onerous conditions, otherwise the combined discount should not normally exceed 40%: *Brown v R* [2010] NSWCCA 73 at [38]; *Haouchar v R* [2014] NSWCCA 227 at [37].
- In *SZ v R*, the judge erred by giving a combined discount of 62.5%, reflecting a 25% discount for a guilty plea and 50% discount for assistance. However, given the unusual circumstances in *Panetta v R* (a voluntary confession to murder where the applicant's involvement was unlikely to have been discovered) a combined discount of 60% (50% for assistance and 10% for his guilty plea) was appropriate: at [7], [76]. See also *R v NP* [2003] NSWCCA 195 at [30] involving a 60% combined discount for plea of guilty and assistance.

However, the court in *Buckley v R*, while acknowledging that earlier cases such as *SZ v R*and *Z v R*expressed and endorsed the view that a single combined discount should not normally exceed 50%, reiterated the importance of assessing the facts and circumstances of the particular case, including most significantly, s 23(3), concluding that the effective constraint is not a rigid mathematical rule but the constraint established by s 23(3): at [1]; [87]. In *McKinley v R [2022] NSWCCA 14*, Rothman J (Macfarlan JA and Dhanji J agreeing) addressed this more directly, observing, at [48]–[49], that cases such as *R v Sukkar* [2006] NSWCCA 92, *SZ v R* and *FS v R* [2009] NSWCCA 301, which said it would be a rare case where a combined discount of more than 60% would not result in a manifestly inadequate sentence, "probably did not withstand later authority criticising an arithmetic approach to sentencing." His Honour emphasised at [50] that determining "the reduction for assistance pursuant to the terms of s 23 … depends on assessment of the mandatory considerations prescribed by s 23(2)."

Ultimately, the sentencing judge must stand back and ask whether the resulting sentence is just and reasonable, not only to the offender but also to the community at large after taking into account the various statutory and common law principles and applying such discounts that arise on the particular facts: *SZ v R* at [5]. The court in *SZ v R* also held that it is important to avoid double counting in cases of assistance by finding special circumstances after the non-parole period has already been reduced: at [11].

The advent of more standardised discounts, such as the utilitarian value of a guilty plea being as high as 25%, following the decision of *R v Thomson and Houlton* (2000) 49 NSWLR 383, means courts have less scope to give a discount for assistance in cases of an early plea: *SZ v R* at [9]. The statutory fixed discounting scheme for the utilitarian value of a guilty plea in matters dealt with on indictment in Pt 3, Div 1A, *Crimes (Sentencing Procedure) Act*1999 may operate to similar effect: see **Guilty plea discounts for offences dealt with on indictment** at [11-515] and **Combining the plea with other factors** at [11-530].

See also **Combining the plea with other factors** at [11-530].

Assistance and not guilty pleas

Z v R [2014] NSWCCA 323 held that *SZ v R* [2007] NSWCCA 19 does not govern the scenario where an offender pleads not guilty and provides substantial assistance to authorities. It is wrong to proceed on the basis that *SZ v R* prescribes a ceiling for the level of discount in such a case; the primary judge had therefore erred in construing s 23 with an implied algorithm to conclude a discount for assistance alone was confined to 25%: *Z v R* at [33]. The court stated that "[t]o construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty": *Z v R* at [34].

[12-240] Promised assistance

Appeals following a failure to provide promised assistance

The Crown may appeal against the reduced sentence if the person fails to fulfil their promise of assistance: s 5DA *Criminal Appeal Act* 1912. In *R v KS* [2005] NSWCCA 87 Wood CJ at CL said at [19]:

> The ability of the Crown to invoke this section is a very important part of the criminal justice system. Persons who give undertakings and who receive the benefit of those undertakings by way of a discounted sentence can, subject to exceptional circumstances, expect to have their sentences increased if they renege on their undertaking to give evidence. The departure from an undertaking of that kind is not to be regarded lightly and it will normally justify appellate intervention.

Where the undertaking is to give evidence, adherence to that undertaking requires more than simply attending court: *R v X* [2016] NSWCCA 265 at [43]. In *R v X*, the respondent gave an undertaking to give evidence as a Crown witness in accordance with an earlier police statement. Although he attended court and gave evidence, in some respects the evidence was diametrically opposed to what he had told police in his statement: *R v X* at [44]–[46]. See also *R v MG* [2016] NSWCCA 304 at [42].

In *R v James* [2014] NSWCCA 311, where the failure to wholly or partly fulfil an undertaking was disputed between the parties, it was accepted that the court would at

least have to be "comfortably satisfied" the undertaking had not been fulfilled, which it was not in the circumstances. Although it was not necessary to determine in light of that conclusion, the court questioned whether parity of reasoning with *The Queen v Olbrich* (1999) 199 CLR 270 would require satisfaction of that fact beyond reasonable doubt: *R v James* at [46].

Exercising the 5DA discretion

The appellate court's power to vary a sentence under s 5DA(2) is discretionary, and the court may exercise its discretion not to intervene in an appropriate case, despite an offender not fulling their promise to assist: *CC v R; R v CC* [2021] NSWCCA 71 at [68]–[71]; see also *R v Skuthorpe* [2015] NSWCCA 140 at [36].

The exercise undertaken by the court is not one of punishment, but of withdrawing an unearned benefit from a person who entered into a bargain and then failed to fulfil it: *R v Dimakos (a pseudonym)* [2018] NSWCCA 78 at [50]; see also *CC v R; R v CC* at [67] and the cases there cited. There are obvious systemic reasons why such a person should, except in unusual circumstances, suffer consequences as a result: *R v Dimakos* at [53].

In *R v OE* [2018] NSWCCA 83 the court, at [55], summarised the proper approach to reversing or adjusting a sentence to take account of a failure to adhere to an undertaking upon which a discount has been given as follows:

1. remove all the discounts to find the starting point of the head sentence at first instance;
2. apply any discount for a guilty plea and any remaining discount for assistance to calculate the head sentence; and
3. apply the same ratio of non-parole period to head sentence as fixed by the first instance sentencing judge.

See also: *R v GD* [2013] NSWCCA 212 at [48]–[52]; *R v Shahrouk* [2014] NSWCCA 87 at [65].

Difficulties may arise where the reason advanced for not fulfilling an offer of assistance is that the respondent has been threatened. In *R v Bagnall and Russell* (unrep, 10/6/94, NSWCCA), the court exercised its discretion not to disturb the sentences even though the respondents failed to comply with their undertakings because the authorities had failed to provide reasonable protection for them. Simpson J said of cases where threats have been made in *R v El-Sayed* (2003) 57 NSWLR 659 at [32]–[35]:

> Generally speaking (apart from situations such as that which arose in *Bagnall and Russell*) the reason for any failure to honour the undertaking is of little materiality. Where, as is here put forward, the reason for the failure to honour the undertaking lies in an understandable fear resulting from threats, that circumstance does not affect the fact that the undertaking has not been honoured. The basis for the discount lies in a factual assumption — that certain evidence will be given. If the evidence is not given, then the factual underpinning for the discount disappears. The discount has been given on a premise which has subsequently been proven to be false …
>
> …
>
> It would be anomalous if an offender, such as the present respondent, who was, at the time of sentencing, willing and able to give assistance, but subsequently, by reason of

> threats of the same kind, found himself or herself unable or unwilling to do so, could retain the benefit given. There is no reason of principle why the two offenders should be distinguished and one should receive a reduction in sentence and the other be denied it, merely by reason of the timing of the threats. In my opinion, the fact that the threats were made does not justify the court in declining to exercise the s 5DA(2) discretion in favour of the Crown.

However, each case must be decided on its own facts and the discretion to dismiss an appeal is not limited to cases where the authorities fail to provide the prisoner with reasonable protection: *R v Chaaban* [2006] NSWCCA 352 at [47] and [55].

The power under s 5DA does not allow the court to review the sentence generally: *R v Waqa* [2004] NSWCCA 405 at [26]; *R v Douar* [2007] NSWCCA 123 at [32]. Given s 5DA(2) empowers the court to re-sentence "as it thinks fit", the court is not limited to merely reapplying the discount given for an unfulfilled promise to give future assistance: *R v GD* at [41] per Button J, *R v Shahrouk* at [51]. Subsequently however, in *R v OE*, Button J emphasised that *R v GD* was to be read "in the unusual context of that appeal; namely the failure of the sentencing judge to provide any allocation between past and future assistance": at [61].

Co-operation post sentencing

Assistance rendered *after* sentence is a matter for the Executive, not the courts, except (rarely) to correct an erroneous basis of sentencing: *R v Moreno* (unrep, 4/11/94, NSWCCA). Therefore, an offender appealing against the severity of their sentence may not seek a reduction of sentence on the ground of assistance given to authorities after the date of sentencing: *Khoury v R* [2011] NSWCCA 118 at [111]–[112]. The appeal court must find error before evidence of post-sentencing events, such as unanticipated assistance to authorities, may be taken into account: *R v Gallagher* (1991) 23 NSWLR 220; *R v Willard* [2001] NSWCCA 6 per Simpson J at [24]–[27]; *Douar v R* [2005] NSWCCA 455 at [126].

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Particular offences

para

NEW SOUTH WALES

Break and enter offences

Sexual offences against children

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

[The next page is 9051]

Sexual offences against children

This chapter should be read in conjunction with **Sexual assault** at [20-600]ff.

[17-400] Change in community attitudes to child sexual assault

The abhorrence with which the community regards the sexual molestation of young children and the emphasis attached to general deterrence in sentencing offenders is reflected in the judgment in *R v BJW* [2000] NSWCCA 60 at [20], where Sheller JA stated:

> The maximum penalties the legislature has set for [child sexual assault] offences reflect community abhorrence of and concern about adult sexual abuse of children. General deterrence is of great importance in sentencing such offenders and especially so when the offender is in a position of trust to the victim. See the remarks of Kirby ACJ in *R v Skinner* (1994) 72 A Crim R 151 at 154.

The case of *R v Fisher* (unrep, 29/3/89, NSWCCA) at 6 is also frequently cited:

> This court has said time and time again that sexual assaults upon young children, especially by those who stand in a position of trust to them, must be severely punished, and that those who engage in this evil conduct must go to gaol for a long period of time, not only to punish them, but also in an endeavour to deter others who might have similar inclinations …
>
> This court must serve notice upon judges who impose weakly merciful sentences in some cases of sexual assault upon children, that heavy custodial sentences are essential if the courts are to play their proper role in protecting young people from sexual attacks by adults …

Tampering with children of tender years is a matter of grave concern to the community: *R v Evans* (unrep, 24/3/88, NSWCCA).

The courts have recognised a change in community attitudes to child sexual assault. In *R v MJR* (2002) 54 NSWLR 368 at [57], Mason P expressed the view that there has been a pattern of increasing sentences for child sexual assault and that this:

> … has come about in response to greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes.

Increased penalties

See also **Sexual assault** at [20-610].

In *R v ABS* [2005] NSWCCA 255 at [26], Buddin J, with whom Brownie AJA and Latham J agreed, said:

> Offences involving acts of significant sexual exploitation against children are almost without exception met with salutary penalties. Moreover, the legislature has in recent years provided for increased penalties in respect of many such offences. It is an area in which the need to protect children from exploitation and to deter others from acting in a similar fashion assume particular significance.

According to *R v PGM* [2008] NSWCCA 172 at [37], the seriousness with which sexual offences against young children must be viewed is reflected in the increase in the maximum penalty for s 66A *Crimes Act* 1900 offences from 20 to 25 years

(effective 1 February 2003) and the introduction of a standard non-parole period of 15 years: *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002.

[17-410] Sentencing for historical child sexual offences

Section 21B *Crimes (Sentencing Procedure) Act* 1999 provides that a court must sentence an offender in accordance with the sentencing patterns and practices *at the time of sentencing*: s 21B(1). The standard non-parole period for an offence is the standard non-parole period, if any, that applied at *the time the offence was committed,* not at the time of sentencing: s 21B(2). Further, when sentencing an offender for a child sexual offence, the court is to have regard to the trauma of sexual abuse on children as understood at the time of sentencing: s 25AA(3).

The exception to s 21B(1) — to sentence in accordance with sentencing practices and patterns *at the time of the offence* where exceptional circumstances exist — does not apply to child sexual offences: s 21B(3)(a). A "child sexual offence" is defined in s 25AA(5) to include specified offences committed against a person who, at the time of the offence, was under 16 years of age (also see s 21B(6)).

Section 21B applies to proceedings that commenced on or after 18 October 2022: *Crimes (Sentencing Procedure) Amendment Act* 2022, Sch 1[4]. Section 21B(1), (2) and (4) replaced s 25AA(1), (2) and (4) (which continues to apply to proceedings commenced before 18 October 2022), but expanded the requirement to sentence in accordance with current sentencing practices and patterns to all offences, rather than to child sexual offences only.

Section 21B(1) (formerly s 25AA(1)) overrides the common law principle expressed in *R v MJR* (2002) 54 NSWLR 368 that a court must apply the sentencing patterns and practices existing at the time of the offence: Second Reading Speech, Criminal Legislation Amendment (Child Sexual Abuse) Bill 2018, NSW, Legislative Assembly, *Debates*, 6 June 2018, p 7. As to the rationale for the enactment of s 25AA(1) and the previous common law see: *R v Cattell* [2019] NSWCCA 297 at [103]–[126]; *Corliss v R* [2020] NSWCCA 65 at [73]–[94] (Johnson J); [131]–[139] (Lonergan J).

In addition to sentencing in accordance with sentencing patterns and practices at the time of sentence, the court must also have regard to the trauma of sexual abuse on children as understood at the time of sentence, which may include recent psychological research or the common experience of courts: s 25AA(3). Justice Price, in *R v Cattell* at [121], said "current sentencing practices" understand the harmful effects of sexual offending against children and would also include the court setting a non-parole period in accordance with s 44 *Crimes (Sentencing Procedure) Act* 1999.

Sentencing practices and patterns are not defined. Given the relatively recent enactment of ss 21B and 25AA, parties will be unable to provide sufficient Judicial Commission statistical material to assist the court in determining "current sentencing patterns": *R v Cattell* at [122].

Section 19, which deals with the effect of alterations in penalties, is not affected by s 21B: s 21B(5), or the former s 25AA: s 25AA(4).

In *Corliss v R*, Johnson J described s 25AA(2) and (4) (now s 21B(2) and (5) respectively) as constituting "the express statutory qualifications to the otherwise

absolute operation of [s 25AA]": at [87]. The overall effect of s 21B(1), (2) (former s 25AA(1), (2)) is that, aside from the statutory guideposts of the maximum penalty and the applicable standard non-parole period, those matters previously identified as typically leading to a lesser sentence in historic cases cannot be taken into account. However, a court may consider the fact a historical offence encompassed a wider range of more serious conduct than would constitute the equivalent current offence: *O'Sullivan v R* [2019] NSWCCA 261 at [36], [46].

The Local Court must apply s 21B when sentencing for child sex offences: see for example *DPP v IJL* [2020] NSWLC 2 which considered the former s 25AA(1).

The approach to the former s 25AA

Note: Judicial consideration of the former s 25AA, which is discussed below, may guide the application of s 21B to historical child sexual offences for proceedings commenced on or after 18 October 2022.

In *R v Cattell* [2019] NSWCCA 297 at [123], Price J said a court sentencing an offender for an offence falling within s 25AA should:

- take into account the sentencing pattern existing at the time of sentence where such a pattern is able to be discerned
- determine the facts as now available to the court
- have regard to the maximum penalty and standard non-parole period (if any) applying at the time of the offence
- identify where the offence falls in the range of objective gravity
- take into account any relevant aggravating and mitigating factors in s 21A(2) and (3)
- set a non-parole period in accordance with s 44 as operative at the time of sentence
- fix the balance of the term.

The sentencing court should expressly state that the offender has been sentenced in accordance with s 25AA(1) and explain how the court has had regard to the trauma of sexual abuse on the child: *R v Cattell* at [125].

The breadth of conduct encompassed by a particular historical offence is likely to influence the identification of where a particular offence falls in the range of objective seriousness. This assumes some significance when s 25AA applies because certain historical offences incorporated conduct which is now the subject of separate offences with significantly higher maximum penalties. For example, the offence of indecent assault in s 81 *Crimes Act* 1900 (rep) which carried a maximum penalty of 5 years included conduct that would now constitute sexual intercourse. Part of the rationale for the increased, or changed, penalties is recognition of the harm caused by these offences: see, for example, *MC v R* [2017] NSWCCA 316 at [40]–[44]; *Woodward v R* [2017] NSWCCA 44 at [46]–[54].

Decision Restricted [2020] NSWCCA 275 and *WB v R* [2020] NSWCCA 159 include some general observations about how the requirements of s 25AA can be satisfied given what is now known about the long-term effects of child sexual abuse when the maximum penalties for historical offences were lower than for current

offences. In *WB v R*, Davies J (Bell P and N Adams J agreeing) acknowledged, in relation to the s 81 (rep) offences the subject of appeal in that case, that it had been superseded by offences with higher penalties, observing at [63]:

> Part of the reason for the heavier penalties is, obviously, that there is now much greater knowledge of the long-term effects of sexual abuse of a child or young person than was [previously] known... That may mean that it will be easier to find that damage or emotional harm is substantial where historical offences are dealt with under earlier legislation with much lower maximum penalties. Such an approach would not be inconsistent with the rationale behind s 25AA…

The operation of s 25AA was not otherwise considered in that case. Subsequently in *Decision Restricted* [2020] NSWCCA 275, N Adams J (Rothman J agreeing) after endorsing that aspect of *WB v R* said, at [164], that "it may well be easier to make a finding of substantial injury to a child for a sentence imposed on a historical child sexual assault offence after the enactment of s 25AA if the maximum penalty is so low as to enable a conclusion that the significant lifelong trauma such offending can inflict on a child is not already reflected in the maximum penalty." In that case one of the grounds of the Crown appeal against sentence, which was accepted by the court, was that the impact of the offending on the victims was not reflected in the aggregate sentence that had been imposed.

However, the impact of offending on the victim is taken into account under s 3A(g) *Crimes (Sentencing Procedure) Act*. Recognition of the harm caused by child sexual assault is a necessary incident of sentencing in such cases in any event and, where there is evidence, substantial harm caused to a victim falling within s 21A(2)(g) is taken into account: see further [12-830] **Evidentiary status and use of victim impact statements on sentence** and [12-832] **Victim impact statements and harm caused by sexual assault**.

Where there are numerous sexual offences and some occur when the victim is 16 or 17 years old, the sentencing court must expressly state when s 25AA applies and when it does not: *R v Cattell* at [115]–[116]. In *Franklin v R* [2019] NSWCCA 325 the applicant's offending extended over a period when the victim was between five and 17 years old. The court dismissed the appeal but said if it had been necessary to resentence, s 25AA could only apply to the offences committed when the victim was under 16 years old and general law principles with respect to sentencing for historical sexual offences would apply to the balance: at [145]. As to the difficulties of applying the principle of totality in this situation, see *R v Cattell* at [152]. There is a degree of artificiality in attempting to do so. See also *Cunningham v R* [2020] NSWCCA 287 at [32]–[33].

Juvenile offenders

Section 21B applies if a juvenile offender commits a child sexual offence but is sentenced as an adult. In *JA v R* [2021] NSWCCA 10 at [62] the court (considering the former s 25AA) commented on the difficulties in sentencing in such circumstances.

Resentencing following successful appeal

When varying or substituting a sentence, a court must vary or substitute the sentence in accordance with the sentencing patterns and practices *at the time of the original sentencing*: s 21B(4). The former s 25AA did not make specific provision for the variation or substitution of a sentence.

Additional resources

H Donnelly "Sentencing according to current and past practices", paper presented at *Sentencing: New Challenges* conference, National Judicial College of Australia on 29 February 2020 at https://njca.com.au/wp-content/uploads/2020/03/Sentencing-for-historical-offences-Donnelly-H.pdf, accessed 22 July 2021.

[17-420] Statutory scheme in the Crimes Act 1900 (NSW)

Table 1 lists the provisions in the *Crimes Act* 1900 which create sexual offences against children, or those that may be committed against children.

Sections 61L and 61M(1) are sexual offences of general application that, in their standard form, apply both to adults and children (see s 77, discussed below). Sections 61N(1), 61O, 66A–66EB, 73, and 91G–91H *Crimes Act* 1900 specifically and exclusively pertain to sexual offences against children. Sections 61J, 61M(1), 61M(2), 80A(2A)(b), 80D(2) and 91J–91L pertain to sexual offences against children by way of aggravation.

Before the commencement of the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010 on 17 September 2010, the *Crimes Act* 1900 defined "child pornography" as material that depicts or describes (or appears to depict or describe), in a manner that would in all the circumstances cause offence to a reasonable person, a person who is (or appears to be) a child:

(a) engaged in sexual activity

(b) in a sexual context, or

(c) as the victim of torture, cruelty or physical abuse (whether or not in a sexual context).

For offences committed from 17 September 2010, such material, which is now more broadly defined, is referred to as "child abuse material" and is defined in s 91FB(1).

Table 1: Sexual offences against children under the Crimes Act 1900

Section^	Offence	Max (yrs)*	Commentary
s 61J(1)	Aggravated sexual assault	20 *[SNPP 10]*	[17-505]
s 61M(1)^	Aggravated indecent assault	7 *[SNPP 5]*	[17-510]
s 61M(2)^	Aggravated indecent assault — child under 16 years	10 *[SNPP 8]*	[17-510]
s 61N(1)^	Act of indecency — child under 16 years	2	[17-520]
s 61N(2)^	Act of indecency — person 16 years or above	1.5	[17-520]
s 61O(1)^	Aggravated act of indecency — child under 16 years	5	[17-520]
s 61O(1A)^	Aggravated act of indecency — person 16 years or above	3	[17-520]
s 61O(2)^	Aggravated act of indecency — child under 10 years	7	[17-520]
s 61O(2A)^	Aggravated act of indecency — child under 16 years (knowing it to be filmed for producing child abuse (previously "child pornography") material)	10	[17-520]

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 66A	Sexual intercourse — child under 10 years	life *[SNPP 15]*	[17-480]
s 66B	Attempting or assaulting with intent to have sexual intercourse with child under 10 years	25 *[SNPP 10]*	[17-480]
s 66C(1)	Sexual intercourse — child between 10 and 14 years	16 *[SNPP 7]*	[17-490]
s 66C(2)	Aggravated sexual intercourse — child between 10 and 14 years	20 *[SNPP 9]*	[17-490]
s 66C(3)	Sexual intercourse — child between 14 and 16 years	10	[17-490]
s 66C(4)	Aggravated sexual intercourse — child between 14 and 16 years	12 *[SNPP 5]*	[17-490]
s 66D	Assaulting with intent to have sexual intercourse with child between 10 and 16 years	as per s 66C(1)–(4)	—
s 66DA	Sexual touching — child under 10	16 *[SNPP 8]*	
s 66DB	Sexual touching — child between 10 and 16	10	
s 66DC	Sexual act — child under 10	7	
s 66DD	Sexual act — child between 10 and 16	2	
s 66DE	Aggravated sexual act — child between 10 and 16	5	
s 66DF	Sexual act for production of child abuse material — child under 16	10	
s 66EA	Persistent sexual abuse of a child	Life [25 if committed before 1.12.2018]	[17-500]
s 66EB(2)(a)	Procuring child for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2)(b)	Procuring a child for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 14 years	15 *[SNPP 6]*	[17-535]
s 66EB(2A)	Meeting a child following grooming for unlawful sexual activity — child under 16 years	12 *[SNPP 5]*	[17-535]
s 66EB(3)(a)	Grooming a child for unlawful sexual activity — child under 14 years	12 [*SNPP 5*]	[17-535]
s 66EB(3)(b)	Grooming a child for unlawful sexual activity — child under 16 years	10 [*SNPP 4*]	[17-535]
s 73(1)	Sexual intercourse with young person above 16 years and under 17 years who is under special care	8	[17-530]
s 73(2)	Sexual intercourse with young person above 17 years and under 18 years who is under special care	4	[17-530]
s 73A(1)	Sexual touching — young person of or above 16 years and under 17 years under special care	4	
s 73A(1)	Sexual touching — young person of or above 17 years and under 18 years under special care	2	
s 80A(2A)(b)	Aggravated sexual assault by forced self-manipulation	20	[20-720]
s 80D(2)	Aggravated causing sexual servitude	20	[17-540]

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

Section^	Offence	Max (yrs)*	Commentary
s 80G	Incitement to commit a sexual offence	Same as penalty for substantive offence	[17-545]
s 91D(1)	Promoting or engaging in acts of child prostitution — child 14 years or above	10	[17-540]
s 91D(1)	Promoting or engaging in acts of child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child 14 years or over	10	[17-540]
s 91E(1)	Obtaining benefit from child prostitution — child under 14 years	14 [*SNPP 6*]	[17-540]
s 91F(1)	Premises not to be used for child prostitution	7	[17-540]
s 91G(1)	Children not to be used for production of child abuse (previously "child pornography") material — child under 14 years	14 [*SNPP 6*]	[17-541]
s 91G(2)	Children not to be used for production of child abuse (previously "child pornography") material — child 14 years or above	10	—
s 91H(2)	Possession, production or dissemination of child abuse (previously "child pornography") material	10	[17-541]
s 91J(1)	Voyeurism	100 penalty units or 2 years or both	[17-543]
s 91J(3)	Aggravated voyeurism	5	[17-543]
s 91K(1)	Filming a person engaged in a private act	100 penalty units or 2 years or both	[17-543]
s 91K(3)	Aggravated filming a person engaged in a private act	5	[17-543]
s 91L(1)	Filming a person's private parts	100 penalty units or 2 years or both	[17-543]
s 91L(3)	Aggravated filming a person's private parts	5	[17-543]

Section 80AE explicitly states that consent is not a defence to a charge under ss 61E(1A), 61E(2), 61E(2A), 61M(2), 61N(1), 61O(1), 61O(2), 61O(2A), 66A, 66B, 66C, 66D, 66DA, 66DB, 66DC, 66DD, 66DE, 66DF, 66EA, 66EB, 66EC, 67 (rep), 68 (rep), 71 (rep), 72 (rep), 72A (rep), 73, 73A, 74 (rep) or 76A (rep), or to a charge under ss 61E(1) (rep), 61L (rep), 61M(1), or 76 (rep) if the victim is a child under 16 years. Consent is also not a defence to a charge under s 91D: s 91D(3).

On conviction of a person for a sexual offence against a child, the court may refer the matter to an appropriate child protection agency if the child is under the authority of the offender: s 80AA.

^ Repealed by the *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 on 1 December 2018.

* SNPP: Standard non-parole period

[17-430] Standard non-parole periods

The *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act* 2002 introduced standard non-parole periods, as detailed in Table 1 at [17-420].

The effect of the introduction of standard non-parole periods will generally be an upward movement in the length of sentences for offences to which they apply: *Muldrock v The Queen* (2011) 244 CLR 120 at [31]; *R v AJP* [2004] NSWCCA 434 at [37].

See further **Move upwards in the length of non-parole periods?** at [7-990].

[17-440] Section 21A Crimes (Sentencing Procedure) Act 1999

Section 21A was inserted into the *Crimes (Sentencing Procedure) Act* in 2002 and provides a non-exhaustive list of aggravating and mitigating factors to be taken into account in determining the appropriate sentence for an offence. The weight of authority indicates that Parliament intended the section to replicate the common law, rather than alter it: *R v Wickham* [2004] NSWCCA 193 at [23].

Some of the aggravating factors relevant to child sexual assault in s 21A(2) are:

- the offender has a record of previous convictions: s 21A(2)(d)
- the offence involved gratuitous cruelty: s 21A(2)(f)
- the injury, emotional harm, loss or damage caused by the offence is substantial: s 21A(2)(g)
- the offender abuses a position of trust or authority in relation to the victim: s 21A(2)(k)
- the victim is vulnerable, for example, because the victim is very young or has a disability: s 21A(2)(l)
- the offence involves multiple victims or a series of criminal acts: s 21A(2)(m)
- the offence was part of a planned or organised criminal activity: s 21A(2)(n).

Application of these subsections are discussed in **Section 21A factors "in addition to" any Act or Rule of Law** at [11-060]ff.

The aggravating factor in s 21A(2)(n) — the offence was part of a planned or organised criminal activity — was considered by the court in *Saddler v R* [2009] NSWCCA 83. The applicant who had downloaded more than 45,000 images and 700 movies from the internet, and stored them on external hard drives, CDs and a laptop, was sentenced for possessing child pornography contrary to s 91H(3) *Crimes Act* 1900 (repealed). These circumstances, however, could not be properly regarded as constituting "planned or organised" criminal activity for the purpose of aggravating the offence under s 21A(2)(n): at [32]. In particular, there was no evidence of planning, or none that went beyond that which is inherent in the offence: at [36].

The court in *Saddler v R* also considered the aggravating factor in s 21A(2)(f) — the offence involved gratuitous cruelty. At that time, child pornography was defined by s 91H(1) *Crimes Act* 1900 to include the element, "torture, cruelty or physical abuse" (the definition, which still includes that phrase, is now contained in s 91FB(1)(a) and child pornography material is now referred to as "child abuse material"). The sentencing judge found that this aspect of the definition of child pornography was

present and had taken it into account in determining the objective gravity of the offence. Taking it into account again under s 21A(2)(f) would be impermissible double counting: at [41]. Further, although there is no direct authority on the question of whether the possession of images after they had been created "involved" gratuitous cruelty, it was likely that it would not. Some involvement of the applicant in the creation of the images is required: at [43].

[17-450] De Simoni principle

The court must disregard a matter of aggravation if taking it into account leads to punishing an offender for a more serious offence: *The Queen v De Simoni* (1981) 147 CLR 383. This consideration is most likely to arise when a basic form of the offence is charged and the court has regard to factors which are often found as aggravating features of offences in the *Crimes Act* 1900; such as, the offence was committed in company (*R v Newham* [2005] NSWCCA 325), the offender used a weapon, or the offender was in a position of trust: *R v Wickham* at [26]. See also **Fact finding at sentence** at [1-500].

[17-460] Victim impact statements

For the use of victim impact statements, see **Victims and victim impact statements** at [12-800].

[17-480] Sexual intercourse — child under ten: s 66A

For a detailed discussion of the offence and applicable principles, see P Poletti, P Mizzi and H Donnelly, "Sentencing for the offence of sexual intercourse with a child under 10", *Sentencing Trends & Issues*, No 44, Judicial Commission of NSW, 2015.

The current form of the offence under s 66A *Crimes Act* 1900, as implemented by the *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 (commenced upon assent on 29 June 2015) provides that any "person who has sexual intercourse with a child who is under the age of 10 years is guilty of an offence". The amendments represent a reversion to a single form of the offence which existed prior to the *Crimes Amendment (Sexual Offences) Act* 2008. A maximum penalty of life imprisonment (previously applicable only to the aggravated form of the offence) applies to the new offence. The standard non-parole period of 15 years continues to apply.

For offences committed between 1 January 2009 and 29 June 2015, the following maximums apply:

- s 66A(1): sexual intercourse with a child under 10 (maximum penalty of 25 years)
- s 66A(2): sexual intercourse with a child under 10 in circumstances of aggravation (maximum penalty of life imprisonment).

A standard non-parole period of 15 years applied to either form of the offence. Subsections 66A(3)(a)–(h) provided that the circumstances of aggravation included when an offender:

- intentionally or recklessly inflicted actual bodily harm on the child
- threatened to inflict actual bodily harm on the child or a person who is present or nearby
- committed the offence in company

- committed the offence on a child under his or her authority
- committed the offence on a child with a serious physical disability
- committed the offence on a child with a cognitive impairment
- took advantage of a child who was under the influence of alcohol or drugs
- deprived the child of his or her liberty, either before or after the commission of the offence, or
- committed the offence of break and enter into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Specific guidance on the factors relevant to assessing the objective seriousness for an offence under s 66A *Crimes Act* 1900 has been provided by the Court of Criminal Appeal: *R v AJP* [2004] NSWCCA 434 at [25], *MLP v R* [2006] NSWCCA 271 at [22], *R v PGM* [2008] NSWCCA 172. These factors include how the offences took place, over what period, with what degree of coercion, the use of threats or pressure, and any immediate effect on the victim. However, caution should be exercised where these cases discuss assessing these factors by reference to being below or above a midpoint: *Muldrock v The Queen* (2011) 244 CLR 120. See **Consideration of standard non-parole period in sentencing** at [7-920].

See also **Sexual assault** at [20-630]ff.

Attempting or assaulting with intent to have sexual intercourse with child under 10: s 66B

In *R v McQueeney* [2005] NSWCCA 168, the offender committed two counts of attempted sexual intercourse with a child under 10 years and was sentenced to a non-parole period of 7 years and a balance of term of 3 years. The court found that the sentencing judge did not offend the principles for an attempted offence. Justice Latham, Howie and Grove JJ agreeing, stated at [25]–[26]:

> [H]is Honour was dealing with the applicant for an attempt rather than the substantive offence. The approach to sentencing for an attempted substantive offence was expressed by this court in *Taouk* (1992) A Crim R 387 as follows:
>
> > "There is clearly an interrelationship between the seriousness of the intended consequences and the real prospects of having achieved them and that relationship has to be weighed in each case in the light of all the circumstances."
>
> In those circumstances his Honour's evaluation of the objective gravity of the offence required his Honour to consider that the substantive offence was not completed and the prospect that the attempt, if not interrupted, would have succeeded. On the facts before him his Honour was entitled to conclude that the substantive offence may well have succeeded but for the fact that the complainant awoke. The applicant had progressed a considerable way towards actual penetration. The boy's underwear had been removed and the applicant was holding the boy by the shoulders. The applicant was actively engaged in the attempt. Given these features of the offence and the gravity of the offence which was attempted, I am not persuaded that his Honour imposed a sentence in respect of this offence which was outside the range of his sentencing discretion. It may well be regarded as a sentence towards the top of the range, but that is insufficient to attract the intervention of this court.

Where committed on or after 29 June 2015, the offence is subject to a standard non-parole period of 10 years.

[17-490] Sexual intercourse — child between 10 and 16: s 66C

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted a new circumstance of aggravation for the aggravated form of this offence — where an offender deprives a child of his or her liberty for a period before or after the commission of the offence: s 66C(5)(h).

The courts have repeatedly emphasised the extremely serious view that has to be taken towards matters of this kind: *R v JVP* (unrep, 6/11/95, NSWCCA). In the early 1990s it was held that the ages of victims and the range of criminality of the offenders may vary greatly, rendering a wide range of sentences appropriate, including periodic detention (then available as a sentencing option, but now replaced by intensive correction orders): *R v Agnew* (unrep, 6/12/90, NSWCCA) per Loveday J; *R v McClymont* (unrep, 17/12/92, NSWCCA) per Gleeson CJ.

The most significant matter which determines where a particular offence is to be placed in the spectrum of offences of this kind is the degree to which the offender is seen to have exploited the youth of the victim: *R v Sea* (unrep, 13/8/90, NSWCCA) per Badgery-Parker J at 4.

In *R v KNL* [2005] NSWCCA 260 at [42]–[43], Latham J, Brownie AJA and Buddin J agreeing, stated:

> It is trite to observe that sexual intercourse with a child of 12, knowing the child's age, is objectively more serious than sexual intercourse with a child of 12, in ignorance of the child's true age. However, it is also the case that, in terms of the position occupied by a given offence on the spectrum of offences of this kind, the younger the child, the more serious the offence; *R v T* (1990) 47 A Crim R 29.
>
> The complainant was just over 12 years of age. She was closer to ten than she was to 16, yet that feature of the offence was largely disregarded, in favour of the mitigation constituted by the respondent's mistaken belief as to her age.

Whether a complainant is a willing participant, notwithstanding his or her age, is relevant to the level of objective seriousness of a s 66C offence: *Wakeling v R* [2016] NSWCCA 33 at [47], [49]; *Hogan v R* [2008] NSWCCA 150 at [77].

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for offences, inter alia, contrary to ss 66C(1), 66C(2) and 66C(4), committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420].

[17-500] Persistent sexual abuse of child: s 66EA

Section 66EA(1) *Crimes Act* 1900, in its current form — for offences committed on or after 1 December 2018 — provides an adult who maintains an unlawful sexual relationship with a child is liable to life imprisonment. An "unlawful sexual relationship" is a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2). At least one of those acts must have occurred in NSW: s 66EA(3). "Unlawful sexual act" is defined in s 66EA(15) as any act that constitutes, or would constitute, one of the sexual offences listed therein.

For offences committed before 1 December 2018, s 66EA(1) provided that a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a "sexual offence", is liable

to imprisonment for 25 years. "Sexual offence" is defined to include, inter alia, the offences encompassed by ss 61I–61O *Crimes Act* 1900. McClellan CJ at CL said of the offence in *R v Langbein* [2008] NSWCCA 38 at [115]:

> The offence of persistent sexual abuse contrary to s 66EA carries a maximum prison term of 25 years. It is a more serious offence than the offences which comprise the individual acts.

Different considerations apply when sentencing for a s 66EA offence committed before 1 December 2018, and from 1 December 2018, because of the different wording of each provision and maximum penalty. However, the case law below may provide some guidance when sentencing for an offence committed in either time period.

Fact finding following a guilty verdict

It had been held that if a jury returns a guilty verdict to a s 66EA offence committed before 1 December 2018, the judge must consider which of the foundational offences are established beyond reasonable doubt so as to sentence in accordance with the verdict: *ARS v R* [2011] NSWCCA 266 at [230]. This is consistent with the duty of the judge to determine the facts relevant on sentence: *ARS v R* at [233] citing *R v Isaacs* (1997) 41 NSWLR 374 at 378; *Cheung v The Queen* (2001) 209 CLR 1 at [4]–[8], [161]–[166]. This approach was questioned in *Chiro v The Queen* (2017) 260 CLR 425, where the High Court analysed a materially similar South Australian provision to s 66EA and held that *Cheung v The Queen* did not concern a persistent abuse offence and is not authority for the proposition that questions should not be asked of a jury (as to which of the acts the Crown had proved). Kiefel CJ, Keane and Nettle JJ at [52] said:

> … where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child contrary to s 50(1) and the judge does not or cannot get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender will have to be sentenced on the basis most favourable to the offender.

Bell J agreed, at [67], that "the exercise of discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved". It was not open for the sentencing judge to sentence the appellant on the basis he had committed all the acts charged as such an approach was contrary to the *De Simoni* principle: at [72]. See also the plurality at [44].

However, in *R v RB* [2022] NSWCCA 142, which related to a s 66EA offence committed after 1 December 2018, the court did not apply *Chiro v The Queen* on the basis s 66EA(5)(c) provides that the members of the jury are not required to agree on which unlawful acts constitute the unlawful sexual relationship. Accordingly, the jury must be taken to have made no findings as to which unlawful sexual acts constituted the offence, and a trial judge is required to determine the facts of offending applying the principles established in *The Queen v Olbrich* (1999) 199 CLR 270, *Cheung v The Queen* and *R v Isaacs*: at [43]–[45], [70] (also see [71]–[77] for a further discussion of the sentencing exercise after a jury's guilty verdict).

Assessing the seriousness of an offence

When sentencing an offender for a s 66EA offence committed on or after 1 December 2018, a consideration of the conduct constituting the unlawful sexual acts towards the child is integral to the assessment of objective seriousness: *GP (a pseudonym) v R* [2021] NSWCCA 180 at [65]. A number of factors bear upon an assessment

of the objective seriousness of a s 66EA offence as observed in *Burr v R* [2020] NSWCCA 282 (see non-exhaustive list at [106]) and these factors are also relevant when sentencing for a s 66EA offence committed on or after 1 December 2018: *GP (a pseudonym) v R* at [64]. Regard should also be had to the maximum penalty of 25 years imprisonment for a s 66EA offence committed before 1 December 2018, and life imprisonment for an offence on or after 1 December 2018.

It is not logical to approach the sentencing task by considering what sentences the individual offences (or unlawful sexual acts for an offence committed on or after 1 December 2018) would have attracted had they been charged as isolated offences: *R v Fitzgerald* (2004) 59 NSWLR 493. There is nothing to suggest Parliament intended sentencing for a course of conduct that had crystallised into a s 66EA conviction to be more harsh than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences: *R v Manners* [2004] NSWCCA 181 at [21]. Section 66EA is capable of applying to a wide range of conduct constituting sexual offences against children: *R v Manners* at [34].

Where the offences constituting the s 66EA charge are three or more representative charges (that is, they are not isolated incidents but part of a course of conduct), s 66EA does not permit a departure from the common law approach taken to sentencing for representative counts: *ARS v R* at [226]. The court can still sentence on the basis the offences were not isolated incidents but the uncharged offences cannot be used to increase the punishment: *R v Fitzgerald* (2004) 59 NSWLR 493 at [13]; *ARS v R* at [226].

See *Hitchen v R* [2010] NSWCCA 77 for a case where the court accepted the sentencing judge's finding that the criminality of a s 66EA offence committed before 1 December 2018 was found to be in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**); see also *Hitchen v R* at [11]–[14].

[17-505] Aggravated sexual assault: s 61J

The offence of aggravated sexual assault under s 61J *Crimes Act* 1900 carries a maximum penalty of 20 years with a standard non-parole period of 10 years. The effect of s 61J(2) is to create an offence with a circumstance of aggravation where the victim was:

- under the age of 16 years: s 61J(2)(d)
- under the authority of the offender: s 61J(2)(e).

See for example, *Fisher v R* [2008] NSWCCA 129 (13-year-old victim) and *R v BWS* [2007] NSWCCA 59 (16-year-old victim). In *Rylands v R* [2008] NSWCCA 106, the victim was aged 15 years and 9 months. The offence comprised an act of cunnilingus. The court noted that crimes of this nature are regarded with great seriousness and that general deterrence and retribution require earnest consideration: at [98].

[17-510] Aggravated indecent assault: s 61M

As to the approach to sentencing for indecent assault committed many years earlier, see **Sentencing for offences committed many years earlier** at [17-410] and *PWB v R* [2011] NSWCCA 84.

RS Hulme J said in *BT v R* [2010] NSWCCA 267 at [41]:

> Sentencing for offences under s 61M is difficult because of the absurd relativity between the 7 years maximum term and the very high standard non-parole period of 5 years for a case in the mid-range of objective seriousness. If the proportions envisaged by s 44 of the *Crimes (Sentencing Procedure) Act* were adhered to, such a non-parole period would be appropriate for a head sentence of 6 years and 8 months, a sentence that in accordance with long-standing sentencing principles would be imposed only for an offence falling very close to a worst case of an offence under s 61M.

Prior to *BT v R* the court had described the ratio of the standard non-parole period to maximum penalty for indecent assault as "somewhat curious and inconsistent": *R v Dagwell* [2006] NSWCCA 98 per Howie J at [38].

The *Crimes Amendment (Sexual Offences) Act* 2008 amended s 61M *Crimes Act* 1900 to increase the maximum penalty for an aggravated indecent assault against a child aged under 16 years from 7 to 10 years imprisonment (effective 1 January 2009): s 61M(2).

An offender who commits an aggravated indecent assault against a victim who is under the authority of the offender is liable to 7 years imprisonment: s 61M(1).

Although it is difficult to reconcile, the court must give attention to the standard non-parole period: *Corby v R* [2010] NSWCCA 146 at [71].

The prescription of a standard non-parole period for indecent assault does not displace the principle that the court is to have regard to the fact that the offence could have been disposed of in the Local Court: *Bonwick v R* [2010] NSWCCA 177 at [47]. Davies J said at [48]: "It will have a greater influence in the sentencing as both the objective criminality falls below the mid-range, and as the subjective criminality of the offender assumes more significance".

Worst cases

In *R v Campbell* [2005] NSWCCA 125 at [31], the court held that the sentencing judge was correct in finding that the criminality of the offences committed by the applicant was within the worst category of the range of possible offences for aggravated indecent assault under s 61M(1).

See generally the discussion at [10-005] **Cases that attract the maximum**.

Section 61M(2)

It is of considerable significance when assessing the objective seriousness of indecent assaults against children to consider the actual character of the assault, including the degree of physical contact involved: *R v PGM* [2008] NSWCCA 172 at [31], applying *G A T v R* [2007] NSWCCA 208 at [22]; *Corby v R* [2010] NSWCCA 146 at [71].

In *R v PGM*, the degree of genital connection in two of the s 61M(2) counts, and the gross indecency involved in the other, meant that the judge's characterisation of the offending as at the lower end of mid-range was indicative of error: at [31], [40]. By way of contrast, where an indecent assault involved the kissing and cuddling of a child the offender believed, unreasonably, was over 16, the court said that in the particular circumstances this "was not deeply intrusive" and that the offence fell "towards the bottom of the range of objective seriousness": *Corby v R* [2010] NSWCCA 146 at [72],

[78], [81]. The age difference (39 to 14 years in *Corby*) can also aggravate the offence: *Corby v R* at [77]. Other factors relevant to the assessment of objective seriousness include the specific age of the child within the range of 10–16 years, the duration of the conduct and any use of coercion: *BT v R* [2010] NSWCCA 267 at [22]–[24]; *R v KNL* [2005] NSWCCA 260 at [42]–[43]; *R v AJP* [2004] NSWCCA 434 at [25]. An absence of any threats "may have much less, and perhaps little, weight" in the context of offences by persons in positions of authority over their victims than in the case of offenders not in such a position: *BT v R* [2010] NSWCCA 267 at [24] per RS Hulme J referring to *R v Woods* [2009] NSWCCA 55 at [52]-[53].

See discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act 1999* at [17-570].

Further appeal cases are accessible in the SNPP Appeals component of JIRS.

[17-520] Act of indecency: s 61N

Table 1 at [17-420] sets out the maximum penalties applicable to acts of indecency committed against persons under 16 years: s 61N(1) *Crimes Act* 1900, and against persons 16 years and above: s 61N(2).

While, ordinarily, a custodial sentence would be appropriate for indecent assaults, such a sentence is neither necessarily required nor inevitable in every case: *R v O'Sullivan* (unrep, 20/10/89, NSWCCA) at 4–5. However, the legislature does expect the courts to punish severely those who commit sexual assaults on young children: *R v Muldoon* (unrep, 13/12/90, NSWCCA) at 6. For example, periodic detention, when it was available as a sentencing option (prior to 1 October 2010), was said not to be appropriate where the offences occurred over a long period of time on young children: *R v Burchell* (unrep, 9/4/87, NSWCCA).

The Court of Criminal Appeal has declined to lay down a requirement that a custodial sentence should ordinarily be imposed in relation to the charge of act of indecency: *R v Baxter* (unrep, 26/5/94, NSWCCA) per Hunt CJ at CL at 11. In *R v Baxter*, the Court of Criminal Appeal emphasised the importance of looking to such considerations as the nature of the assault, the existence and extent of any penetration, the age of the victim and other features relevant to the case: *R v Barrett* (unrep, 26/7/95, NSWCCA) per Kirby ACJ at 6. In *Corby v R* [2010] NSWCCA 146 at [84], the Court of Criminal Appeal stated that if the act of indecency occurred in the physical presence of the victim this will bear on the determination of the seriousness of the offence. The seriousness of the offence escalates if the offence continues over a period of days: at [86].

Aggravated act of indecency: s 61O

Table 1 at [17-420] sets out the maximum penalties for aggravated acts of indecency offences committed against a person under 16 years: s 61O(1) *Crimes Act* 1900, 16 years or above: s 61O(1A); or under 10 years: s 61O(2). Table 1 also sets out the maximum penalty for the offence of committing an act of indecency with or towards a person under the age of 16 years (or inciting a person under the age of 16 years to an act of indecency) knowing that the act of indecency is being filmed for the purpose of producing child abuse material (previously child pornography): s 61O(2A), inserted by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

In *R v ARC* (unrep, 28/8/96, NSWCCA), Hunt CJ at CL stated the following in relation to s 61O offences:

> … the size of the scale in relation to the acts of indecency referred to in [the] NSW *Crimes Act* is necessarily small. Section 61O provides for circumstances of aggravation … That further reduces the size of the relevant scale. Moreover, it does not take much for an act of indecency to become an indecent assault, with a correspondingly higher maximum sentence.

[17-530] Sexual intercourse with child between 16 and 18 under special care: s 73

Any person who has sexual intercourse with someone under their special care who is of or above 16 but under 17 years of age, is liable to imprisonment for 8 years. Where the victim is of or above the age of 17 years and under the age of 18 years, the offender is liable to imprisonment for 4 years: s 73(2) *Crimes Act* 1900. "Under the special care of another person", for the purposes of s 73, is defined in s 73(3).

[17-535] Procuring or grooming: s 66EB

Under s 66EB(2) *Crimes Act* 1900, an adult who intentionally procures a child for unlawful sexual activity with that or any other person is guilty of an offence. The offence carries a maximum penalty of 15 years imprisonment where the child involved is under 14 years of age, and 12 years imprisonment in any other case.

In *Tector v R* [2008] NSWCCA 151, the offender was charged with using a telecommunications service to procure a 12-year-old boy to engage in sexual activity: s 474.26(1) Criminal Code (Cth). Section 474.26(1) is the Commonwealth equivalent of s 66EB(2). Like s 66EB(2)(a), it carries a maximum penalty of 15 years. The court (Hall J, Giles JA and Barr J agreeing) sentenced the offender to a head sentence of 8 years imprisonment, with a non-parole period of 5 years. The gravamen of the offence is conduct by an adult directed at a child under 16 years, undertaken with the intent of encouraging, enticing, recruiting or inducing (whether by threats, promises or otherwise) that child to engage in sexual activity. "Sexual activity" is defined in s 474.28(11) (now repealed) to include "any" activity of a sexual or indecent nature and "need not involve physical contact between people": at [90]. In addition to the nature of the sexual activity proposed, the following factors were relevant to the determination of sentence at [94]:

- the offender invited the child to engage in sexual activity with him
- money was offered as an inducement to sexual activity
- the offender persistently pursued the child (over a course of approximately six weeks)
- the child, at 12 years of age, was significantly below the age of 16 years
- the extent of the age difference between the 41-year-old applicant and the 12-year-old child
- the offender took steps to remain anonymous (false name, public telephones and internet cafes).

A new offence of "meeting child following grooming" was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: ss 66EB(2A) and (2B). It carries a maximum penalty of 15 years imprisonment where the child involved is

under 14 years of age, and 12 years imprisonment in any other case: s 66EB(2A). The offence involves an adult intentionally meeting a child, or travelling to meet a child, whom he or she has groomed for sexual purposes, with the intention of procuring the child for unlawful sexual activity: s 66EB(2A).

The *Crimes Legislation Amendment (Child Sex Offences) Act* 2015 introduced standard non-parole periods for all offences under s 66EB, committed on or after 29 June 2015. See **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420].

[17-540] Child sexual servitude and prostitution

Part 3 Div 10A (ss 80B–80F) *Crimes Act* 1900 deals with offences relating to sexual servitude. The aggravated form of the offence of causing sexual servitude applies to persons under the age of 18 years: ss 80C(a), 80D(2). The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for the aggravated form of the offence from 19 to 20 years imprisonment (effective 1 January 2009): s 80D(2).

Part 3 Divs 15 and 15A (ss 91C–91H) of the *Crimes Act* 1900 deal with offences relating to child prostitution and child abuse/pornography material. The *Crimes Amendment (Child Pornography) Act* 2004 amended ss 91C and 91G and introduced s 91H. Significantly, the maximum penalty for offences in s 91G was doubled, increasing from 7 to 14 years where the child is under the age of 14 years, and from 5 to 10 years where the child is of or above the age of 14. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for offences under s 91E (obtaining benefit from child prostitution): see below.

Child prostitution

Promoting or engaging in acts of child prostitution: s 91D

In *R v Romano* [2004] NSWCCA 380, the applicant had been sentenced to a fixed term of 6 years on each of three counts of causing a child to participate in act of child prostitution and on each of three counts of causing a child under 14 years to participate in an act of child prostitution. The court found that, although the sentencing judge, in setting a sentence close to the maximum, erred in characterising s 91D prostitution offences as "in many ways … analogous to a violent aggravated sexual assault in terms of its effect on the community and particularly on the girl", when the offences on the Form 1 were taken into account, the sentence imposed was within the sentencing range.

For offences under s 91D(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420]), committed on or after 29 June 2015, a standard non-parole period of 6 years applies.

Obtaining benefit from child prostitution: s 91E

On each of seven counts of obtaining benefit from child prostitution under s 91E in *R v Romano* [2004] NSWCCA 380, the applicant was sentenced to a fixed term of 3 years. The *Crimes Amendment (Sexual Offences) Act* 2008 increased the maximum penalty for receiving money or any other material benefit knowing that it is derived from an act of prostitution involving a child under the age of 14 years from 10 to 14 years imprisonment (effective 1 January 2009): s 91E(1). The higher maximum penalty only applies where the age of the child is set out in the charge for the offence: s 91E(3).

For offences under s 91E(1) (see **Table 1: Sexual offences against children under the *Crimes Act* 1900** at [17-420]), committed on or after 29 June 2015, a standard non-parole period of 6 years applies where the offence is one involving a child under 14, attracting the 14 year maximum penalty.

Premises not to be used for child prostitution: s 91F

In *R v Hilton* [2005] NSWCCA 317, the applicant was charged with 11 counts of obtaining money from child prostitution under s 91E(1) and eight counts of premises not to be used for child prostitution under s 91F(1). His defence — that he did not know the two girls were under 18 years of age — was rejected by the sentencing judge. On appeal, the submission that he was double punished for his conduct was made good: *Pearce v The Queen* (1998) 194 CLR 610 applied. There was no need to charge the applicant with offences under s 91F(1) as well as under s 91E(1); the offences under s 91F, in point of criminality, being almost entirely subsumed in the offences committed under s 91E: at [8]. Therefore, the sentence for offences under s 91E(1) was reduced for each count to a fixed term of 2 months, whereas the sentence for offences under s 91F(1) was confirmed as a 3-year-term of imprisonment with a non-parole period of 12 months. Justice Adams (with Bell and Hall JJ agreeing), stated that despite the powerful subjective circumstances of this case the objective criminality of the offences was substantial and necessitated a term of full-time custody.

[17-541] Child abuse/pornography offences

The following text sets out both Commonwealth and State offences. Increases to maximum penalties reflect the view of the State and Federal Parliament of the serious criminality involved in child pornography offences: *R v Porte* [2015] NSWCCA 174 at [57], [58]. In 2008, the maximum penalty for an offence against s 91H(2) *Crimes Act* 1900 (see below) was increased from 5 to 10 years imprisonment. In 2010, the maximum penalty for the Criminal Code (Cth), s 474.19 (see below) (and other similar offences) was increased from 10 to 15 years imprisonment.

State offences

Part 3 Div 15A *Crimes Act* 1900 contains the following State child abuse material (previously child pornography) offences:

- using a child to produce child abuse material: s 91G(1)
- producing child abuse material: s 91H(2)
- disseminating child abuse material: s 91H(2)
- possessing child abuse material: s 91H(2).

"Child abuse material" is defined in s 91FB as material which:

> … depicts or describes in a way that reasonable persons would regard as being, in all the circumstances, offensive:
>
> (a) a person who is, appears to be or is implied to be, a child as a victim of torture, cruelty or physical abuse, or
>
> (b) a person who is, appears to be or is implied to be, a child engaged in or apparently engaged in a sexual pose or sexual activity (whether or not in the presence of other persons), or

(c) a person who is, appears to be or is implied to be, a child in the presence of another person who is engaged or apparently engaged in a sexual pose or sexual activity, or

(d) the private parts of a person who is, appears to be or is implied to be, a child.

Commonwealth offences

Chapter 10 Pts 10.5 and 10.6 Criminal Code (Cth) contain the following Commonwealth child pornography and child abuse material offences:

- using a postal service for child pornography or child abuse material: ss 471.16, 471.19 (maximum penalty of 15 years)
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use through a postal or similar service: ss 471.17, 471.20 (maximum penalty of 15 years)
- using a carriage service to access, transmit (or cause to be transmitted to himself or herself), make available, publish, distribute, advertise, promote or solicit child pornography or child abuse material: ss 474.19, 474.22 (maximum penalty of 15 years). See **Special Bulletin 11 — DPP (Cth) and DPP (Vic) v Garside [2016] VSCA 74**, which reviewed the leading authorities in NSW and Victoria.
- possessing, controlling, producing, supplying or obtaining child pornography or child abuse material for use by the offender or another person to commit an offence against ss 474.19 and 474.22: ss 474.20, 474.23 (maximum penalty of 15 years).

An aggravated form of each offence is contained in ss 471.22 and 474.24A Criminal Code (Cth) (maximum penalty of 25 years). It is also an offence for an internet service provider or internet content host who is aware that a service they provide can be used to access material they believe, on reasonable grounds, is either child pornography or child abuse material to not refer details of that material to the Australian Federal Police within a reasonable time after becoming aware of the existence of the material: s 474.25 (maximum penalty of 100 penalty units, that is, $18,000).

There is also an offence of importing or exporting child pornography or child abuse material: s 233BAB *Customs Act* 1901 (Cth) (maximum penalty of 10 years).

Mixture of State and Commonwealth offences

It is apparent that there is a degree of overlap between some of the Commonwealth and State offences. In *R v Cheung* [2010] NSWCCA 244 at [131], the court said that it was open to a sentencing court to seek guidance from the sentences in respect of much longer established identical state offences. Although these comments were made in the context of drug offences, the statement of principle should apply regardless of the offence. See further discussion in **Sentencing Commonwealth offenders** at [16-002].

A combination of Commonwealth and State offences is not uncommon in a child pornography matter: *R v Porte* at [55]. Although the offences overlap, they are not identical. Commonwealth offences focus on the internet and the role it plays as the heart of the child pornography industry, whereas State offences are not concerned with the means by which the offender gains possession of the material: *R v Porte* at [56]; *R v Fulop* [2009] VSCA 296 at [11]–[12].

For a detailed discussion of the sentencing principles which apply in relation to sentencing for such offences see P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research

Monograph 34, Judicial Commission of NSW, 2010. As a general rule, the same sentencing principles apply regardless of whether the court is dealing with a State or Commonwealth offence.

Sentencing principles

General deterrence

General deterrence is a paramount consideration for offences involving child abuse/child pornography material. In *R v Booth* [2009] NSWCCA 89 at [40]–[44], Simpson J said:

> possession of child pornography is an offence which is particularly one to which notions of general deterrence apply. Possession of child pornography is a callous and predatory crime.
>
> In sentencing for such a crime, it is well to bear firmly in mind that the material in question cannot come into existence without exploitation and abuse of children somewhere in the world. Often this is in underdeveloped or disadvantaged countries that lack the resources to provide adequate child protection mechanisms. The damage done to the children may be, and undoubtedly often is, profound. Those who make use of the product feed upon that exploitation and abuse, and upon the poverty of the children the subject of the material.
>
> What makes the crime callous is not just that it exploits and abuses children; it is callous because, each time the material is viewed, the offender is reminded of and confronted with obvious pictorial evidence of that exploitation and abuse, and the degradation it causes.
>
> And every occasion on which an internet child pornography site is accessed (or when such material is accessed by any means at all) provides further encouragement to expand their activities to those who create and purvey the material.
>
> It is for that reason that this is a crime in respect of which general deterrence is of particular significance. In my opinion the sentencing judge too readily dismissed from consideration the need to convey the very serious manner in which courts view possession of child pornography.

In *R v Gent* [2005] NSWCCA 370 at [43], where the applicant was charged with importing child pornography under s 233BAB(5) *Customs Act* and sentenced to 18 months imprisonment with a non-parole period of 12 months, the Crown relied upon the statement of Morden ACJO in the Ontario Court of Appeal in *R v Stroempl* (1995) 105 CCC (3d) 187 at 191 to the following effect:

> The possession of child pornography is a very important contributing element in the general problem of child pornography. In a very real sense, possessors such as the appellant instigate the production and distribution of child pornography — and the production of child pornography, in turn, frequently involves direct child abuse in one form or another. The trial judge was right in his observation that if the courts, through the imposition of appropriate sanctions, stifle the activities of the prospective purchasers and collectors of child pornography, this may go some distance to smother the market for child pornography altogether. In turn, this would substantially reduce the motivation to produce child pornography in the first place.

This passage has been applied in Australia in *R v Jones* (1999) 108 A Crim R 50 at 51, a decision referred to by Malcolm CJ in *Assheton v R* (2002) 132 A Crim R 237 and Williams JA and MacKenzie J in *R v Cook* [2004] QCA 469.

Prior good character

In dismissing the severity appeal, the court in *R v Gent* (McClellan CJ at CL, Adams and Johnson JJ) found that the sentencing judge did not err in giving limited weight to the applicant's prior good character. General deterrence remains the "paramount consideration": at [64], [100].

In *Mouscas v R* [2008] NSWCCA 181 at [37], the court held that as the offence of possessing child pornography is frequently committed by persons of prior good character and since general deterrence is necessarily important, it is legitimate for a court to give less weight to good character as a mitigating factor. This aspect of Price J's judgment was endorsed in *DPP (Cth) v D'Alessandro* [2010] VSCA 60 in relation to Commonwealth offences. See the discussion of good character and s 21A(5A) *Crimes (Sentencing Procedure) Act* at [17-570]. See also *R v Elliot* [2008] NSWDC 238 at [57]; *Police v Power* [2007] NSWLC 1.

Assessing the objective seriousness generally

Assessing the objective seriousness of a particular offence involving child abuse or child pornography material offence is the most significant aspect of the sentencing exercise. In *Minehan v R* [2010] NSWCCA 140 at [94], the Court of Criminal Appeal identified the following factors as being relevant to an assessment of the objective seriousness of a range of offences including, possessing, disseminating and transmitting child pornography:

1. Whether actual children were used in the creation of the material.
2. The nature and content of the material, including the age of the children and the gravity of the sexual activity portrayed.
3. The extent of any cruelty or physical harm occasioned to the children that may be discernible from the material.
4. The number of images or items of material — in a case of possession, the significance lying more in the number of different children depicted.
5. In a case of possession, the offender's purpose, whether for his/her own use or for sale or dissemination. In this regard, care is needed to avoid any infringement of the principle in *The Queen v De Simoni* (1981) 147 CLR 383.
6. In a case of dissemination/transmission, the number of persons to whom the material was disseminated/transmitted.
7. Whether any payment or other material benefit (including the exchange of child pornographic material) was made, provided or received for the acquisition or dissemination/transmission.
8. The proximity of the offender's activities to those responsible for bringing the material into existence.
9. The degree of planning, organisation or sophistication employed by the offender in acquiring, storing, disseminating or transmitting the material.
10. Whether the offender acted alone or in a collaborative network of like-minded persons.
11. Any risk of the material being seen or acquired by vulnerable persons, particularly children.

12. Any risk of the material being seen or acquired by persons susceptible to act in the manner described or depicted.
13. Any other matter in s 21A(2) or (3) *Crimes (Sentencing Procedure) Act* (for State offences) or s 16A *Crimes Act* 1914 (for Commonwealth offences) bearing upon the objective seriousness of the offence.

In *R v Porte* [2015] NSWCCA 174 at [63]–[64], the court said the sentencing principles set out in *Minehan v R* remain relevant and have been applied in numerous decisions including: *R v Linardon* [2014] NSWCCA 247; *R v Martin* [2014] NSWCCA 283; *James v R* [2015] NSWCCA 97. The court added to these principles the following considerations:

- The absence of an intention to sell or distribute child abuse material does not mitigate penalty for a possession offence: *R v Porte* at [66]; *Saddler v R* [2009] NSWCCA 83 at [49]–[50]; *R v Booth* [2009] NSWCCA 89 at [46].
- The possession of child abuse material is not a victimless crime. Those who possess such material help to create a market for the continued exploitation and abuse of children. It is for that reason that general deterrence is of particular significance: *R v Porte* at [68]–[70]; *R v Booth* at [41]–[42].
- Evidence of rehabilitation, while an important sentencing consideration under s 16A(2)(n) *Crimes Act* 1914 (Cth) and s 21A(3)(h) *Crimes (Sentencing Procedure) Act* 1999, may have reduced significance given the predominance of general deterrence and denunciation in the sentencing process for these offences: *R v Porte* at [71]–[72]; *R v Booth* at [47].

R v Porte was applied in *R v De Leeuw* [2015] NSWCCA 183 at [70]. See also *Lyons v R* [2017] NSWCCA 204 at [76].

The use of scales, such as the CETS (Child Exploitation Tracking System) scale, to categorise the material is a helpful way to assist a sentencing court in assessing the objective seriousness of the offence: *R v Porte* at [75]. It is of further assistance to provide random sample evidence of the material to the court so that it has before it something more than a formulaic classification which may not communicate the true nature of the material: *R v Porte* at [77], [114]. Such evidence is permitted under s 289B *Criminal Procedure Act* 1986.

Other factors of universal application which must be considered when sentencing for these offences include: the offender's motivation; the way in which the material is organised; whether the charges are representative; evidence concerning the surrounding circumstances and the proper application of the *De Simoni* principle; and issues related to totality: see further P Mizzi, T Gotsis and P Poletti, *Sentencing offenders convicted of child pornography and child abuse material offences*, Research Monograph 34, Judicial Commission of NSW, Sydney, 2010. The court in *R v Porte* at [62] described the monograph as a helpful publication.

Specific offences

Children not to be used for production of child abuse material: s 91G(1) Crimes Act 1900

A person commits an offence under s 91G if they use a child for the production of child abuse material, cause or procure a child to be so used, or consents to a child in their care

being so used. The wording of this section was amended by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The phrase, "for pornographic purposes" was replaced by "for the production of child abuse material". Offences contrary to s 91G(1) committed on or after 29 June 2015 attract a standard non-parole period of 6 years.

In *R v Pearson* [2005] NSWCCA 116, on the charge of using a child under 14 years for pornographic purposes, the applicant was sentenced to a fixed term of 18 months. Although the court found that in sentencing the applicant for that offence the sentencing judge contravened s 21A(2) *Crimes (Sentencing Procedure) Act* by taking into account, as a circumstance of aggravation, that the complainant was under the age of 14, notwithstanding the error, the sentences imposed on the applicant were not found to be manifestly excessive.

In *Hitchen v R* [2010] NSWCCA 77, the applicant was charged with a number of child pornography offences including one against s 91G(1)(a) which was accepted as a "worst category" case (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**): *Hitchen v R* at [11], [24]. That offence involved the applicant using his 7-year-old step-daughter on nine separate occasions for the purpose of photographing and videoing her in erotic postures which the sentencing judge described as "disgusting and degrading": *Hitchen v R* at [15]. The applicant was sentenced to a non-parole period of 2 years with a balance of term of 4 years for this offence (the total effective sentence was 18 years with a non-parole period of 14 years).

Production, dissemination or possession of child abuse material: s 91H Crimes Act 1900

A new form of s 91H was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Child Pornography and Abuse Material) Act* 2010, effective 17 September 2010. The new section uses the phrase "child abuse material" rather than "child pornography".

The maximum penalty for the possession offence under the previous form of s 91H was increased from 5 to 10 years imprisonment, and the previous production, dissemination and possession offences were merged into s 91H(2): *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009).

"Child abuse material" includes material that "appears to be or is implied to be" a child: as a victim of torture, cruelty or physical abuse; engaged in a sexual pose or sexual activity; or in the presence of a person who is engaged in a sexual pose or sexual activity or: s 91FB(1).

The fact that no actual children are used in the production of offending material is a relevant matter in the assessment of objective seriousness: *Minehan v R* [2010] NSWCCA 140 at [90]. In *Whiley v R* [2010] NSWCCA 53, the images the subject of the charge were drawn by the applicant and did not involve the actual abuse of children. This, together with the small number of images produced and the fact that the offender produced them for his own gratification, justified a finding that the offence fell within the low range: at [55]–[71]. In *R v Jarrold* [2010] NSWCCA 69, the production offences involved internet conversations with others concerning sexual activity between the respondent and children. An argument that the offences should be treated as less serious because they were a result of fantasy was strongly rejected:

at [53]. The court did accept that, although the offences were separate and distinct, and two related to ongoing criminal activity, they otherwise fell towards the bottom of the range: at [55].

Accessing, transmitting and making available child pornography or child abuse material: ss 474.19 and 474.22 Criminal Code (Cth)

In *James v R* [2009] NSWCCA 62 at [16], the court separately determined the seriousness of an offence of accessing child pornography and an offence of possession of such material, noting that the access offence continued over a shorter period of time than the possession offence which had continued for a period of over 3 years.

In offences involving the transmission and making available of child pornography or child abuse material, the degree of sophistication and technical skill in the use of the internet is relevant to a determination of the objective seriousness of the offence. In *R v Mara* (2009) [2009] QCA 208 at [10], [37], the court concluded that such sophistication and skill was an aggravating factor. In *R v Talbot* [2009] TASSC 107 at [9], the fact material was made available using two file sharing programs and was encrypted, thus making detection more difficult, justified a finding that the offences fell within the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**).

See the discussion of factors which might bear on an assessment of the objective seriousness of these types of offences referred to in *Minehan v R* [2010] NSWCCA 140 at [94] discussed above.

[17-543] Voyeurism and related offences

New voyeurism and related offences were inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008: Pt 3 Div 15B (ss 91I–91M) (effective 1 January 2009). The maximum penalties for these offences are detailed in Table 1 at [17-420].

Voyeurism: s 91J

Voyeurism is the seeking of sexual arousal or gratification by observing another person engaged in a private act without the consent of the person and knowing that the other person has not consented to be observed for that purpose: s 91J(1). "Engaged in a private act" is defined in s 91I(2). An offence against s 91J(1) is a summary offence: s 91J(2).

An aggravated form of the offence is committed when the person observed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose facilitating the commission of the offence: s 91J(3), (4).

Filming a person engaged in a private act: s 91K

It is an offence for a person to seek sexual arousal or gratification (or enable another person to do so) by filming another person engaged in a private act without the consent of the person and knowing that the person being filmed has not consented to being filmed for that purpose: s 91K(1). An aggravated form of the offence is committed if the person being filmed was under 16 years of age or the offender constructed or adapted the fabric of any building for the purpose of facilitating the commission of the offence: s 91K(3), (4).

Filming a person's private parts: s 91L

It is an offence for a person to seek sexual arousal or gratification (or seek to enable another person to do so) by filming another person's private parts without the consent of the person and knowing that the person being filmed does not consent to being filmed for that purpose: s 91L(1). An offence against s 91L(1) is a summary offence. An aggravated form of the offence is committed if the person filmed was under 16 years of age or the offender constructed or adapted the fabric of a building for the purpose of facilitating the commission of the offence: s 91L(3), (4).

[17-545] Incitement to commit a sexual offence

An offence of inciting a person to commit a sexual offence was inserted into the *Crimes Act* 1900 by the *Crimes Amendment (Sexual Offences) Act* 2008 (effective 1 January 2009): s 80G. Inciting a person to commit a sexual offence carries the penalty provided for the commission of the sexual offence: s 80G(1).

[17-550] Intensive correction order not available for a "prescribed sexual offence"

Section 66 *Crimes (Sentencing Procedure) Act* provides that an intensive correction order may not be made in respect of a sentence of imprisonment for an offence under Div 10 or 10A of Pt 3 *Crimes Act* 1900.

For a further discussion of restrictions on the power to make intensive correction orders see **Intensive correction orders (ICOs)** at [3-630].

[17-560] Other aggravating circumstances

Breach of trust

It is an obvious aggravating feature if the offender was in a position of trust and violated that trust by sexually assaulting the child: *R v Muldoon* (unrep, 13/12/90, NSWCCA). There is a variety of situations where breach of trust has been recognised.

Family members

The abuse of trust is considered more serious where the offender is the father (or family member) of the victim. Sentences must be of a severe nature and little leniency can be given, even though the parent has been otherwise of good character: *R v Evans* (unrep, 24/3/88, NSWCCA); *R v Welcher* (unrep, 9/11/90, NSWCCA) per Lee CJ at CL at [15]; *R v Bamford* (unrep, 23/7/91, NSWCCA). In *R v Hudson* (unrep, 30/7/98, NSWCCA) at 2, Sully and Ireland JJ, Spigelman CJ agreeing, stated:

> children in a family situation are virtually helpless against sexual attack by the male parent and … children have a right to be protected from sexual molestation within the family and … this can only be achieved by the courts imposing sentences of a salutary nature.

The Court of Criminal Appeal has expressed particular concern that in family situations children are required to obey their parents. The offender exploits that authority and their power to discipline the child: *R v JVP* (unrep, 6/11/95, NSWCCA); *R v RKB* (unrep, 30/6/92, NSWCCA). In *R v BJW* [2000] NSWCCA 60 at [20]–[21], Sheller JA stated:

> [A] child aged 13 or younger is virtually helpless in the family unit when sexually abused by a step-parent. All too often the child is afraid to inform upon the step-parent; see

generally *R v Bamford* (unreported) CCA, 23 July 1991 per Lee CJ at CL at 5. The younger the victim the more serious is the criminality; see *R v PWH* (unreported) CCA, 20 February 1992.

Teachers, coaches and group leaders

In *R v King* (unrep, 20/8/91, NSWCCA), the respondent was a leader in a junior athletics organisation. In allowing the Crown appeal the court increased his sentence from a 2-year periodic detention order to a fixed term of 2 years.

In *R v MacDonnell* (unrep, 8/12/95, NSWCCA), the respondent was the head teacher at the victim's school. On the charge of carnal knowledge under s 73 he was sentenced to a minimum term of 6 months with an additional term of 2 years.

In *R v Lumsden* (unrep, 31/7/96, NSWCCA), the applicant was the victim's swimming coach. The court found that the sentencing judge did not err in finding that the breach of trust arising from a coach and pupil relationship aggravated the circumstances of the child sexual assault offences.

Carers

In *R v Eagles* (unrep, 16/12/93, NSWCCA), the applicant was a baby sitter. On multiple charges of homosexual child abuse he was sentenced to a minimum term of 7 years with an additional term of 3 years.

Priests

In *Ryan v The Queen* (2001) 206 CLR 267, the applicant was a priest who abused his position of trust by sexually assaulting young boys over an extended period of time.

Homeless children

In *R v Fisk* (unrep, 21/7/98, NSWCCA), the applicant was charged with 24 separate counts of serious sexual misconduct against three victims. In confirming the aggregate sentence of a minimum term of 9 years with an additional term of 3 years, the court found that the applicant's behaviour in manipulating, exploiting and taking advantage of the boys' dysfunctional family backgrounds and homeless state, was a further aggravating factor.

Multiple assaults

Merely that the offences occurred in the course of a single extended episode does not justify the conclusion that the sentences are to be wholly concurrent: *R v Dunn* [2004] NSWCCA 41 at [50]. In *Carlton v The Queen* [2008] NSWCCA 244 at [122], the court held that there should have been at least partial accumulation of the sentences notwithstanding that they occurred as part of one episode. The imposition of totally concurrent sentences failed to acknowledge the separate harm done to the victim by the different acts of the appellant: at [122]. This was an occasion where consideration of an offender's behaviour being closely related in time should not have obscured the fact that different offences were committed: at [122].

In child sexual assault cases where there are multiple assaults occurring as part of a background of continuous abuse, the fact that these offences are not isolated events is a material consideration in sentencing: *R v Bamford* (unrep, 23/7/91, NSWCCA). In *Dousha v R* [2008] NSWCCA 263 at [27]:

> I am satisfied that her Honour's finding that the counts were representative of a course of conduct was in order to emphasise the distinction between the leniency that might be extended for an isolated instance of misconduct as distinct from repeated and discrete misconduct.

Offences involving a number of victims or a large number of instances which occurred over a long period of time have been regarded as demonstrative of cases involving a very high degree of criminality: see *R v Hill* (unrep, 7/7/92, NSWCCA). Condign punishment is called for where grave and repeated sexual assaults are perpetrated upon young children, particularly by a person in a position of trust and authority: *R v JCW* [2000] NSWCCA 209 per Spigelman J at [121]. However, each case must be necessarily understood upon its own facts and by reference to the particular objective circumstances. Such consideration would necessarily include the number of victims involved, the duration of the offence(s) and the extent of sexual invasion seen: *R v Davis* [1999] NSWCCA 15 at [65].

Caution must be exercised when a criminal escapade involves consequences for more than one victim. In these circumstances, there is a special need to ensure that by imposing concurrent sentences, insufficient recognition is not given to the fact that more than one victim has been impacted by the criminal activity: *R v AB* [2005] NSWCCA 360.

In *R v Wicks* [2005] NSWCCA 409 at [49], McClellan CJ at CL stated:

> Persons who set about committing crimes of a sexual nature upon a number of different victims, even if the offence occurs in a short space of time can expect a penalty which imposes a prison term which will be served separately for at least some of the offences (… see the discussion about multiple victims in *R v Dunn* [2004] NSWCCA 41 at [50], *R v AB & Clifford* [2005] NSWCCA 360 at [90]–[84], *R v Weldon* (2002) 136 A Crim R 55 at 62 per Ipp J).

In *R v Katon* [2008] NSWCCA 228 at [41], the court, applying *R v Knight* [2005] NSWCCA 253 per Johnson J at [112], held that:

> The facts relating to the various offences disclose a course of serious criminal conduct over a number of years. That conduct involved the sexual abuse of 3 individual victims. In the ordinary course there should be a recognition of that separate offending by at least partial accumulation of the sentences …

In *Dousha v R* [2008] NSWCCA 263 at [57], a case involving discrete offending against two young children over a period of years, the court held that there was no error manifested in the fact that the sentences were partially accumulated.

[17-570] Mitigating factors

The issue of consent

Consent is *not* a mitigating factor or defence. Children are to be protected from sexual conduct, even if they are willing participants: *R v McClymont* (unrep, 17/12/92, NSWCCA); *R v Brady* (unrep, 3/3/94, NSWCCA).

Sections 77(1) and 91D(3) *Crimes Act* 1900 provide that consent is no defence to the offences specified in those sections, as noted above at [17-420]. The judge erred in *R v Nelson* [2016] NSWCCA 130 by describing, as a factor in the respondent's favour, the offences as "consensual". "Consensual" is not a proper description; the offending may be better described as not being the subject of opposition. Lack of consent is not an element of the offences because the law deems persons of that age unable to give informed consent. While the use of threats or force would have aggravated the offending, mere lack of opposition is irrelevant and not a mitigating factor: *R v Nelson* at [23]. The age difference between the victims and the respondent was significant: *R v Nelson* at [25], [64].

Good character

The *Crimes Amendment (Sexual Offences) Act* 2008 inserted special rules for child sexual offences: ss 21A(5A), (5B) *Crimes (Sentencing Procedure) Act* (effective 1 January 2009). Subsection 21A(5A) provides that, in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. Section 21A(5A) has effect despite any Act or rule of law to the contrary: s 21A(5B). See further [10-410].

A new definition of "child sexual offence" was also inserted: s 21A(6). The good character amendment applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59.

Prior to the commencement of the *Crimes Amendment (Sexual Offences) Act* 2008, an offender's prior good character was held to be of less significance in child sex cases than other types of offences: *R v Rhule* (unrep, 25/7/95, NSWCCA); *R v Muldoon* (unrep, 13/12/90, NSWCCA); *R v DCM* (unrep, 26/10/93, NSWCCA); *R v Balenaivalu* (unrep, 19/2/96, NSWCCA); *R v Levi* (unrep, 15/5/97, NSWCCA); *R v C* (unrep, 24/4/97, NSWCCA) ; *R v Elliot* [2008] NSWDC 238 at [42]; *Mouscas v R* [2008] NSWCCA 181 at [37]; *R v PGM* [2008] NSWCCA 172 at [43]–[44] and *Dousha v R* [2008] NSWCCA 263 at [49].

In *R v PGM* [2008] NSWCCA 172 at [44], the court observed that, while the judge was entitled to take the respondent's previous good character into account, to afford it "very significant weight" failed to recognise that the pattern of repeat offending extended over a period of seven months and that the relationship with the victim was deliberately fostered by the respondent for his own sexual gratification. Further, a determined and conscious course of offending diminishes the mitigating impact of a finding of good character: *R v Kennedy* [2000] NSWCCA 527 at [21]; *R v ABS* [2005] NSWCCA 255 at [25]. The fact that the respondent used child pornography when perpetrating one of the s 61M(2) offences further indicated that his offending was "neither opportunistic nor in any meaningful contrast to his outward or public good character": *R v PGM* at [44].

Offender abused as a child

If it is established that a child sexual assault offender was sexually abused as a child, and that the history of abuse has *contributed* to the offender's own criminality, that

is a matter which can be taken into account by a sentencing judge as a factor in mitigation of penalty: *R v AGR* (unrep, 24/7/98, NSWCCA) at 13. However, while it is appropriate to take such a circumstance into account, it cannot be regarded as an excuse, notwithstanding the fact that such a link may aid in explaining the reason why the offender committed the offence: *R v Lett* (unrep, 27/3/95, NSWCCA) per Hunt CJ at CL at [5]; *R v Reynolds* (unrep, 7/12/98, NSWCCA) per Hulme J. Courts have to do what they can to see that the cycle of sexual abuse is broken: *R v Reynolds*.

The weight to be given to this circumstance will depend very much on the facts of the individual case and will be subject to a wide discretion in the sentencing judge: *R v AGR* (unrep, 24/7/98, NSWCCA) at [5]. Such a consideration will usually only go to reducing the offender's moral culpability for the acts, notwithstanding that it may also be relevant to the offender's prospects of rehabilitation: *R v AGR*.

In *R v Cunningham* [2006] NSWCCA 176 at [67], the court held that the applicant's history of sexual abuse did not entitle him to mitigation because the psychiatric evidence did not go so far as to suggest that the abuse contributed to his paedophilia or the offences. Furthermore, the offences were committed in breach of a bond for similar prior offences with regard to which the applicant had already received the benefit of the history at sentence.

In *Dousha v R* [2008] NSWCCA 263 at [47], the applicant conceded that there was no direct evidence that the single instance of sexual abuse he suffered as a child had in any way contributed to his offending. Indeed, there was evidence to the contrary, as a psychologist who assessed the applicant opined that the incident did not contribute to the applicant's offending. The court held at [47] that, "[i]n the absence of any causal connection of that kind (or the issue having any bearing upon the applicant's prospects of rehabilitation)", the incident was not relevant to the sentencing discretion.

Delay

Substantial delay in bringing a matter before the court in some cases may operate to the offender's advantage, for example by providing the offender with the opportunity to establish a new life and demonstrate rehabilitation. In other cases, the period of delay may lead to some constraint upon the offender's lifestyle or other detriment which may also justify a degree of leniency: *R v V* (unrep, 24/2/98, NSWCCA) per Wood J. In *R v Todd* [1982] 2 NSWLR 517 at 519, a case concerned with factors arising from consideration of offences committed interstate and resulting delays, Street CJ set down the following principle:

> where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense and to what will happen to him when in due course he comes up for sentence on subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.

In the case of child sexual assault, it does not necessarily benefit a child sex offender that the offences are not revealed until many years after they were committed: *R v Moon*

[2000] NSWCCA 534. In *R v Dennis* (unrep, 14/12/92, NSWCCA), the applicant had been charged with five counts of indecent assault and two counts of buggery after the victim came forward in 1990 following a public appeal about child abuse, and complained of offences that had occurred over the period 1974–1980. In rejecting the submission that the sentencing judge had erred by not giving adequate weight to the lapse of time between the commission of the last offence and the time when the applicant came forward for sentence, James J, Hunt CJ at CL and Carruthers J agreeing, said:

> It is not infrequently the case that sexual offences committed against a child of which only the offender and the child have knowledge, are first revealed by the child to a third person only years afterwards when the child has attained a certain level of maturity. In such cases the mere passage of time between the committing of the offences and the disclosure of the offences and the apprehension of the offender is of little weight as a factor in mitigation of penalty.

Lapse of time between the commission of the offence and notification to police should be a mitigating factor only where the delay would cause unfairness to the offender: *R v Johnson* (unrep, 16/5/97, NSWCCA) per Priestley JA. However, it is impossible to lay down any general principle as to the operation of leniency arising from delay: *R v Thomson* (unrep, 18/6/96, NSWCCA) per Levine J.

In *R v Holyoak* (1995) 82 A Crim R 502, a case involving sexual offences in which the appellant had not been charged until more than 20 years had passed and in which there had been a further six years delay before conviction; "extra curial" punishment via the media; and "hate" communications, Allen J stated:

> Whether, in any particular case, so long a delay is a detriment depends upon the circumstances of that case. There is no rule of law that it always is a detriment — although often it will be. It could be, to take a case at one extreme, that the offender has spent years in emotional hell, appalled at what he has done, terrified that the day may come when he is found out, disgraced and convicted, fearing that at any time there will be that knock on the door and never feeling free to remain so long in any community that he comes to be known and his background be of interest to others. At the other extreme the offender may have gone through the years untroubled by his offences, lacking any remorse in respect of them and feeling confident that they will never come to light because the victim never would be prepared to talk about them, his confidence increasing as the years went by with his victim remaining silent — the offender enjoying over the many years unwarranted acceptance by his associates in his respectable and stable lifestyle.

In finding that the sentencing judge made no error in principle in relation to delay, Levine J in *R v Thomson*, Priestley JA and Abadee J agreeing, applied *R v Holyoak*. The sentencing judge had found this was not a case where there had been any dilatory conduct by the police or prosecuting authorities, nor was it a matter in which there had been charges 'hanging over' the prisoners head. As far as the applicant was concerned the matter was not going to proceed after the victim's mother refused to co-operate with the authorities in 1987. There was no evidence to the effect that the prisoner's life was in any way affected by the delay between the detection by his wife in 1987 and the eventual furnishing of evidence enabling prosecution.

The issue of delay was considered in *R v Humphries* [2004] NSWCCA 370, where Barr J, Buddin and Campbell JJ agreeing, stated that the sentencing judge was entitled

to ignore the fact that there was an 11-year delay between the victim's complaint to her mother and her complaint to police and the subsequent charging of the applicant. In that case, the complainant had been discouraged from making a report by her family. Justice Barr stated at [19]–[20]:

> Although a lengthy delay between finding and charging can be taken into account in favour of an offender, there is no rule that that must happen. Each case depends on its own facts. There is no rule of law that delay is always a detriment to the offender, though it often will be: *R v Holyoak* (1995) 82 A Crim R 502 at 508.
>
> One of the incidents of a lengthy delay can be that the offender is left in an agony of mind, not knowing whether or not he will be charged. The applicant was not put into any such frame of mind. He was able confidently to rely, until the police were finally told, upon the complainant's not telling the police, in accordance with the understanding he believed had been reached [among the family].

In *R v EGC* [2005] NSWCCA 392, in referring to the distinction drawn in *R v Holyoak*, the applicant submitted that, while the rehabilitation of an offender is not necessarily a mitigating factor in cases where there is a time lapse between the commission of the offences and conviction for them, it is a powerful mitigating factor where delay was a consequence of the prosecuting authorities failing to expeditiously bring the offender to trial. Justice Latham, Sully and Hulme JJ agreeing, doubted whether such a neat distinction can be drawn. Justice Latham stated at [32]:

> nothing in the judgment [in *R v Holyoak*] suggests that the weight to be afforded to the rehabilitation of an offender varies according to whether delay has been occasioned by tardiness on the part of the prosecution.

In *R v EGC*, although police were notified in 1991, both the victim and her mother rejected police involvement. The victim's mother had in fact married the applicant six months after being told by the victim of the sexual assaults. Stating at [35] that "mere knowledge of such allegations cannot found a justifiable inference of deliberate inaction by prosecuting authorities", Latham J continued at [36]:

> A number of decisions of this court are consistent with the Judge's approach to this issue, in circumstances where the complainant and members of her family decline to make a statement or contact the police, despite some early intervention by welfare authorities. *V*, *Thompson* and *Humphries* all fall into that category and resulted in the dismissal of sentence appeals premised upon non-adherence to the principles established in *R v Todd* [1982] 2 NSWLR 517. In *V*, Wood CJ at CL cites *Thompson* and *Holyoak* amongst others, as illustrative of the proposition that leniency is not necessarily extended wherever there is a stale offence or substantial delay (at 300).

Although the court in *R v EGC* held that the sentencing judge did not fail to give sufficient weight to the applicant's rehabilitation in the context of the delay between notification of the assaults to police and charge, it found that the passage of time between the commission of the offences and sentence was capable of, and ought to have, constituted special circumstances. The Court of Criminal Appeal has recognised prosecution for a stale offence as a special circumstance warranting alteration of the statutory ratio: *R v Virgona* [2004] NSWCCA 415; *R v Fidow* [2004] NSWCCA 172.

In *Dousha v R* [2008] NSWCCA 263 at [30], where there was a delay of about 20 years, the court held that it was open to her Honour to conclude that rehabilitation was not established. Although the fact that a lengthy period has elapsed without

further offences being committed may allow for a finding that an offender has either rehabilitated or has good prospects for doing so, such a finding is not mandated. Her Honour gave greater weight to the psychologist's opinion that the applicant possessed persisting features of paedophilic orientation: at [18], [29].

Pre-Trial Diversion of Offenders Program

The *Pre-Trial Diversion of Offenders Act* 1985 applied to "a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner": s 3A. It established a procedure whereby certain offenders are to be diverted from the ordinary curial path and made subject to a program of treatment intended to modify their criminal behaviour; the ultimate aim of the treatment being the reduction of the prospects of re-offending: *R v DWD* (unrep, 2/3/98, NSWCCA). As the legislation was explained when it was introduced into Parliament, the Act was based upon the theory that there are certain cases in which punishment is not an effective or appropriate deterrent. It has as its principal objective the protection and alleviation of the stress of victims of child sexual assault.

Following the repeal of the *Pre-Trial Diversion of Offenders Regulation* 2005 on 1 September 2012, the program closed. See *Attorney General for NSW v CMB* [2015] NSWCCA 166 at [5]–[12] for a legislative history.

Possibility of summary disposal

See discussion under **Sexual assault** at [20-770].

Health

Ill-health may be a mitigating factor where the evidence establishes that imprisonment will be more burdensome because of the offender's state of health or that imprisonment will have a "gravely adverse effect on the offender's health": *R v Smith* (1987) 44 SASR 587 at 589. See also *R v Bailey* (unrep, 3/6/88, NSWCCA); *R v Zappala* (unrep, 4/11/91, NSWCCA) at 5–6; *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Cole* (unrep, 29/3/94, NSWCCA) at 10. For a lengthy discussion on the principles relating to ill-health see *R v L* (unrep, 17/6/96, NSWCCA) at 6–9.

Ultimately, the fact that a person may suffer hardship in gaol by reason of some illness or disability is a matter for the prison authorities. It is their responsibility to ensure that the prisoner is not subjected to undue hardship: *R v Zappala* and *R v L*.

There may be exceptional cases where the offender's condition is so severe that imprisonment would be inhumane: *R v Vento* (unrep, 6/7/93, NSWCCA); *R v Dowe* (unrep, 1/9/95, NSWCCA) referred to in *R v L*.

Age

The age of the offender is relevant on sentence primarily on the basis that imprisonment may be more onerous for an older individual. There is no automatic reduction because of age. It is a matter to be considered together with the other circumstances of the case: *R v Varner* (unrep, 24/3/92, NSWCCA); *R v Holyoak* (1995) 82 A Crim R 502. In *R v DCM* (unrep, 26/10/93, NSWCCA) at 3, Badgery-Parker J said, Kirby ACJ and Loveday AJ agreeing:

> Age is not a licence to commit sexual offences nor should it be thought that a person who commits such offences can then expect to be allowed to go free merely because of advanced years.

There is no principle that the offender should not be sentenced to a term that would result in him or her spending the rest of his or her life in gaol: *R v Varner*; *R v Holyoak*; *R v Gallagher* (unrep, 29/11/95, NSWCCA).

The youth of an offender may also be a relevant consideration. In *R v JJS* [2005] NSWCCA 225 the applicant, a 14-year-old boy who assaulted his three-year-old cousin contrary to s 61M(2), was sentenced to a 5-year good behaviour bond. The bond was reduced on appeal to a term of 3 years, the court finding that the sentence was unduly burdensome and inappropriate in the circumstances of the case.

Intellectual handicap/mental disorder

General deterrence should be given less weight in cases where the offender is suffering from a severe intellectual disability or mental disorder because such an offender is not an appropriate medium for making an example to others. The court moderates the consideration of general deterrence to the circumstances of the particular case. See the discussion about an offender's mental condition and *Muldrock v The Queen* (2011) 244 CLR 120 at [10-460].

In *R v Morrow* [1999] NSWCCA 64, where the intellectually disabled applicant was charged with one count of sexual intercourse with child under 10 years contrary to s 66A, the court dismissed the Crown appeal against a 5-year s 558 recognizance order. The applicant was suffering from serious depression and his ability to function in the general community was 99.9% lower than the rest of the population.

Where the offender knows what he or she is doing and understands the gravity of his or her actions, the moderation will not be great: *R v Champion* (1992) 64 A Crim R 244 at 254. See also *R v DCM* at 6–7; *R v Engert* (unrep, 20/11/95, NSWCCA); and *R v Monk* (unrep, 2/3/98, NSWCCA) at 3–5.

As to the relevance of an offender's mental condition for standard non-parole period offences see *Mental condition* in **What is the standard non-parole period?** at [7-910].

Offender undertakes treatment

It has been said that it is "an important matter in his favour" that the offender is prepared to undertake treatment for his sexual attraction to children. This is particularly so in cases involving Depo Provera treatment ("chemical castration"), where there are significant side effects. In *R v DCM* (unrep, 26/10/93, NSWCCA), the respondent was charged with 16 counts of child sexual assault offences involving five children over a period of 4 years and 5 months. In dismissing the Crown appeal and confirming the 300 hours community service and recognizance orders, Badgery-Parker J, Kirby ACJ and Loveday AJ agreeing, had regard to "the quite exceptional circumstances of this case", including that the respondent underwent a course of treatment of Depo Provera and Androcur.

Extra-curial punishment

The sentencing court is entitled to take into account punishment meted out by others, such as abuse, harassment and threats of injury to person and property: *R v Allpass* (unrep, 5/5/93, NSWCCA). In *R v Holyoak* (unrep, 1/9/95, NSWCCA), the fact that the applicant had suffered substantially from personal harassment by media representatives as well as received a large volume of "hate" communications from members of the public, meant that the punishment commenced, in a real sense, before his sentence.

Section 24A(1) provides that, in sentencing an offender, the court must not take into account, as a mitigating factor, the fact that the offender has or may become:

(a) a registrable person under the *Child Protection (Offenders Registration) Act* 2000 as a consequence of the offence, or

(b) the subject of an order under the *Child Protection (Offenders Prohibition Orders) Act* 2004, or

(c) as a consequence of being convicted of the offence, has become a disqualified person under the *Child Protection (Working with Children) Act* 2012, or

(d) the subject of an order under the *Crimes (High Risk Offenders) Act* 2006 (whether as a high risk sex offender or as a high risk violent offender).

Section 24A(1)(a)–(b) has effect despite any Act or rule of law to the contrary: s 24A(2). It applies to the determination of a sentence for an offence whenever committed unless, before the commencement of the amendments, a court has convicted the person being sentenced of the offence or accepted a plea of guilty (which has not been withdrawn): Sch 2 Pt 19 cl 59. Section 24A(1)(c) applies to offences whenever committed unless, before 3 March 2011, a court has convicted the person being sentenced of the offence, or a plea of guilty has been accepted and the plea has not been withdrawn: *Crimes (Sentencing Procedure) Act* 1999, Sch 2, Pt 21, cl 62.

For the position before the enactment of s 24A see *R v KNL* [2005] NSWCCA 260 at [49]–[50].

Hardship of custody for child sex offender

Protective custody is not automatically to be regarded as a circumstance mitigating the sentence: *Clinton v R* [2009] NSWCCA 276 at [24]; *R v Way* (2004) 60 NSWLR 168 at [176]–[177]; *R v Durocher-Yvon* (2003) 58 NSWLR 581. The Court of Criminal Appeal has repeatedly applied the principle that where an offender seeks to receive a reduction of sentence on the ground that conditions of imprisonment will be more onerous, it is for the offender to lead evidence of what those conditions entail: *Clarkson v R* [2007] NSWCCA 70 per Howie J, Sully J agreeing, at [273]. It will be an error to take into account in mitigation the fact that an offender will serve a sentence in protective custody — either in the determination of the sentences or in the finding of special circumstances under s 44(2) *Crimes (Sentencing Procedure) Act* — without evidence that the conditions of imprisonment will be more onerous: *RWB v R* [2010] NSWCCA 147 at [192]–[195]; *R v LP* [2010] NSWCCA 154 at [21].

The Sentencing Council of NSW said in a report, *"Penalties Relating to Sexual Assault Offences in New South Wales"*, 2008, Vol 1, at [6.49]:

> In the case of sexual offenders, it is difficult to imagine that those prisoners who are assumed likely to serve their sentences in special management areas or in limited association areas, who have access to programs or services or a reasonable degree of association with other inmates, would qualify for special consideration. Each case would, however, need to depend on its own facts.

The Council expressed the view at [6.51] that "the conditions of protective custody should more actively be promoted to judicial officers".

A paper on protective custody by Domenic Pezzano, Superintendent Operations Branch, Corrective Services NSW, "*Information for ODPP/Courts on options*

for offenders who request protective custody — limited association and non-association" (revised December 2010) describes the programs and employment opportunities.

[The next page is 9241]

Offences against justice/in public office

[20-120] Introduction

Part 7 *Crimes Act* 1900 (NSW) is headed "Public justice offences". Division 2 deals broadly with interference in the administration of justice. Division 3 provides offences for interfering with participants in the criminal justice process. Division 4 provides offences for perjury and other false acts.

The seriousness with which the community regards offences against justice can be gauged from the Second Reading Speech for the Crimes (Public Justice) Amendment Bill (Legislative Assembly, *Hansard*, 17 May 1990) which inserted Pt 7 into the *Crimes Act*: *Marinellis v R* [2006] NSWCCA 307 at [10]; *Richards v R* [2006] NSWCCA 262 at [68].

The then Attorney-General, the Hon John Dowd MLA said at p 3691:

> Offences that damage the administration of justice strike at the very heart of our judicial system. It is fundamentally important that confidence is maintained in our system of justice, and to this end must be protected from attack. Those who interfere with the course of justice must be subject to severe penalties. Not only do offences concerning the administration of justice affect individuals, but the community as a whole has an interest in ensuring that justice is properly done.

Other offences involving the administration of justice are found in Pt III *Crimes Act* 1914 (Cth), the *Jury Act* 1977, the *Independent Commission Against Corruption Act* 1988 and the *Police Act* 1990. There are also a number of residual common law offences for bribery and contempt.

[20-130] Purposes of punishment — general deterrence and denunciation

Section 3A *Crimes (Sentencing Procedure) Act* 1999 sets out the purposes for which a sentence may be imposed, including s 3A(b): "to prevent crime by deterring the offender and other persons from committing similar offences"; and s 3A(f) "to denounce the conduct of the offender".

The Court of Criminal Appeal has consistently held that offences against justice require strong deterrent sentences and must be severely punished whenever detected: *Marinellis v R* [2006] NSWCCA 307 at [10]; *R v Taouk* (1992) 65 A Crim R 387.

The purpose of an appropriate sentence for an offence such as perjury is not only to punish the offender, but to deter others and make plain that the commission of this type of offence will be visited with serious punishment: *R v Bulliman* (unrep, 25/2/93, NSWCCA); *R v Aristodemou* (unrep, 30/6/94, NSWCCA).

In *Harrigan v R* [2005] NSWCCA 449 at [47], the court endorsed the statement of McClellan J (as he then was) in the two-judge bench decision of *R v Giang* [2001] NSWCCA 276. In relation to an act intending to pervert the course of justice, McClellan J stated at [21]:

> In every case the court has been concerned to emphasise the need to impose a sentence which not only punishes the offender but will deter others from a similar course of action.

The court has also emphasised the importance of general deterrence in relation to bribery offences: *R v Pangallo* (1991) 56 A Crim R 441 at 443.

The court has also held that denunciation is to be given greater importance in sentencing for an offence against justice committed by those directly involved in the administration of justice: *R v Nguyen* [2004] NSWCCA 332 at [43].

[20-140] Offences against justice committed by public officials

Where an offence against justice is committed by a public official, the Court of Criminal Appeal has consistently held that the offender's position is generally a significant matter in aggravation. In *Retsos v R* [2006] NSWCCA 85 at [31], Sully J (with Howie and Simpson JJ agreeing) stated:

> Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly.

In *R v Nguyen* [2004] NSWCCA 332 at [38], Spigelman CJ (with Barr and Hoeben JJ agreeing) explained: "The fact that the offence of perverting the course of justice is committed by a person directly involved in the administration of justice is a relevant consideration, even if the conduct does not occur in the course of that person's official duty". See also *R v Chapman* (unrep, 21/5/98, NSWCCA).

Denunciation is to be given greater importance in sentencing for an offence of attempting to pervert the course of justice committed by someone involved in the justice system: *R v Nguyen* at [43].

Breaching a position of trust is a matter of aggravation: see generally **Objective Factors (cf 21A(1))** at [10-060].

Police officers

In *R v Nguyen* [2004] NSWCCA 332, Spigelman CJ at CL stated at [39]:

> There is authority in this Court to the effect that it is relevant that a person who commits an offence with respect to the administration of justice is a police officer.

Spigelman CJ quoted from *R v Chapman* (unrep, 21/5/98, NSWCCA), where Simpson J said:

> Those concerned in the administration of the law must be taken to appreciate the supreme importance of truthful evidence being given in judicial proceedings. The respondent did not cease being a police officer, or carrying out the duties and responsibilities, and having the privileges of that office, because these events arose out of recreational and not professional activities. He must be taken to have known, better than most, how important the curial procedure is, and with what respect it must be treated.

Earlier, in *R v Nomchong* (unrep, 10/4/97, NSWCCA), McInerney J (with Hunt CJ at CL and Sully J agreeing) stated:

> The crime of bribery by a police officer, therefore, must be severely punished whenever detected. The police are in constant contact with members of the public and the opportunity for bribery is always great. Those circumstances themselves mean that the element of general deterrence is always a matter that must be kept very much in the

> forefront of the mind of a sentencing judge when a police officer is charged with an offence such as this. It is important to deter other police officers who may be inclined to similar conduct.

See also *R v O'Mally* [2005] NSWCCA 166 at [15].

R v Nomchong involved a senior sergeant attempting to corrupt a junior officer under his supervision. McInerney J endorsed the trial judge's statement that:

> The inevitable consequence of the conviction of a police officer for the offence of attempting to pervert the course of justice would in most cases be a fulltime custodial sentence.

In *R v Hilder* (unrep, 13/5/93, NSWCCA) the police officer was convicted of "seriously corrupt conduct … in the performance of his duties". Wood J (as he then was) concluded: "That kind of conduct must attract a significant custodial sentence …" However, Wood J noted that "[i]t remains, of course, appropriate in any case involving a person holding public office to take into account the loss of reputation, and employment and also where appropriate, the loss of a pension or superannuation benefits".

The rank of the police officer, and the corruption of other officers, is relevant to the seriousness of the offence: *R v Irwin* [1999] NSWCCA 361 at [47]; *R v Nomchong*.

In the context of corruption offences, less weight can be given to evidence of good character as a police officer: *R v Chad* (unrep, 13/5/97, NSWCCA); see also *R v Farquhar* (unrep, 29/5/85, NSWCCA) in relation to judicial officers.

Solicitors

The fact that an offender who bribes or attempts to bribe a police officer is a solicitor is an aggravating feature, whether the bribe is large or small: *R v Pangallo* (1991) 56 A Crim R 441. In *Pangallo*, Lee CJ at CL explained at 443–444:

> The police are in constant contact with members of the legal profession, both barristers and solicitors, and the opportunities for bribery are great and those circumstances of themselves mean that the element of deterrence is always a matter which must be kept very much to the forefront of the mind of a sentencing judge when a solicitor appears before him on a charge such as the present one. Solicitors as part of the legal profession, are expected to conduct themselves towards their clients with honesty … and that high standard of honesty is also expected of them in their dealings with the police, the courts and indeed also with other public authorities.

Judicial officers

In a case of attempting to pervert the course of justice, a custodial sentence will be imposed where the offender is a judicial officer: *R v Farquhar* (unrep, 29/5/85, NSWCCA). The court stated at pp 30–31:

> Where, as here, the offence is committed by a person holding judicial office in the judicial hierarchy of the State the attempt to commit the offence strikes at the very core of the integrity of the administration of justice. Such a person is in a commanding position to attempt to pervert the course of justice and when he seeks to abuse his position to achieve that end, public confidence in the judicial system will be lost unless it is made clear that such conduct will bring a prison sentence.

The court made clear that since the public is entitled to expect a judicial officer will be of good character and integrity, previous good character or reputation of a judge

convicted of attempting to pervert the course of justice will be of far less weight than in a different type of offence: *R v Farquhar* at p 31. In *Einfeld v R* (2010) 200 A Crim R 1 at [81], Basten JA said:

> … it is beyond question that for a senior legal practitioner and former judge of a superior court to commit offences against the administration of justice is apt to give rise to public disquiet about the integrity of the judicial system. These were offences to which the present status of, and the offices formerly held by, the applicant were of great significance.

There is "a risk that judges will deal more harshly than some would think appropriate with those from within their own ranks": *Einfeld v R* at [82]. Notwithstanding that danger, it is accepted that an offender's status as a senior legal practitioner and former judge rendered perjury and perverting the course of justice more serious than they would otherwise have been: *Einfeld v R* at [82]. Basten JA also stated at [83] (Latham J agreeing at [196]; RS Hulme J agreeing at [195]) that the applicant's former positions removed:

> … an element of ignorance which might otherwise have diminished the degree of culpability. It was not merely a matter of knowing that it is a crime to lie on oath or seek to pervert the course of justice: it was a matter of understanding the significance accorded to such conduct by the law and the heightened seriousness of offences when committed by a person with the applicant's background and experience.

Politicians

In *R v Jackson and Hakim* (unrep, NSWSC, 2/9/87), the Minister for Corrective Services of NSW was sentenced to a term of sentence of 7 years 6 months, with a non-parole period of 3 years 9 months, for the common law offence of conspiracy. He had conspired to receive money corruptly in exchange for the early release of prisoners on administrative licence. Roden J stated:

> The true measure of his criminality, however, is not to be found solely in how much or little he gained, or in how much or how little society may have suffered through the early releases of prisoners he procured. Its true measure lies in the undermining of the institutions and the principles on which we depend.

A Crown appeal asserting that the sentence was manifestly inadequate was upheld (Lee J; with Finlay J agreeing, Street CJ dissenting): *R v Jackson and Hakim* (unrep, NSWCCA, 23/6/88). The court resentenced Jackson to 10 years imprisonment, with a non-parole period of 5 years. Lee J observed at p 1:

> We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex.

The fact that Jackson was not the instigator of the scheme, was addicted to gambling and had previously been of good character counted for little. In relation to the last matter, Lee J explained at p 3:

> … as was pointed out in *R v Farquhar* … the good character of a person holding high office who commits a crime relating to the performance of his office cannot form a basis

> for the same mitigation of sentence as in the case of an ordinary citizen committing crime, for the public is entitled to expect that those who are placed in high office will necessarily be persons whose character makes them fit to hold that office.

[20-150] Interference in the administration of justice: Pt 7 Div 2 *Crimes Act* 1900

Section 314 — False accusations etc

Section 314 states: "A person who makes an accusation intending a person to be the subject of an investigation of an offence, knowing that other person to be innocent of the offence, is liable to imprisonment for 7 years".

It is appropriate in assessing the objective criminality of an offence under s 314 to identify a critical respect in which the police investigation was diverted: *R v Richards* [2006] NSWCCA 262 at [70]. Where an offender under s 314 stands to gain more than co-offenders, his or her objective criminality will be greater: *R v Richards* at [75].

Section 315 — Hindering investigation etc

Section 315(1)(a)–(c) prohibits any conduct that is intended in any way to hinder the investigation of, discovery of evidence in relation to, or apprehension of another for, a serious indictable offence.

Range of offending

Hindering an investigation under s 315(1)(a) is capable of encompassing a wide range of objective criminality: *R v Mobbs* [2005] NSWCCA 371 at [48]. It is appropriate to take into account the seriousness of the "serious indictable offence", the investigation of which was hindered by the offender: *R v Mobbs* [2005] NSWCCA 371 at [49]; *R v Lawrence* [2004] NSWCCA 404 at [21].

It is also relevant to consider the extent to which the investigation is hindered and the conviction of a person for the related "serious indictable offence" is made more difficult. In some cases, the hindering will be relatively unsuccessful. For example, in *R v Lawrence*, the applicant maintained statements exculpating her de facto partner of an assault, despite police arresting him and finding evidence linking him to the crime. Howie J at [22] contrasted the case with *R v Derbas* [2003] NSWCCA 44, where an offender organised other persons to degrease a vehicle used in connection with a homicide and make it appear stolen.

Similarly in *R v Richmond* [2000] NSWCCA 173, the court took particular note of the actual impact on the investigation. Smart AJ explained at [24]: "While the police were subjected to additional expense and there was probably some delay in the investigation, it could not be said that Mr Richmond's criminality extended to other than making a false statement which was not accepted". In *Sampson v R* [2014] NSWCCA 19, the fact police were not hindered in their investigation by the offending conduct was a factor taken into account by the sentencing judge in finding the offence was "in the lower part of the middle range" of objective seriousness: *Sampson v R* at [11]–[12].

In some circumstances where a person hinders an investigation, the fact that the person who committed the "serious indictable offence" is eventually convicted will be of no significant weight. In *R v Derbas*, the killer was only convicted by the fortuitous circumstance of another person coming forward: *R v Derbas* at [10]–[11].

The statutory hierarchy of offences in Part 7 and the De Simoni principle

Care must be taken not to infringe the *De Simoni* principle (see discussion at [1-500]) when sentencing an offender for an offence under Pt 7 of the *Crimes Act* 1900. See generally **Fact Finding at Sentence** at [1-500]. In *R v Mobbs* [2005] NSWCCA 371 at [31]–[32], Johnson J stated that:

> The offence under s 319 [perverting the course of justice — 14 years] is regarded by the legislature as being more serious than an offence under s 315 [hindering investigation — 7 years]. As Howie J observed in *R v Hamze* [2005] NSWSC 136 at paragraph 24, insofar as the maximum penalty for a s 315 offence reflects Parliament's assessment of the conduct giving rise to the offence, a maximum penalty of seven years is "a relatively modest one". In passing sentence for a s 315 offence, it is necessary to keep in mind the different elements and penalties referable to offences under ss 315 and 319. A sentencing judge must not attribute to an offender conduct which would constitute a more serious offence [than] that for which he is to be sentenced: *De Simoni*; *R v El-Zeyat* [2002] NSWCCA 138 at paragraph 46.
>
> … A finding that, but for the actions of a s 315 offender, another person would have been prosecuted for a more serious offence appears to me to move beyond the elements of a s 315 offence to a s 319 offence so as to infringe the *De Simoni* principle.

Motive

A decision to hinder an investigation based on threats may be relevant to sentencing, but such a claim must be supported by evidence: *R v Derbas* [2003] NSWCCA 44 at [15]–[16].

An offence motivated by loyalty is not necessarily less serious than conduct motivated by reward. The former is part of the evil against which s 315 is directed. Although a motivation of reward may be thought to be more deserving of censure, the need for general deterrence of offenders motivated by loyalty is likely to be greater: *R v Derbas* at [28].

Offending committed on the spur of the moment must be distinguished from the more serious scenario of conduct which, although not premeditated, is nevertheless ongoing and organised: *R v Derbas* at [17].

Other factors

Factors relevant to sentencing an offender under s 315 were discussed by Johnson J in *R v Mobbs* [2005] NSWCCA 371 at [49]–[51]. The applicant was a passenger in a car driven by Richards which was involved in a fatal head-on collision. The applicant agreed with Richards that he would claim to be the driver:

> There had been a tragic collision causing the death of one person and serious injury to a number of people. For a period of about 24 hours, the Applicant hindered the police investigation. He told a number of people that he was the driver and he placed his P plates on Richards' vehicle. These were aggravating features of this offence.
>
> There are other factors, however, which bear upon an assessment of the objective criminality of the offence. The fact that the offence is committed on the spur of the moment, without planning or premeditation, is relevant … The length of time during which the hindering is maintained is also relevant … The motive of the offender in committing the offence is relevant … General deterrence is significant …
>
> This was not an offence where the Applicant stood to gain or receive any benefit for himself. Indeed, an admission that he was the driver of a motor vehicle which had just

> been involved in such a catastrophic collision could only be regarded as an admission attracting substantial detriment to the Applicant. This is a most unusual feature of this case. The Applicant's hindering of the investigation of the offence attracted investigation by police of himself for serious offences. [Citations omitted.]

Similarly, Howie J enumerated a number of factors relevant to the objective seriousness of an offence under s 315 in *R v Hamze* [2005] NSWSC 136 at [21]–[24].

Section 316(1) — Concealing serious indictable offence

It is an offence for a person, knowing or believing that a serious indictable offence has been committed, to fail without reasonable excuse to give information which might be of material assistance to police: s 316(1). A person who solicits or agrees to accept a benefit in consideration for doing anything that would be an offence under s 316(1) is also guilty of an offence: s 316(2).

The seriousness of the "serious indictable offence" which is concealed is relevant to the objective seriousness of an offence under s 316: *R v Crofts* (unrep, 10/3/95, NSWCCA).

In *Crofts*, Meagher JA observed:

> The section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words "without reasonable excuse", difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.

Gleeson CJ added: "… depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was 'without reasonable excuse'".

The NSW Law Reform Commission concluded in *Review of Section 316 of the Crimes Act 1900 (NSW)*, Discussion Paper 39, 1997 at [4.40] that the wide scope for prosecution under s 316(1) was unsatisfactory:

> Section 316 has a valid social purpose of encouraging members of the public who have information about serious crimes to report that information to the police and other appropriate authorities. However, the technical application of s 316(1) to information acquired in the course of confidential relationships, including relationships between law enforcement agencies and informants, health care professionals and patients and researchers and research subjects inhibits participation in these relationships. This problem outweighs the social utility of s 316(1).

In 1997, Parliament introduced s 316(4)–(5), which provides:

> (4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.
>
> (5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

In the subsequent report, *Review of Section 316 of the Crimes Act 1900 (NSW)*, Report 93, 1999, the NSW Law Reform Commission stated at [3.1]:

> The Commission has concluded that the amendments to s 316 which came into force in March 1998 do not adequately address the problems with the section identified in the Discussion Paper. The Commission recommends that s 316(1) should be repealed. This is a unanimous recommendation. A minority of Commissioners favours the substitution of a new provision, somewhat analogous, but, in the minority's view, adequate to overcome the grave problems created by the present subsection. The Commission also considers that the compounding offence contained in s 316(2) should be slightly amended.

Section 319 — Perverting the course of justice

Section 319 provides: "A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years".

Objective seriousness of offence

The high maximum penalty recognises the importance of protecting the integrity of the criminal justice system: *R v Purtell* [2001] NSWCCA 21 at [12]. Offences of perverting the course of justice are singled out as offences of the most serious kind: *Taylor v R* [2007] NSWCCA 99 at [23]. They strike at the very heart of the justice system and must be severely punished wherever detected: *Marinellis v R* [2006] NSWCCA 307 at [10]; citing *R v Pangallo* (1991) 56 A Crim R 441 at 443.

Strongly deterrent sentences are required in sentencing for an offence under s 319: *Taylor* at [23]; *Marinellis* at [10]; *Harrigan v R* [2005] NSWCCA 449 at [47]; *R v Giang* [2001] NSWCCA 276 at [21]; *Church v R* [2012] NSWCCA 149 at [46].

In *Harrigan*, James J said at [48]–[50]:

> It seems to me that an offence under section 319 has some affinity with an offence of bribing a police officer, in that each offence is an interference with the criminal justice system.
>
> In *R v Duong* (1999) 109 A Crim R 60, a case in which one of the offences was an offence of offering a bribe to a police officer, Wood CJ at CL said … "save in the most exceptional circumstances, such an offence will call for a significant term of imprisonment to be imposed cumulatively or at least substantially cumulatively upon the sentence for the primary offence in respect of the detection or prosecution of which the bribe was offered."
>
> In my opinion, her Honour was required to make the sentences she imposed at least substantially cumulative on each other.

The fact that an attempt to pervert the course of justice did not succeed or was doomed to failure is of far less significance than in the case of sentencing for an attempt to commit some other substantive offence: *Taylor v R* [2007] NSWCCA 99 at [25]; *Marinellis v R* [2006] NSWCCA 307 at [8]; *R v Taouk* (1992) 65 A Crim R 387 at 392. It is, therefore, an error to take into account the fact the acts were unsuccessful when assessing the objective seriousness of an offence of perverting the course of justice: *R v PFC* [2011] NSWCCA 117 at [66]–[67], applying *Taylor v R*. It is the tendency of the conduct which is decisive and it is irrelevant whether the conduct does or does not bring about a miscarriage of justice: *Marinellis v R* at [8].

In *R v Nomchong* (unrep, 10/4/97, NSWCCA) McInerney J (with Hunt CJ at CL and Sully J agreeing), endorsed the trial judge's reasoning that "… the inevitable consequence of the conviction of a police officer for the offence of attempting to pervert the course of justice would in most cases be a full-time custodial sentence". The case involved a senior police officer attempting to corrupt a junior officer under his supervision.

In the two judge-bench of *R v Giang* [2001] NSWCCA 276, McClellan J (as he then was) stated at [26]–[27]:

> There can be little doubt that when the offender is the instigator of the act which is intended to compromise the integrity of the curial process and benefits or intends to benefit from the doing of the agreed act, extraordinary circumstances will be required before a custodial sentence is not appropriate.
>
> The situation may be different when the offender, although a willing participant, neither initiates or stands to benefit from the offence.

The use of intimidation or threatened violence as part of conduct intended to pervert the course of justice increases the seriousness of the offence: *R v Mrish* [2000] NSWCCA 17 at [13].

Motive

It has been accepted that the fact a person is protecting a family member is a relevant consideration when sentencing for a s 319 offence: *Podesta v R* [2009] NSWCCA 97 per McClellan CJ at CL at [21]. However, in *R v Nguyen* [2004] NSWCCA 332, Spigelman CJ held at [55]:

> … personal advantage can take many forms. Greed may be regarded as a less worthy motive than protection of a family member. The latter is no less a form of personal gain to an offender and, often, is a more powerful motive. Protection of the system of criminal justice should not be significantly less vigilant where its perversion is attempted for reason of family ties, rather than the expectation of monetary gain.

The more serious the offence, the less weight should be given to motive as a mitigating factor: *R v Mitchell* [2007] NSWCCA 296 per Howie J at [31]–[32].

In *R v Moore* [2012] NSWCCA 3, the respondent forged a letter from his employer in support of an application for bail variation with the intended purpose of enabling him to attend a weekend vocational course without breaching bail conditions. In the course of dismissing the Crown's appeal against sentence, the court noted (per Simpson J at [35]) that "when consideration is given to the other purposes for which an offence of this kind is sometimes committed — for example, unwarranted acquittal on a serious charge — this offence may be seen in its proper perspective on the scale of objective gravity".

Relevance of the principal charges being no billed or dropped

In *R v Marinellis* [2001] NSWCCA 328, the applicant asked a number of acquaintances to provide an alibi for an alleged sexual assault. The sexual assault charges were ultimately not proceeded with, although the applicant was committed for trial. In rejecting his sentence appeal in relation to perverting the course of justice, McClellan J (with Studdert J agreeing in a two-judge bench), stated at [38]–[39]:

> I do not accept that the applicant's culpability should be reduced by reason of the fact that the charges of aggravated sexual assault were not proceeded with. The Court is not aware

> of the circumstances which motivated that decision and is unable to form any conclusion about the strength or otherwise of the Crown case. However, it is apparent that the applicant was committed for trial. The fact that the applicant believed it necessary to procure others to give false alibi evidence on his behalf suggests a belief in him that, unless this was done, he was at risk of being convicted.
>
> In these circumstances, even if it be relevant, there was no basis for his Honour to conclude that the motive for the offence was to achieve a just result. I do not accept that even if the court was to assume that the applicant was the subject of false allegations, this was a significant mitigating feature. A result obtained by perjured evidence could not be described as just.

In *Church v R* [2012] NSWCCA 149, the applicant perverted the course of justice by failing to contradict, in sentence proceedings for an assault occasioning actual bodily harm, an assertion by her solicitor that she was suffering from cancer. On appeal against the sentence imposed for the perversion offence, the court found it was not an error for the sentencing judge to consider the hypothetical sentencing outcome had the course of justice not been perverted: *Church v R* at [23]. The finding that the applicant evaded imprisonment for 12 months, which would have been the appropriate sentence for the assault offence, was an important part of assessing the objective seriousness of the perversion offence: *Church v R* at [23], [26].

Level of interference in the justice process — stage of proceedings

The offence of perverting the course of justice is not confined to legal proceedings already in existence but can extend to acts done with intent to frustrate or deflect the course of judicial proceedings that the accused contemplates may be instituted: *The Queen v Beckett* (2015) 256 CLR 305 at [7].

In *R v Finnie and Finnie* [2007] NSWCCA 38 at [64], Sully J (with Simpson and Latham JJ agreeing) endorsed the sentencing judge's approach that an offence intended to influence the grant of bail is not generally as serious as an intended perversion of trial or sentencing proceedings.

In *R v Purtell* [2001] NSWCCA 21 at [11], Giles JA accepted the Crown's submission that intending to influence sentencing proceedings was as serious as interference with trial proceedings.

In *R v Karageorge* (1998) 103 A Crim R 157 at 175, although the court allowed a conviction appeal and ordered a new trial, Levine J, with Sully and Simpson JJ agreeing, expressed a view that:

> For myself, I would not regard the obtaining of an adjournment as a perversion of a relatively minor kind: the course of justice must include the efficient management of the Court's business in respect of which great reliance is placed upon the conduct of the profession. A trial adjourned is, of course, a trial delayed thereby depriving both the Crown and the accused of that which the law strives to attain, namely finality. It prejudices people waiting for their cases to be listed. The course of justice in relation to a particular matter adjourned on the false basis here predicated may cause immense prejudice arising not merely from the fact of delay but its effect upon the memories of all those to be called to give testimony.

In *R v Nguyen* [2004] NSWCCA 332 at [54], Spigelman CJ rejected the respondent's submission that encouraging an innocent person to plead guilty could be assessed as a "low" level of seriousness:

> Encouraging a person to plead guilty to an offence, which that person did not commit, and thereby allowing a citizen to acquire a criminal record and to suffer criminal punishment is, in my opinion, a significant form of the offence of perverting the course of justice.

See also *R v Meissner* (unrep, 27/11/92, NSWCCA), where Allen J (with Sully and Ireland JJ agreeing) endorsed the trial judge's comment: "… to directly interfere with a person's right to plead not guilty to a criminal charge is to cut the 'golden thread'. It is to interfere with the most fundamental right that any person has under the law, the right to defend a criminal charge relying upon the presumption of innocence".

In *Allen v R* [2008] NSWCCA 11, the applicant had been charged with sexually assaulting his former girlfriend. Emails and a video containing sexually explicit images of the complainant were later sent to a number of people. The applicant said he could stop the circulation of the images if the complainant made a statement that she wanted the charges dropped. The applicant's counsel argued on appeal that higher sentences for perverting the course of justice should be reserved for those who interfere with justice officials such as judges or police officers. Grove J rejected the submission at [25]:

> Each case needs to be assessed in its particular circumstances and, as a generality, the attempt to suborn a complainant, who may succumb, could very well be misconduct more serious than an attempt directed at those whose callings make it more likely that they would not only resist the attempt but report it to authority and thereby ensure that the offender is called upon to answer.

In *R v Egan* [2013] NSWCCA 196, the respondent was charged with sexual offences and used the complainant's email address to send emails to himself in an attempt to damage her credibility. The first trial date was vacated while the integrity of the emails was investigated. The court found it was not open to the sentencing judge to regard the offence as "at the low end of the range" given its intention to bring about a miscarriage of justice for the respondent's own benefit in his trial for serious offences: *R v Egan* at [74].

[20-155] Common law contempt of court

Forms of contempt

The common law offence of contempt is broadly aimed at preventing interference in the administration of justice: *Director of Public Prosecutions v John Fairfax & Sons Ltd* (1987) 8 NSWLR 732 at 739. Contempt may involve, amongst other things:

- interference by publication (sub judice contempt)
- misconduct by participants in the proceedings
- breach of orders or undertakings
- refusal to attend on subpoena or give evidence.

Contempt may also be classified as occurring "in the face of the court": see *Civil Trials Bench Book*, **Contempt in the face of the court** at [9-0000]. See further *Civil Trials Bench Book*, **Contempt generally** at [9-0300] and the *Criminal Trial Courts Bench Book*, **Contempt, etc** at [1-250]ff.

The NSW Law Reform Commission reviewed sub judice contempt in *Contempt by Publication*, Report 100, 2003. For a discussion of the history and various species of contempt, see a paper by the Honourable Justice Whealy, "Contempt: some contemporary thoughts", 2007, available at <www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_whealy180807>.

Contempt may be classified as either civil or criminal, although the distinction has been criticised as "unsatisfactory" and "illusory": *Australasian Meat Industry Employees Union Ltd v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109; *Witham v Holloway* (1995) 183 CLR 525 at 534. Notwithstanding what was said in *Witham v Holloway*, the court in that case were at pains to make clear that proceedings on a charge of contempt were not to be regarded as the equivalent of a criminal trial and do not attract the criminal jurisdiction of a court: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [43], [59]. The contempt proceeding in Boral's case arose in the course of a civil proceeding between Boral and the appellant, and was commenced and pursued under the civil procedure rules: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* at [41]–[42], [66].

The "companion principle" — that the prosecution cannot compel the accused to assist it to discharge its onus is a "companion" of the accusatorial nature of criminal trials, and does not apply in contempt proceedings: *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* at [36], [46]–[47], [62]–[64]. There are important distinctions between contempt proceedings and criminal proceedings.

Contempt must be proved beyond reasonable doubt: *Pang v Bydand Holdings Pty Ltd* [2011] NSWCA 69 at [72], [101], [179]. The rules of court do not distinguish between civil and criminal contempt and the "punishment" that can be imposed applies regardless of whether a contempt is characterised as civil or criminal: *Pang v Bydand Holdings Pty Ltd* at [70].

Referrals by the Local Court to the Supreme Court and procedural fairness

In *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277, the Court of Appeal held that before the Local Court could exercise its power of referral under s 24(4) *Local Court Act* 2007, the principles of natural justice apply — procedural fairness requires the magistrate to inform the respondent of the two options available ie to deal with the alleged contempt summarily or to refer the matter under s 24(4). An alleged contemnor should be given an opportunity to make submissions on the question of referral and must be afforded procedural fairness: *Prothonotary of the Supreme Court of NSW v Dangerfield* at [77]. In *Prothonotary of the Supreme Court of NSW v Chan (No 23)* [2017] NSWSC 535, the defendant was unrepresented. There was no adjournment so he could receive advice, nor was he given, as he had to be, an explanation of the options open to the Local Court under s 24, or their consequences. Justice required the matter be referred back to the Local Court to determine how

the defendant's contempt should be further dealt with, after the defendant has been given the procedural fairness that s 24 required: *Prothonotary of the Supreme Court of NSW v Chan (No 23)* at [75].

Penalty for contempt

The provisions of the *Crimes (Sentencing Procedure) Act* 1999 apply when sentencing an offender to imprisonment for contempt: *Principal Registrar of the Supreme Court of NSW v Jando* (2001) 53 NSWLR 527 at [38]–[45]; confirmed in *Attorney-General for NSW v Whiley* (1993) 31 NSWLR 314 at 320–321.

As a common law offence, there is no specific maximum penalty for contempt. As Hunt CJ at CL described it in *Wood v Galea* (1997) 92 A Crim R 287 at 290: "Punishment is said to be 'at large', subject only to the restriction in the *Bill of Rights* 1688 (UK) upon cruel punishments. [*Smith v The Queen* (1991) 25 NSWLR 1 at 15–18]". The Supreme Court Rules 1970, Pt 55, r 13 provides:

> (1) Where the contemnor is not a corporation, the Court may punish contempt by committal to a correctional centre or fine or both …
>
> (2) Where the contemnor is a corporation, the Court may punish contempt by sequestration or fine or both.
>
> (3) The Court may make an order for punishment on terms, including a suspension of punishment or a suspension of punishment in case the contemnor gives security in such manner and in such sum as the Court may approve for good behaviour and performs the terms of the security.

The rule merely confirms the court's sentencing power and does not exhaust it: *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309 at 314; *Whiley* at 320; *Jando* at [37]. The sentencing principles for contempt were helpfully summarised by Wilson J in *In the Matter of Steven Smith (No 2)* [2015] NSWSC 1141 at [36]–[41].

Part 55, r 14 confers power on the Supreme Court to "revisit and review" a decision to imprison a person for contempt. It permits the contemnor to have the court review the question of punishment and sentencing in light of some change in the relevant circumstances: *Menzies v Paccar Financial Pty Ltd* (2016) 93 NSWLR 88 at [17]–[20]. It confers power in circumstances where the court fixing punishment by a term of imprisonment might otherwise be functus officio. The rule is clearly designed to permit discharge short of the service of a specified term: *Menzies v Paccar Financial Pty Ltd* at [16]; Y*oung v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262 at 282–283.

Discharge is to permit the convicted contemnor to ask for clemency, demonstrate contrition, and establish that the punishment suffered already is enough to vindicate the authority of the court: *Menzies v Paccar Financial Pty Ltd* at [18].

An offender dealt with in the District or Local Courts for contempt in the face of the court may receive a fine not exceeding 20 penalty units or imprisonment not exceeding 28 days: s 199(7) *District Court Act* 1973; s 24(1) *Local Court Act* 2007; see further *Civil Trials Bench Book*, **Contempt in the face of the court** at [9-0000].

Maximum penalties for statutory offences that are similar to common law contempt charges may provide some guidance. In *Whiley*, the offender threatened violence in an attempt to influence Children's Court proceedings involving his infant son. The Court

of Appeal accepted that the 10 year maximum penalty under s 322 of the *Crimes Act* 1900 reflected the seriousness with which such conduct is regarded by the legislature and the community: *Whiley* at 319.

Range of seriousness — technical to contumacious contempt

The "nature of the contempt itself and its consequences vary … greatly in different cases": *Wood v Galea* at 277.

In *Maniam (No 2)* (1992) 26 NSWLR 309 at 314, Kirby P identified classes of cases relevant to sentencing an offender guilty of contempt:

> For the purposes of punishment, various classes of contempt have been identified in the cases. They include technical, wilful and contumacious contempt. For technical contempts, the Court will usually accept an apology from the contemnor. It may order that the contemnor pay the costs of the proceedings brought to uphold the authority of the courts of law … A similar approach is sometimes taken to contempts which are more than technical and which, although wilful, are not found to have been deliberate …

In relation to the most objectively serious form of contempt, Kirby P continued:

> The most serious class of contempt, from the point of view of sanction, is contumacious contempt. Not every intentional disobedience involves a conscious defiance of the authority of the Court which is the essence of this class of contempt …This class of contempt is reserved to cases where the behaviour of the contemnor has been shown to be aimed at the integrity of the courts and designed to degrade the administration of justice, as distinguished from a simple interference with property rights manifested by a court order … In cases where such a measure of wilfulness is established, the court may proceed to punish the convicted contemnor by the imposition of a custodial sentence or a fine or both. In such a case the elements necessary to establish wilfulness, carrying as they do the potential of penal consequences, must all be proved to the criminal standard.

This approach was followed in *Jando* at [15].

Contempt by publication (sub judice contempt)

In *Director of Public Prosecutions v Wran* (1987) 7 NSWLR 616, the NSW Court of Appeal (in a five-judge bench) found then Premier Wran and Nationwide News Pty Ltd guilty of contempt. In sentencing proceedings, the court said:

> … it has long been established that it is a serious contempt of court to make public assertions about the guilt or innocence of an accused which have a tendency to prejudice the fair conduct of an impending trial. It does not matter whether the assertion is of innocence or guilt. Either is capable of affecting a potential juror's mind and of defeating the fair trial which it is the fundamental purpose of our system of criminal justice to secure …
>
> It must be made plain in particular that the courts will not tolerate the deliberate intervention of those in positions of authority who deploy their power and prestige in support of assertions of that kind.

In the South Australian case of *Director of Public Prosecutions v Francis (No 2)* (2006) 95 SASR 321, Bleby J reviewed a number of sentences involving contempt by media organisations and commentators, from NSW and other jurisdictions. His Honour said at [60]:

> … the penalty for this kind of contempt must give significant recognition to the seriousness of the offending and must be such as to act as a deterrent both to the offender and to others. The vice in this type of contempt is the denigration of and the undermining of confidence in the administration of justice.

Bleby J referred at [57] to *Gallagher v Durack* (1983) 152 CLR 238 at 243, where the High Court considered factors relevant to contempt involving imputations against the court or judges:

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment "is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable".

See also *DPP (Cth) v Besim (No 2)* [2017] VSCA 165.

Breach of orders or undertakings

The High Court in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 112–113 has noted that "lying behind punishment for a contempt which involves wilful disobedience to a court order, is the very substantial purpose of disciplining the defendant and vindicating the authority of the court".

Not every intentional disobedience of a court order involves a conscious defiance of the authority of the Court, but wilful contempt in defiance of the court is contumacious contempt: *DB Mahaffy & Associates v Mahaffy* [2015] NSWSC 1959 at [25].

In *The Prothonotary of the Supreme Court of NSW v Battye* [2017] NSWSC 48, the defendant solicitor transferred shares to a third party in breach of a District Court order. Given the defendant's status as an officer of the court and the fact it left open no doubt as to his understanding of the contempt involved, the court concluded that the seriousness of the offence, as a wilful and contumacious contempt, precluded disposal of the offence by way of a s 10 non-conviction order under the *Crimes (Sentencing Procedure) Act* 1999: *Prothonotary v Battye* at [25], [46]–[47]. A term of imprisonment would have been the only appropriate sentence had the shares not been finally transferred to the intended recipient under the court order: at *Prothonotary v Battye* at [53].

Misconduct against judicial officers by participants in proceedings

In *Prothonotary v Wilson* [1999] NSWSC 1148, Wilson threw two bags of yellow paint at the trial judge after he received an advance ruling. Wood CJ at CL explained at [21] that in the case of a contempt in the face of the court involving a reprisal against a judge:

> The gravamen of the offence lies not in protecting the personal dignity of the judge who may be the object of an assault or personal attack but of protecting the public from the mischief that will incur if the authority of the courts is undermined or impaired.

An appeal against sentence was allowed on the basis of fresh evidence: *Wilson v Prothonotary* [2000] NSWCA 23.

Several cases and sentences involving reprisals against judges are referred to in *Principal Registrar of Supreme Court of NSW v Drollet* [2002] NSWSC 490 at [19]–[25], and also discussed in the paper by the Honourable Justice Whealy, "Contempt: some contemporary thoughts", 2007, see above under Forms of Contempt

at [20-110]. See also *R v Dent* [2016] NSWSC 444 at [56] where the offender was sentenced for three serious examples of contempt involving "wilful and extreme defiance and disregard for the authority of the court".

Refusal to attend on subpoena or give evidence

In *Registrar of the Court of Appeal v Raad* (unrep, 9/6/1992, NSWCA), Kirby P stated at p 14:

> The refusal to answer questions which are relevant and admissible strikes at the very way in which justice is done in the courts of this country. It undermines the rule of law observed in our society. As this Court said in *Gilby*, the refusal to be sworn, or once sworn to give evidence, is a failure to discharge the obligation which the person owes as a member of the community or because he or she is within it. It is a concomitant of a society ruled by law and not by brute force that a person competent to do so should, where required, be sworn or affirmed to give truthful evidence and that he or she should give evidence when called upon to do so in the courts in answer to questions lawfully addressed.

A refusal to be sworn or affirmed, or to answer questions, has been identified as "very serious" contempt: *Principal Registrar of the Supreme Court of NSW v Jando* at [19], *R v Razzak* [2006] NSWSC 1366 at [39]–[44]; *In the Matter of Steven Smith (No 2)* [2015] NSWSC 1141 at [49]. It is not unusual for persons who wilfully disobey a subpoena to attend court as a witness to receive a custodial sentence, especially in criminal proceedings: *Registrar of the Court of Appeal v Maniam (No 2)* at 315.

The Court of Appeal in *Field v New South Wales Crime Commission* [2009] NSWCA 144 at [21] considered *Registrar of the Court of Appeal v Gilby* (unreported, NSWCA 20 August 1991) which identified the following factors to be taken into account when punishing for a contempt in the context of a deliberate refusal to give evidence:

- the objective seriousness of the contempt
- whether the contemnor was aware of the consequences of what he or she proposed to do
- whether the contempt was committed in the context of serious crime
- whether the contempts were motivated by fear of harm should evidence be given
- whether the contemnor had received a benefit by indicating an intention to give evidence.

In *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 at 185, Dunford J identified similar factors, as well as a number of additional factors, which may be relevant when sentencing for contempt involving a refusal to give evidence. These factors have been referred to and applied in subsequent cases involving the refusal to give evidence: *Principal Registrar of Supreme Court of NSW v Drollet* at [17] and *Anderson v Hassett (No 2)* [2007] NSWSC 1444 at [6].

The contemnor in *Field v NSW Crime Commission* twice refused to submit to an examination before the Supreme Court under ss 10 and 12 *Criminal Assets Recovery Act* 1990. The Court of Appeal characterised the conduct as "a contumacious contempt in circumstances where the appellant was fully aware of the possible consequences". A sentence of a fixed term of imprisonment of 4½ years was held not to be excessive in the circumstances: at [20], [27].

No tariff of sentences for contempt

Heydon JA remarked in *Wilson v The Prothonotary* [2000] NSWCA 23 at [42]: "there is little point in comparing sentences in a field of criminal conduct which is rarely committed".

In *Principal Registrar of the Supreme Court of NSW v Jando*, Studdert J had been referred by counsel to a schedule of contempt cases and penalties but concluded at [56]:

> I have considered those various cases but I do not propose to review them in the course of this judgment. The penalties varied significantly from case to case. That is by no means surprising because it has to be recognised that what penalty is appropriate in a particular case is so dependent upon the assessment of all its features, including the nature of the particular contempt and its consequences.

Similarly in *R v Razzak*, Johnson J said at [89]:

> I do not consider that sentences for contempt, in other cases, provide a safe guide to the proper tariff or punishment for contempt of court given that the nature of the contempt itself, and its consequences, vary so greatly between the cases …

In *Principal Registrar of Supreme Court of NSW v Tran* [2006] NSWSC 1183 at [38], the court acknowledged the vast range of criminality encompassed by contempt. The case has a schedule attached containing 15 contempt cases and the penalties imposed. A summary of penalties imposed in contempt cases up to 2007 can also be found in the Honourable Justice Whealy's paper, "Contempt: some contemporary thoughts", 2007, see **Forms of Contempt** at [20-155].

[20-158] Disrespectful behaviour in court

From 1 September 2016, an accused person, defendant, party to, or person called to give evidence in proceedings before the court is guilty of an offence if they intentionally engage in behaviour in the court during the proceedings and that behaviour is disrespectful to the court or presiding judge: *Local Court Act* 2007, s 24A; *District Court Act* 1973, s 200A; *Supreme Court Act* 1970, s 131; *Land and Environment Court Act* 1979, s 67A; *Coroners Act* 2009, s 103A. The offence was introduced to bridge the gap between contempt and community expectations of behaviour in court (Second Reading Speech, Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016, NSW, Legislative Council, *Debates*, 11 May 2016, p 9).

The offence is punishable by 14 days imprisonment or 10 penalty units, or both. Proceedings for the offence are to be dealt with summarily before the Local Court (or the Supreme Court in its summary jurisdiction, where the offence is committed in the Supreme Court: *Supreme Court Act*, s 131(4)).

The new offence does not affect any power with respect to contempt. Proceedings for contempt may be brought in respect of behaviour that constitutes a "disrespectful behaviour" offence, but a person cannot be prosecuted for both contempt and the offence in respect of essentially the same behaviour.

[20-160] Interference with judicial officers, witnesses, jurors etc: Pt 7 Div 3 Crimes Act 1900; s 68A Jury Act 1977

Section 323 — Influencing witnesses and jurors

Section 323(a) provides a maximum penalty of seven years for, inter alia, intending to cause a witness in any judicial proceeding to give false evidence, withhold true evidence, not to attend as a witness, or not to produce anything in evidence pursuant to a summons or subpoena. The essence of a s 323(a) offence is that it strikes at the integrity of the justice system and so some form of custodial sentence is normally appropriate: *Warby v R* [2007] NSWCCA 173 at [25]; *R v Burton* [2008] NSWCCA 128 at [101]; *Asplund v R (Cth)* [2014] NSWCCA 237 at [62].

Section 323(b) provides a maximum penalty of seven years for intending to influence the conduct of a juror in any judicial proceedings.

Section 324 is an aggravated form of ss 321–323, punishable by a maximum of 14 years, where the offence is committed with the intent of procuring a conviction or acquittal for a "serious indictable offence".

It is an error to sentence an offender, who pleads guilty to an offence under s 323(a), for the more aggravated offence under s 324. Section 324 "constitutes a distinct and greater offence which must be specifically alleged in the indictment": *Warby v R*, above, at [18].

But, in assessing the objective seriousness of an offence under s 323(a), it is an error to have regard to the absence of a fact which, if it were present, would constitute a different and more serious offence, such as an offence of threatening or intimidating a juror under s 322(a): *R v Burton*, above, at [89].

Where an offence under s 323(a) is committed in the context of domestic violence by an offender who wants to dissuade criminally the victim from giving evidence, there is a need for a significant element of general deterrence: *R v Burton* at [105]. A correct exercise of sentencing discretion required the court to have express regard to the need for general and specific deterrence and denunciation of domestic violence offences: *R v Burton* at [107], *Hiron v R* [2007] NSWCCA 336 at [32], *R v Hamid* [2006] NSWCCA 302 at [86]. Additionally, given that victims of domestic violence often — and contrary to their interests — forgive their attackers (at [104]), a court should cautiously approach a victim's expressions of forgiveness and requests for a lenient sentence: at [102], [105].

In *Asplund v R (Cth)*, there was an added element of seriousness to an offence under s 323(a) where the witness influenced by the offender was his 17-year-old son, as such offending had a traumatic effect on the witness and constituted a breach of trust: *Asplund v R (Cth)* at [62].

In sentencing for an offence under s 323(b), it is relevant to consider the nature of the intention to influence a juror. In the unusual case of *R v Sultan* [2005] NSWCCA 461, the applicant approached the husband of a juror during his trial for a break and

enter offence. He asked that the juror "listen to the evidence carefully". Grove J (with Sully and Howie JJ agreeing) accepted that the applicant's conduct was merely "an exhortation to perform the duty of the juror": at [17]. Grove J observed at [16]:

> The intention of the legislature in enacting s 323(b) was clearly to proscribe any act intended to influence a jury in any way whether benign or not. But it does not derogate from acknowledgement of that intention to assess the seriousness of an offence against the presence or absence of sinister connotation.

See also s 68A *Jury Act* 1977 below; *R v Laws* (2000) 50 NSWLR 96.

Section 326 — Reprisals against judges, witnesses, jurors etc

Section 326(1) provides a maximum penalty of 10 years for threatening or causing injury or detriment to a person on account of anything lawfully done as a witness, juror, judicial officer or other public justice official. A similar offence applies where an offender threatens, does or causes injury or detriment believing the person will or may be called as a witness or serve as a juror: s 326(2). It is immaterial whether the accused acted wholly or partly for a reason specified in ss 326(1) or (2): s 326(3).

An offence against s 326 is, by its very nature, serious; amounting to a direct attack upon the administration of justice: *Linney v R* [2013] NSWCCA 251 at [88]. In *Linney v R*, the applicant sent emails containing death threats aimed at a judge via the judge's associate and the police. The court found no error in the sentencing judge's assessment of the offence as above mid-range: *Linney v R* at [85]. Although the offence is concerned not only with threatening but also doing or causing injury or detriment, the death threats made by the applicant were repeated, not spontaneous and made in circumstances where the recipient was given real cause to fear they could be carried out: *Linney v R* at [82], [84]–[85].

In *R v Jaques* [2002] NSWCCA 444, where the applicant made a threat to kill a magistrate, Dowd J (with Wood CJ at CL and Bell J agreeing) explained the gravamen of the offence at [5]:

> The offence of course is complete with the uttering of the words, and in the circumstances of the uttering of those words, the finding of guilty by the jury is not a finding of his intention to carry out the threat.

Dowd J continued at [12]–[13]:

> His Honour is correct that there is a need for deterrence for this sort of offence. However, in the circumstances of an offence which was not made in the face of the court, which was done in an office where there were other people present, and although it appears it was uttered in anger, it was not such as to clearly indicate an intention to commit the offence that was threatened.
>
> I consider that his Honour has erred in giving too much weight, in the circumstances of the utterance of these remarks, to the severity of what was uttered and has taken into account the applicant's previous record, and in the circumstances, the penalty is manifestly excessive.

In *R v Gaudry; MacDonald* [2010] NSWCCA 70 at [61], the sentencing judge erred by finding the s 326 offences committed by each respondent fell "toward the bottom of the range". Each respondent threatened a person waiting in the foyer of a courthouse

to give evidence. The threat involved reprisals against the person by persons with a reputation for violence. The making of the threat actually interfered with the course of justice by intimidating the person threatened to the effect that he did not give evidence that day: *R v Gaudry; MacDonald* at [61].

In *Malicki v R* [2015] NSWCCA 162, however, the offence contrary to s 326(2) was held to be properly characterised as at the lower end on the basis that Malicki's criminality was dwarfed by that of the co-offender Widmer: *Malicki v R* at [70].

Section 68A Jury Act 1977 — Soliciting information from or harassing jurors or former jurors

It is an offence under s 68A *Jury Act* 1977 to solicit information from, or harass, a juror or former juror for the purpose of obtaining information about the deliberations of a jury or how a juror, or the jury, formed any opinion or conclusion in relation to an issue arising in the trial (or coronial inquest).

In sentencing the radio presenter John Laws for an offence under s 68A, Wood CJ at CL noted that the increase in maximum penalty from a fine to imprisonment for seven years in 1997 "marks the seriousness with which the Legislature regards intrusion into the sanctity of the jury room": *R v Laws* (2000) 50 NSWLR 96 at [24]. Wood CJ at CL imposed a suspended sentence.

[20-170] Perjury, false statements etc: Pt 7 Div 4 Crimes Act 1900; ICAC Act 1988; Police Integrity Commission Act 1996; Crime Commission Act 2012

Part 7 Div 4 *Crimes Act* provides a range of offences for perjury and false statements. Section 87 of the *Independent Commission Against Corruption Act* 1988 (ICAC Act) also provides that a person who, at a compulsory examination or public inquiry conducted by the Commission, gives evidence that is false or misleading in a material particular knowing it to be false or misleading, or not believing it to be true, is guilty of an indictable offence. The maximum penalty for the offence is 200 penalty units or imprisonment for 5 years, or both. Similarly, s 107(1) *Police Integrity Commission Act* 1996 and s 27(1) *Crime Commission Act* 2012 provides that a person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence. The maximum penalty for an offence under s 107 is the same as the maximum penalty for an offence under s 87 ICAC Act. The text in s 107, "(cf ICAC Act s 87)", evinces a legislative intention that the sentencer should compare or confer with the false swearing offence created in s 87.

Seriousness of offences

Offences of perjury and false swearing undermine the very foundation of the justice system: *R v Aristodemou* (unrep, 30/6/94, NSWCCA).

The need for general deterrence is the prime consideration in sentencing for offences of this kind: *R v Aristodemou*; *R v Bulliman* (unrep, 25/2/93, NSWCCA).

Any person who commits perjury or false swearing in the course of judicial proceedings or in proceedings such as a Royal Commission or an Independent Commission Against Corruption (ICAC) inquiry should do so in the clear understanding that if their offence is detected, they will go to gaol except in

exceptional circumstances: *R v Aristodemou*; *R v Chad* (unrep, 13/5/97, NSWCCA); *R v Chapman* (unrep, 21/5/98, NSWCCA); *R v Fish* [2002] NSWCCA 196 at [143], [152]; *R v Mahoney* [2004] NSWCCA 138 at [12]–[14].

Motive as relevant factor

An offence of perjury or false swearing will be of lower objective seriousness where it was motivated by threats rather than the offender's own purposes: *R v Pile* [2005] NSWCCA 74 at [33]. In that case, the applicant falsely resiled from statements implicating a co-offender in a robbery, but only after he was transferred from protective custody into a cell next to the co-offender.

In *R v Fish*, the first appellant was a police officer who denied in court that fellow police, including her husband, had assaulted prisoners. The husband had a history of domestic violence towards the appellant. Bell J (with Ipp AJA and Dunford J agreeing) allowed an appeal against sentence. Bell J stated at [163]:

> I am persuaded that it was relevant to the question of sentence to take into account the circumstance that the appellant's offence took place in the context of an abusive marital relationship. This was not simply a matter of a police officer lying in court to protect fellow officers because of a misguided sense of loyalty. The appellant's case in this respect possessed exceptional features. The reality of her situation was that had she given truthful evidence … she would not only have exposed her husband to liability for his criminal offences but almost certainly she would have been subject to serious physical violence at his hands. These matters raise considerations quite distinct from the need for courts to impose deterrent sentences in cases where police officers lie in order to protect their colleagues.

In *R v Yilmaz* (unrep, 4/3/91, NSWCCA) Smart J (with Gleeson CJ and Lee CJ at CL agreeing) considered that the applicant's subjective case was sufficient to justify a non-custodial sentence. The applicant spoke poor English and did not fully understand the consequences of giving false evidence; the false evidence was to no avail; there was considerable delay in finalising the matter. Regarding delay as a mitigating circumstance, see also *R v Fifita* (unrep, 26/11/92, NSWCCA).

However, in *R v Bulliman* (unrep, 25/2/93, NSWCCA) Abadee J (with Gleeson CJ and Hunt CJ at CL agreeing) stated:

> False evidence strikes at the whole basis of the administration of justice and indeed, it undermines the whole basis of it. Justice inevitably suffers, whatever be the motive for the making of false statements on oath and whatever be the circumstances in which the offence or offences are committed.

In *R v Aristodemou* (unrep, 30/6/94, NSWCCA) Badgery-Parker J stated:

> I do not accept the proposition that the community would regard as in any way a mitigating circumstance that the motive for the applicant's false swearing was not to conceal corruption on his own part but was to conceal the corrupt conduct of others. No doubt there is an acceptance on the part of those who commit crime that it is dishonourable to inform on others and that there is some nobility in declining to do so. It by no means follows that the same view is taken by right-thinking members of the community and for my part, I refuse to proceed on the assumption that that is so. It is no doubt true that in some circumstances the seriousness of a crime may be seen to be mitigated if it was committed for an honourable, albeit mistaken motive. It is in my view an attempt to press that submission too far if the conduct is such to defeat the purpose of legislation enacted in the public interest.

Other factors

In *R v Mahoney* [2004] NSWCCA 138 at [17], the respondent argued that his perjury was less serious because it involved "a pathetic attempt" to mount a defence to an "overwhelming case". Shaw J concluded that such a characterisation did not fundamentally detract from the seriousness of the offence.

Similarly, in *R v Bulliman* (unrep, 25/2/93, NSWCCA), Abadee J (with Gleeson CJ and Hunt CJ at CL agreeing) stated that offenders convicted of perjury "ought to be severely punished and this is irrespective of whatever be the outcome of the proceedings in which the false evidence was given".

[20-180] Other corruption and bribery offences: Pt 4A Crimes Act 1900; s 200 Police Act 1990; common law bribery

Part 4A Crimes Act 1900

Part 4A provides offences for corruptly receiving commissions or rewards, and other corrupt conduct.

In *Retsos v R* [2006] NSWCCA 85 at [31], Sully J (with Simpson and Howie JJ agreeing) said that: "Any offence of, or ancillary to, corrupt conduct on the part of any public official should be denounced plainly and punished condignly".

In *R v Potter* [2005] NSWCCA 26, the applicant pleaded guilty to five counts of corruptly receiving a benefit under s 249B(1)(a) as the Chief Steward of the Greyhound Racing Control Board. The sentencing judge properly took into account the historical background that the applicant had engaged in corrupt conduct for at least seven years, although he had been convicted of only five offences. It was permissible to use the applicant's course of conduct to demonstrate the seriousness of those offences: at [31]. The offences were at the top of the range, based on his official position, the motive of financial gain, the duration of his corrupt conduct, and the number of innocent people affected: at [46].

Section 200 *Police Act* 1990 — common law bribery offences

Further offences of bribery and corruption are provided in s 200 *Police Act* 1990. Under s 200(1), it is an offence for a member of the NSW Police Force to receive or solicit a bribe (pecuniary or otherwise). Under s 200(2), it is an offence for a person to give, offer or promise a bribe to, or make any collusive agreement with, a police officer.

An offence against s 200 is an indictable offence punishable by 200 penalty units, or 7 years imprisonment, or both: s 200(4).

There are also residual common law offences of bribery, conspiracy to bribe a public officer, and conspiracy to receive or solicit a bribe.

In *R v Pangallo* (1991) 56 A Crim R 441 at 443, Lee J stated that:

> In my view, the crime of bribery is always to be regarded as one which strikes at the very heart of the justice system and it must be severely punished whenever it is detected.

In *R v O'Mally* [2005] NSWCCA 166 at [15]–[16], Grove J (with Stein AJA and Howie J agreeing) endorsed the following comments in *R v Nomchong* (unrep, 10/4/1997, NSWCCA): "The police are in a position of authority and trust in the community and the public depends on them to uphold the rule of law. The crime of bribery by a police officer is one that strikes at the very heart of the justice system".

Grove J added, "Those remarks are pertinent to the present offence and not just to an offence higher in the scale of criminality such as was the circumstance in that particular instance."

In *R v Duong* [1999] NSWCCA 353, Wood CJ at CL (with Foster AJ agreeing) said at [27]:

> The offence of bribery or of offering a bribe to police in the course of the execution of their duties is a most serious offence … Save in the most exceptional circumstances it will call for a significant term of imprisonment to be imposed cumulatively or at least substantially cumulatively upon the sentence for the primary offence in respect of the detection or prosecution of which the bribe was offered.

In *R v MacLeod* [2013] NSWCCA 108 at [64], the CCA reiterated the serious nature of offences of the kind under s 200, threatening as they do the integrity of the administration of justice and potentially posing danger to police sources of information and jeopardising important investigations.

The failure of an attempted bribery may not be a mitigating factor: *R v Duong* at [16]. The fact that an attempted bribery was made is more significant than in other attempts to commit substantive offences: *R v Duong* at [17]; *R v Taouk* (1992) 65 A Crim R 387. The likely outcome of an attempted bribery, if it had been successful, may be an aggravating factor. In *R v Duong*, Wood CJ at CL explained at [20]:

> Here we have an offence which, had the attempt succeeded, two results would have followed: first, two police would have been corrupted; second, no less than $8,000,000 worth of heroin would have found its way on to the streets of Sydney with the horrific social consequences which would flow from that release.
>
> These matters, and particularly the second of them, in my view place this attempt to bribe police squarely within the category of the worst type of case.

[20-190] Common law offence of misconduct in public office

The common law offence of misconduct in public office provides that it is an offence for a public official, in the course of or connected to his or her public offence, to wilfully misconduct himself or herself by act or omission without reasonable excuse or justification, where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects: *R v Quach* (2010) 27 VR 310 at [46]; *Obeid v R* [2015] NSWCCA 309 at [133]; *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 per Sir Anthony Mason NPJ.

The offence extends to politicians, such as a member of the NSW Legislative Council: *Obeid v R* (2015) 91 NSWLR 226 at [123]–[125]. Members of Parliament are entrusted with certain powers and discretions on behalf of the community, and they must be free to exercise those powers and discretions in the public interest, unfettered by considerations of personal gain or profit: *Horne v Barber* (1920) 27 CLR 494 per Rich J. The system of government expects, and depends on, individual Ministers to do the right thing: *R v Macdonald* [2017] NSWSC 638 at [239].

As a common law offence, the penalty for misconduct in public office is at large. In such instances it is the practice of the court to adopt an analogous or corresponding

statutory offence, where available, as a reference point for the imposition of penalty: *Blackstock v R* [2013] NSWCCA 172 at [8]; citing *R v Hokin* (1922) 22 SR (NSW) 280. However, the courts have emphasised that the statutory analogue is a point of reference only; it does not establish a kind of de facto maximum: *Blackstock v R* at [59]; *Jansen v R* [2013] NSWCCA 301 at [51].

The penalty for an offence of being an accessory before the fact to misconduct in public office is also at large, as an accessory before the fact is liable to the same punishment as the principal offender: s 346 *Crimes Act* 1900. The same approach of sentencing having regard to a statutory reference point, as set out in *R v Hokin*, may be applied: *Jaturawong v R* [2011] NSWCCA 168 at [5]. The misconduct in *Jaturawong v R* involved the offender corruptly receiving payments whilst acting as the manager of a registry of the RTA. Both the offender and the Crown accepted that the relevant reference point was Pt 4A *Crimes Act* which provides for offences of corruptly receiving commissions and other corrupt practices which carried a maximum penalty of 7 years imprisonment: *Jaturawong v R* at [6].

Assessing objective seriousness

Given the offence can cover a wide range of conduct, the circumstances of a given offence and offender are likely to vary enormously; it is not helpful to attempt to break the offence up into artificial sub-categories: *Jansen v R* [2013] NSWCCA 301 at [64].

The court said in *Blackstock v R* [2013] NSWCCA 172 at [14]:

> By way of explanation of the rationale for the offence, Doyle CJ said in *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 66:
>
> > It is clear, I consider, that the .... offence ... strikes at the public officer who deliberately acts contrary to the duties of the public office in a manner which is an abuse of the trust placed in the office holder and which, to put it differently, involves an element of corruption. It may be that the mere deliberate misuse of information is sufficient to give rise to an offence, but the further allegation of an intent to receive a benefit clearly, in my opinion, brings the matter within the ambit of the common law offence.
>
> This statement of the purpose of the applicable rule of criminal responsibility assists in the task of assessing the objective seriousness of the offending in this case: see also *R v Quach* [2010] VSCA 106; (2010) 27 VR 310 at [44]–[47]; and *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868; [2005] 1 QB 73 at [55]–[61].

Where relevant, the amount of money involved is a highly relevant consideration in assessing the objective seriousness of the offending: *Blackstock v R* at [63]. In that case, the offender had channelled government contracts to a company he had specifically established for that purpose, and the level of profitability indicated the degree of abuse of office involved: *Blackstock v R* at [63].

However, the offence need not involve monetary amounts to be objectively serious. In *Hughes v R* [2014] NSWCCA 15, a police officer improperly accessed the COPS database for illegitimate purposes, passed on the information so gained, and failed to report admissions to crimes to appropriate police officers. The offending was correctly characterised as of a high level of objective seriousness: *Hughes v R* at [50]. *Jansen v R* [2013] NSWCCA 301 is a further example of the offence involving access and dissemination of confidential police information.

In the case of misconduct on the part of a politician, the damage caused by the offence is not measured by any material loss to the State or gain to the offender; the real harm is the damage caused to the institutions of government and public confidence in them: *R v Obeid (No 12)* [2016] NSWSC 1815 at [84]; *R v Macdonald* [2017] NSWSC 638 at [231], [237]–[238]. The offender's conduct in *R v Macdonald* in exercising power conferred by a statute, as a Minister, for an improper purpose to confer a benefit on a third party was found to be a serious example of the offence: *R v Macdonald* at [249].

As a breach of trust is not part of the definition of the offence under common law, it does not constitute double counting for a sentencing judge to have regard to that factor; rather it "serves to emphasise the degree of departure from the proper standard that must be established": *Blackstock v R* at [61] citing *R v Quach* (2010) 27 VR 310 at [44].

A very significant matter in the assessment of any level of criminality is the nature of the duty owed and the extent of the breach. The more senior the public official, the greater the level of public trust in their position and the more onerous the duty that is imposed: *R v Obeid (No 12)* at [79], [88]. Mr Obeid's offence was regarded by the court as a very serious example because of the onerous nature of the duty owed as a parliamentarian compared to other officials, and the extent of his departure from it: *R v Obeid (No 12)* at [89]. General deterrence, denunciation and recognition of harm done to the community were the dominant considerations in determining the appropriate sentence. No penalty other than imprisonment was appropriate in that case given the nature of the offending: *R v Obeid (No 12)* at [138].

Extra-curial punishment

Publicity will only be considered where "it reaches such proportion as to have a physical or psychological effect on the offender": *R v Obeid (No 12)* at [102] applying *Duncan v R* [2012] NSWCCA 78 at [28].

See further **Extra-curial punishment** at [10-520].

[20-195] Resisting/hindering/impersonating police

A person who hinders, resists, or incites another person to hinder or resist, a police officer in the execution of their duty is liable to imprisonment for 12 months and/or a fine of 20 penalty units: s 60(1AA) *Crimes Act* 1900.

Offences of assault and other actions against police and other law enforcement officers are contained in Pt 3 Div 8A (see [50-120] **Assaults etc against law enforcement officers and frontline emergency and health workers**).

It is also a summary offence to impersonate a police officer: s 546D(1) *Crimes Act*. A maximum penalty of 2 years imprisonment and/or a fine of 100 penalty units applies. Section 546D(2) provides for an aggravated form of the offence where a person not only impersonates an officer but purports to exercise a power or function as a police officer, with intent to deceive. A maximum penalty of 7 years' imprisonment applies.

The offence of impersonating a police officer was formerly in s 204 *Police Act* 1990. The maximum penalty was 6 months imprisonment and/or a fine of 100 penalty units. On 1 July 2007, the offence was replaced by s 546D, which was inserted into the *Crimes Act* by the *Police Amendment (Miscellaneous) Act* 2006. These amendments may be

taken as an indication by Parliament that such offences were to be regarded as more serious and warranted a higher level of criminal sanction than was previously the case: *Opacic v R* [2013] NSWCCA 294 at [55].

The aggravated offence under s 546D(2) committed in *Opacic v R* was "significantly serious" given the target of the applicant's deception was a young woman whose vulnerability was exploited for the applicant's own sexual gratification: *Opacic v R* at [65].

[The next page is 9571]

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.

[30-050] 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]

Assault, wounding and related offences

[50-000] Introduction and statutory framework

This chapter deals with the key personal violence offences under the *Crimes Act* 1900, listed below:

Offence	Section	Penalty (Max)
Common assault	s 61	2 yrs
Assault with intent to commit a serious indictable offence	s 58	5 yrs
Assault occasioning actual bodily harm	s 59	5 yrs
Assault occasioning actual bodily harm in company	s 59(2)	7 yrs
Reckless wounding	s 35(4)	7 yrs/SNPP 3 yrs
Reckless wounding in company	s 35(3)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm	s 35(2)	10 yrs/SNPP 4 yrs
Reckless infliction of grievous bodily harm in company	s 35(1)	14 yrs/SNPP 5 yrs
Wound or inflict grievous bodily harm with intent to cause grievous bodily harm or resist arrest	s 33(1)–(2)	25 yrs/SNPP 7 yrs
Use or possess weapon to resist arrest	s 33B(1)	12 yrs
Assault causing death	s 25A(1)	20 yrs
Assault causing death when intoxicated	s 25A(2)	25 yrs
Choke, suffocate or strangle	s 37(1A)	5 yrs
Choke, suffocate or strangle being reckless as to rendering other unconscious etc	s 37(1)	10 yrs
Choke, suffocate or strangle and render unconscious, with intent to commit serious indictable offence	s 37(2)	25 yrs
Administer intoxicating substance	s 38	25 yrs

There are also specific offences of assaulting law enforcement officers and frontline emergency and health workers under Pt 3 Div 8A, with penalties ranging up to 14 years (see [50-120]).

In general terms, personal violence offences may be differentiated according to the degree of harm inflicted upon the victim and the intention of the offender, ranging from common assault to those offences where the offender has the intention to inflict a particular type of harm, such as the intentional infliction of grievous bodily harm.

A heavier maximum penalty applies to certain offences due to the occupational status of the victim.

[50-020] Offences of personal violence generally viewed seriously

Offences of personal violence cover a wide spectrum of behaviour and consequences. Such offences are viewed very seriously by the courts. Deterrence is an important consideration, particularly in cases involving violence on the streets: *R v Mitchell* [2007] NSWCCA 296 at [29]; *R v McKenna* [2007] NSWCCA 113 at [2], [33]–[35], and unprovoked attacks on people going about their ordinary business: *R v Woods* (unrep, 9/10/90, NSWCCA), per Lee CJ at CL. The assault causing death offences under s 25A *Crimes Act* 1900 (see [50-085]) were enacted in 2014 because of a concern about unprovoked serious assaults.

[50-030] The De Simoni principle

The *Crimes Act* 1900 creates an escalating statutory scheme for assault and wounding offences. The principle that a court cannot take into account as an aggravating factor a circumstance that would warrant conviction for a more serious offence (*R v De Simoni* (1981) 147 CLR 383 at 389 quoted in *Elias v The Queen* (2013) 248 CLR 483 at fn 65) is an important consideration when sentencing for offences of personal violence — both in terms of the nature of the injury inflicted and the intention or mental element with which the offence is committed.

The *De Simoni* principle is discussed further below in relation to particular offences.

[50-040] Factors relevant to assessment of the objective gravity of a personal violence offence

There are three factors particularly relevant to assessing the objective gravity of a personal violence offence: the extent and nature of the injuries; the degree of violence; and the mental element of the offence. These factors are elaborated upon below and, where relevant, discussed further under each particular offence.

Extent and nature of the injuries

The nature of the injury caused to the victim will, to a very significant degree, determine the seriousness of the offence and the appropriate sentence: *R v Mitchell* [2007] NSWCCA 296 at [27]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *R v Zhang* [2004] NSWCCA 358 at [4]. However, there is no rule or principle which mandates that the nature of the injuries sustained will be the most important factor or necessarily determine the assessment of the objective seriousness of the offence: *Waterfall v R* [2019] NSWCCA 281 at [33], [35]. In general terms, the graver the injury, the more serious the offence. An offence may be characterised as falling close to the worst of its kind by reason of the injuries inflicted upon the victim.

Degree of violence

The degree of violence used or ferocity of the attack is a material consideration on sentence: *R v Bloomfield* (1998) 44 NSWLR 734 at 740; *R v Zhang* [2004] NSWCCA 358 at [18]. This is so even if the consequences of the attack on the victim are minimal: *R v Kirkland* [2005] NSWCCA 130 at [33] per Hunt AJA.

Conversely, a victim may suffer very serious injuries but the violence used may have been slight: *R v Bloomfield*, above, at 740.

Intention/mental element

The intention with which the offender inflicts harm is also an important consideration. This factor is referred to in the discussion of particular offences, below.

[50-050] Common assault: s 61

Section 61 *Crimes Act* 1900 provides, "Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years". An assault may be established by proof of either physical contact (battery), or an act which intentionally or recklessly causes another person to apprehend immediate and unlawful violence: *R v Knight* (1988) 35 A Crim R 314 at 316–317; *Barton v Armstrong* [1969] 2 NSWLR 451 at 454–455; *R v Venna* [1976] QB 421; *R v McNamara* [1954] VLR 137.

Extent of injury

As a charge of common assault does not involve actual bodily harm, an offence is not mitigated by virtue of the fact the injuries suffered by the victim were minor: *R v Williams* (unrep, 30/5/94, NSWCCA). The offence in that case was found to be objectively serious, as the offender had punched the victim in a cold and calculated manner.

Degree of violence

The criminality in a s 61 offence is not generally mitigated on account of there being minimal violence. In *R v Lardner* (unrep, 10/9/98, NSWCCA) it was held that a submission to that effect "overlooks the fact that the degree of violence involved in common assault cases is invariably moderate, because if the violence is more severe it causes actual bodily harm or wounding and results in a more serious charge."

In *R v Abboud* [2005] NSWCCA 251, the offender assaulted his partner on three separate days by punching, choking, grabbing her face, kicking and biting. It was accepted that the criminality and circumstances involved in the assaults were of the most serious kind for an offence under s 61: *R v Abboud* at [17], [33].

De Simoni considerations

In *R v Lardner* (unrep, 10/9/98, NSWCCA) the court considered whether the sentencing judge infringed the *De Simoni* principle by taking into account matters which constituted the more serious offence of assault occasioning actual bodily harm. It was observed that "bodily harm" includes any hurt or injury calculated to interfere with the health or comfort of the victim; it need not be permanent but must be more than merely transient or trifling. Physical and emotional reactions to an assault such as difficulty sleeping, memory problems, anxiety and poor concentration were therefore matters properly taken into account in sentencing for common assault. However, a psychiatric condition could constitute "actual bodily harm" and such a condition should not be taken into account in sentencing for common assault.

Evidence which seeks to demonstrate actual bodily harm should not be admitted on sentence for common assault. In *R v Abboud* [2005] NSWCCA 251 at [19], the court said:

> It is impermissible for the Crown to tender, or for a court to admit, evidence in sentencing proceedings for common assault which evidence seeks to demonstrate actual bodily harm. While it may be that this occurs because of agreement relating to a plea on a lesser charge, it is still impermissible and if it is not possible to adduce material relevant to the sentencing without also adducing irrelevant material the matter should be adjourned in order to be dealt with properly. The adducing of such material has become a common occurrence which is to be deprecated.

[50-060] Assault occasioning actual bodily harm: s 59

Assault occasioning actual bodily harm attracts a maximum penalty of 5 years imprisonment, or 7 years if committed in company: s 59.

Extent of the injury and degree of violence

Section 59 does not define actual bodily harm. Typical examples of injuries that are capable of amounting to actual bodily harm include scratches and bruises: *McIntyre v R* (2009) 198 A Crim R 549 at [44]. Actual bodily harm will likely have been occasioned

where a victim has been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind: *Li v R* [2005] NSWCCA 442 at [45]. The degree of violence involved in an assault is a material consideration in sentencing: *R v Bloomfield* (1988) 44 NSWLR 734 at 740. In that case, a single punch led to very severe injuries occasioned by the victim falling on his head. The sentencing judge properly gave considerable weight to the serious injuries occasioned by the assault, but erred in not considering the limited degree of violence involved. Likewise, an offence may be objectively serious due to the nature of the assault notwithstanding minor injuries: see *R v Burke* [2001] NSWCCA 47 at [17].

De Simoni considerations

The phrase "bodily harm" is to be given its ordinary meaning. It includes "any hurt or injury calculated to interfere with the health or comfort of the victim": *R v Lardner* (unrep, 10/9/98, NSWCCA) per Dunford J at 4. In *McIntyre v R* at [44], Johnson J held:

> It need not be permanent, but must be more than merely transient or trifling — it is something less than *"grievous bodily harm*", which requires really serious physical injury, and "*wounding"*, which requires breaking of the skin …

There is no need to prove a specific intent to cause actual bodily harm for an offence under s 59: *Coulter v The Queen* (1988) 164 CLR 350. The prosecution need only prove that the accused intentionally or recklessly assaulted the victim and that actual bodily harm was occasioned as a result: *R v Bloomfield* (1998) 44 NSWLR 734 at 737.

An act forming the basis of an offence under s 59 may result in serious injuries. Care must be taken not to infringe the principle in *De Simoni* by taking into account injuries and a state of mind which would justify a more serious offence: *R v Overall* (1993) 71 A Crim R 170 at 175; *R v Baugh* [1999] NSWCCA 131 at [35].

An offence under s 59 does not require that the Crown prove the offender intended, or was reckless as to, causing actual bodily harm, whereas an offence under s 35 requires proof that the accused realised the possibility that grievous bodily harm or wounding (as the case may be) may possibly be inflicted upon the victim and yet went ahead and acted as he or she did: *Blackwell v R* [2011] NSWCCA 93 at [82], [120], [170].

[50-070] Recklessly causing grievous bodily harm or wounding: s 35

Section 35 sets out the following offences and maximum penalties:

(1) recklessly causing grievous bodily harm in company: 14 yrs (SNPP 5 yrs),

(2) recklessly causing grievous bodily harm: 10 yrs (SNPP 4 yrs),

(3) reckless wounding in company: 10 yrs (SNPP 4 yrs),

(4) reckless wounding: 7 yrs (SNPP 3 yrs).

There are two categories of offence depending upon the type of injury inflicted with corresponding higher maximum penalties. The Crown must prove the accused caused grievous bodily harm to (s 35(1), (2)) or wounded (s 35(3), (4)) a person and was reckless as to causing actual bodily harm: see *Chen v R* [2013] NSWCCA 116 at [66] and the *Criminal Trial Courts Bench Book* at [4-080] **Recklessness (Malice)**.

Standard non-parole periods

The standard non-parole periods are indicated above and apply to offences "whenever committed": *Crimes (Sentencing Procedure) Act* 1999, Sch 2, Pt 17.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Extent and nature of injuries

Generally speaking, the seriousness of the offence will significantly depend upon the seriousness of the wounding: *McCullough v R* [2009] NSWCCA 94 at [37]. The injury inflicted is not the only factor in determining the seriousness of an offence under s 35. The nature of the attack and surrounding circumstances are highly relevant: *R v Channells* (unrep, 30/9/97, NSWCCA); *McCullough v R* at [37]. In *R v Douglas* [2007] NSWCCA 31 at [12], it was held that the number of blows and the circumstances in which they were delivered were relevant to the objective seriousness of the offence.

Grievous bodily harm

Section 4(1) defines "grievous bodily harm" to include any permanent or serious disfiguring of the person, the destruction of a foetus, and any grievous bodily disease. At common law, the words "grievous bodily harm" are given their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" simply means "really serious": *DPP v Smith* [1961] AC 290; *Haoui v R* (2008) 188 A Crim R 331 at [137], [160]; *Swan v R* [2016] NSWCCA 79 at [54]–[63].

The way in which grievous bodily harm may be inflicted varies substantially: *R v Kama* [2000] NSWCCA 23 at [16]. The seriousness of an offence under s 35 may be assessed by reference to the viciousness of the attack and severity of the consequences: *R v Kama* at [17].

In *R v Esho* [2001] NSWCCA 415 at [160], the court held the offence was properly characterised as a "worst case" having regard to the number of participants and the ferocity of an attack upon the victim. It is not necessary for the injuries caused to the victim to be of the "worst type" for an offence to fall into the "worst case" category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256); the nature of the offender's conduct may bring it within that category: *R v Westerman* [2004] NSWCCA 161 at [17].

In *Kanengele-Yondjo v R* [2006] NSWCCA 354, the offender was sentenced for two offences of maliciously inflicting grievous bodily harm. The offender infected two victims with HIV, knowing he was carrying the virus. The court agreed with the sentencing judge's assessment of the offences as "heinous crimes which showed a contemptible and callous disregard" for the lives of the victims: *Kanengele-Yondjo v R* at [15]–[16], [50]. The offences were rightly described as falling within the worst case category: *Kanengele-Yondjo v R* at [17]. The expression "worst case category" should now be avoided: see *The Queen v Kilic* at [18].

Wounding

"Wounding" is not defined in the *Crimes Act*. It was been defined at common law to involve the breaking of the skin: *R v Shepherd* [2003] NSWCCA 351 at [31]; *Vallance v The Queen* (1961) 108 CLR 56 at 77; *R v Hatch* [2006] NSWCCA 330 at [16]; *R v Devine* (1982) 8 A Crim R 45 at 47, 52, 56.

The consequences of a wounding can vary widely: *R v Hatch*, above, at [17]; and may be quite minor: *R v Hooper* [2004] NSWCCA 10 at [36]. It need not involve the

use of a weapon: *R v Shepherd*, above at [32]. A case involving significant wounding does not by virtue of that factor alone mean the offence attracts the maximum penalty. The offender's mental state is a relevant factor, particularly if there is a degree of cognitive disturbance and an absence of premeditation: *R v Aala* (unrep, 30/5/96, NSWCCA).

De Simoni considerations

Although the same penalty applied for the separate offences under (now repealed) s 35(a), malicious wounding, and s 35(b), malicious wounding with intent to inflict grievous bodily harm, it was not permissible to sentence an offender for injuries not charged where those injuries were more serious: *McCullough v R* (2009) 194 A Crim R 439. Howie J said at [39]: "To sentence for the infliction of grievous bodily harm on a charge of wounding, seems to me to eradicate the difference between the two offences". Similar logic must apply to the offences created in s 35(2) and (4).

A sentencer must be careful to differentiate between an offence under s 35 and an offence under s 33 which involves specific intent. That does not mean there is no "room for a 'worst case' under s 35 without crossing the boundary of s 33": *R v Esho* [2001] NSWCCA 415 at [160].

As the more serious offence under s 33 requires proof of an intention to inflict grievous bodily harm, there is no breach of *De Simoni* by taking into account in sentencing for an offence under s 35 that the offender intended to inflict actual bodily harm: *R v Channells* (unrep, 20/9/97, NSWCCA); *R v Driscoll* (unrep, 15/11/90, NSWCCA).

Offences under s 35 carry higher maximum penalties where the offence is committed in company: s 35(1), (3). It is a breach of the *De Simoni* principle to treat the circumstance of being in company as an aggravating feature when sentencing an offender for the basic offence: *R v Tran* [2005] NSWCCA 35 at [17].

[50-080] Wound or inflict grievous bodily harm with intent to do grievous bodily harm or resist arrest: s 33

Section 33 sets out the offences of wounding or inflicting grievous bodily harm with intent to cause grievous bodily harm (s 33(1)(a)–(b)) and wounding or inflicting grievous bodily harm with intent to resist or prevent lawful arrest or detention (s 33(2)(a)–(b)). The maximum penalty is 25 years imprisonment for each offence.

For definitions of "grievous bodily harm" and "wounding" see [50-070], above.

Standard non-parole periods

A standard non-parole period of seven years applies to s 33 offences committed on or after 1 February 2003: *Crimes (Sentencing Procedure) Act* 1999, ss 54A–54D.

For discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

General sentencing principles

For a useful summary of the relevant sentencing principles see *AM v R* [2012] NSWCCA 203 at [67]–[74].

The maximum sentence of 25 years imprisonment indicates the seriousness with which an offence under s 33 is regarded: *R v Zhang* [2004] NSWCCA 358 at [28]; *R v Watt* (unrep, 2/4/97, NSWCCA); *R v Zamagias* [2002] NSWCCA 17 at [11]. It is the longest determinate sentence available for an offence in the *Crimes Act* 1900: *R v Hookey* [2018] NSWCCA 147 at [57].

A breadth of conduct and consequences is comprehended by s 33: *R v Williams* [2004] NSWCCA 246 at [51]; *Heron v R* [2006] NSWCCA 215 at [54]. It is important for the sentencer to analyse the facts of each case. Notwithstanding the circumstances giving rise to the offence vary widely and the range of culpability is vast, some assistance may be gained from considering the sentences imposed in other cases to achieve consistency: *Newman v R* [2015] NSWCCA 270 at [19].

In *Kennedy v R* [2008] NSWCCA 21 it was held that the offender's psychological condition — not just the physical act — is relevant in determining the objective seriousness of an offence under s 33: at [41]. However, in *Muldrock v The Queen* (2011) 244 CLR 120, the High Court appear to exclude an offender's mental condition from an assessment of objective seriousness: at [54]–[55].

Extent and nature of the injuries

In *R v Williams* [2004] NSWCCA 246, the fact the injury consisted of a single superficial stab wound was taken into account in holding that the lengthy sentence imposed at first instance was not warranted. The wound was not life threatening and did not cause any lasting physical damage: *R v Williams* at [54].

The extent of the injuries may bring an offence into the very serious category. In *R v Mitchell* [2007] NSWCCA 296, the victim suffered a serious brain injury and was reduced to a vegetative state after a brutal attack. Howie J said at [27]:

> A very important aspect of an offence under s 33 is the result of the offender's conduct. The nature of the injury caused to the victim will to a very significant degree determine the seriousness of the offence and the appropriate sentence. This is not to underestimate the intent component of the offence, after all that is the element that makes the offender liable to a maximum penalty of 25 years as opposed to 7 years for a s 35 offence. But there is less scope for variation in the nature of the intention to do grievous bodily harm when determining the seriousness of a particular instance of the offence than there is for variation in the nature of the injury inflicted. …

In *R v Kirkland* [2005] NSWCCA 130 and *R v Bobak* [2005] NSWCCA 320 (two offenders jointly involved in maliciously inflict grievous bodily harm with intent), the victim was attacked with a hammer and left with extremely serious physical and mental injuries. Both cases were characterised as at the very upper end of the range of seriousness, while falling short of a worst case: *R v Kirkland* at [36]; *R v Bobak* at [32]. Similarly, in *R v Nolan* [2017] NSWCCA 91, an assault leaving an infant with horrific injuries and permanent brain damage was characterised as being in the "high range" (at [73]) but did not warrant the maximum penalty because of the offender's favourable subjective case (at [67]–[68]).

In *R v Hookey* [2018] NSWCCA 147, an unprovoked road rage case, where the offender alighted his car and stabbed the victim three times with a knife, with no provocation, the court found the objective circumstances of the case were extremely

serious and the victim's injuries so serious, only luck prevented his death. Although, in the particular circumstances of that case, the court was satisfied the sentence imposed at first instance was manifestly inadequate, the residual discretion not to intervene was exercised. Rothman J said "if it were not for the subjective circumstances, I could not imagine, given the need for general and specific deterrence in particular, that a sentence lower than 8 years would be appropriate: at [64].

The objective gravity of an offence under s 33 "is not determined merely by considering the injuries": *Vragovic v R* [2007] NSWCCA 46 at [32]. In that case, the circumstances of the offence, including the fact that the victim was a 57-year-old female, attacked with a metal club in her home, and that the assault was premeditated and involved repeated blows, justified the sentencing judge's characterisation of the offence as "near the top of the range of seriousness": *Vragovic v R* at [32]–[34]. Nor must a judge be satisfied beyond reasonable doubt as to precisely how the injury was sustained because it may not be possible for the court to determine the precise mechanism by which the offender injured the victim: *R v Nolan* at [72].

Even where the injuries fall into the lower end of the range of grievous bodily harm, the circumstances in which they were inflicted may still warrant the characterisation of the offence as serious: *R v Testalamuta* [2007] NSWCCA 258 at [31].

An offence may be aggravated by the infliction of an injury that exceeds the minimum necessary to qualify as grievous bodily harm: *R v Chisari* [2006] NSWCCA 19 at [22]; *R v Jenkins* [2006] NSWCCA 412 at [13]; *R v Zoef* [2005] NSWCCA 268 at [123]. Any injury in excess of the bare requirements of grievous bodily harm can be taken into account as a matter of aggravation: *Heron v R* [2006] NSWCCA 215 at [49]. A sentencing judge should not speculate as to what might have occurred had the victim not received medical assistance: *Heron v R* at [49].

Intention

The mental element of an offence under s 33 is the intention that the harm inflicted be grievous bodily harm, differentiating the offence from the less serious offence under s 35: *R v Wiki* (unrep, 13/9/1993, NSWCCA). The degree of harm intended in a particular case may make the absence of premeditation less significant: *R v Zamagias* [2002] NSWCCA 17 at [13]–[14].

The degree of harm intended or foreseen by the offender, as evidenced by the offender's conduct, was considered in *R v Mitchell* [2007] NSWCCA 296. The victim was reduced to a vegetative state following a brutal and sustained attack as he lay unconscious on the ground. Howie J said at [35]:

> The Judge took into account as a mitigating factor that the respondents did not intend the degree of harm that was caused to the victim. That consideration would be understandable in a case where the injury far outweighed what might have been envisaged as the consequence of the behaviour causing it. Such a consideration might be relevant in the case of, for example, a single punch to the face that results in the victim falling to the ground and suffering very grievous injuries as a consequence. But in this case the respondents indulged in … a brutal and sustained attack upon a defenceless person by kicking or stomping on his head and body while he was lying on the ground. The fact that the respondents might not have foreseen that the consequence of such serious conduct was to have left the victim in a vegetative state is of little, if any, weight in my opinion.

Degree of violence

The degree of violence used or the ferocity of the attack is a material consideration on sentence: *R v Zhang* [2004] NSWCCA 358 at [18]. The consequences to the victim are not the only important factor and the acts of the offender which led to those consequences should also be considered: *R v Kirkland* [2005] NSWCCA 130 at [33].

Cases that attract the maximum

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

In *R v Baquayee* [2003] NSWCCA 401, the court held that the combination of the use of a handgun (an aggravating feature) and the severity of the wounds placed the crime in the worst case category. The sentencing judge should have considered imposing the maximum sentence: *R v Baquayee* at [12].

In *R v Stokes and Difford* (1990) 51 A Crim R 25, it was held that the repeated attack on a fine defaulter by prison inmates, rendering the victim a quadriplegic, fell within the worst case category: *R v Stokes and Difford* at 34.

De Simoni considerations

In *R v Pillay* [2006] NSWCCA 402, the offender was acquitted of attempted murder (s 27) and convicted of maliciously wound with intent to inflict grievous bodily harm. The sentencing judge erred in taking into account, as aggravating factors, the pre-meditation and planning of the offence whereby the offender had forced the victim to write a false suicide note. Such factors implicitly ascribed an intention to murder and breached the principle in *De Simoni*: at [16].

Double counting

The actual or threatened use of violence cannot be considered as an aggravating factor of an offence under s 33 as the infliction of actual violence is an element of the offence of malicious wounding: *R v Cramp* [2004] NSWCCA 264 at [53]–[58]; *R v LNT* [2005] NSWCCA 307 at [28]. In *R v Hookey* [2018] NSWCCA 147 the judge erroneously found the "use of a weapon" was an element of the offence under s 33(1)(a). However, if it is taken into account in determining the objective seriousness of the offence, it cannot be counted again as an aggravating feature under *Crimes (Sentencing Procedure) Act* 1999, s 21A(2)(c): *R v Hookey* at [44], [67].

[50-085] Assault causing death: s 25A

Section 25A(1) creates an offence of assault causing death. A person is guilty of such an offence if:

(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and

(b) the assault is not authorised or excused by law, and

(c) the assault causes the death of the other person.

The maximum penalty for the offence is 20 years imprisonment.

Assault causing death while intoxicated

Section 25A(2) sets out the aggravated form of the s 25A(1) offence. A person aged 18 or above who commits an offence under s 25A(1) when intoxicated commits an offence under s 25A(2).

The maximum penalty for an offence under s 25A(2) is 25 years imprisonment.

Section 25B(1) sets a mandatory minimum sentence of imprisonment of not less than 8 years and further provides that any non-parole period is also required to be not less than 8 years. Section 25B(2) provides that "… nothing in section 21 (or any other provision) of the *Crimes (Sentencing Procedure) Act 1999* or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period)".

Section 25A(3) provides that an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault. Section 25A(4) further provides that it is not necessary for the Crown to prove that the death was reasonably foreseeable for the purposes of the basic or aggravated offence.

[50-090] Use weapon/threaten injury to resist lawful apprehension: s 33B

Section 33B provides it is an offence to use, attempt to use, threaten to use, or possess an offensive weapon or instrument, or threaten injury to any person or property with any of the following states of mind:

- intent to commit an indictable offence
- intent to prevent or hinder lawful apprehension or detention
- intent to prevent or hinder investigation.

The maximum penalty is 12 years, or 15 years if committed in company.

General sentencing principles

In *R v Hamilton* (1993) 66 A Crim R 575, Gleeson CJ said 581:

> … offences against s 33B, which make it unlawful to use an offensive weapon or instrument with intent to prevent lawful apprehension, are regarded by the Court extremely seriously. It is incumbent upon the Court in dealing with offences of this nature to show an appropriate measure of support for police officers who undertake a difficult, dangerous and usually thankless task.

Remarks to similar effect were made in *R v Barton* [2001] NSWCCA 63 at [33].

General deterrence must play a significant role in the sentencing of offenders for offences contrary to s 33B: *Sharpe v R* [2006] NSWCCA 255 at [72]. In *R v Perez* (unrep, 11/12/91, NSWCCA), a case involving the driving of a vehicle towards police officers, Kirby P (with whom Gleeson CJ and Campbell J agreed) said at pp 20–21:

> The provision of the specific offence found in s 33B of the *Crimes Act* was obviously intended by Parliament to keep our community free of just the kind of conduct of which the jury convicted the appellant in this case … If in such circumstances, persons defy the instructions of police officers to halt and use motor vehicles or other weapons in an attempt [to] prevent detention, they must expect heavy punishment. Nothing else

> will mark society's disapproval of the objective features of such offences … Only by imposing severe punishment will courts reflect the seriousness which Parliament has attached to such offences by the specific provisions of s 33B of the *Crimes Act*. Only in that way may the message of deterrence be sent from the courts to people who are tempted to act as the appellant did.

The threat of violence constituted by an offender using an offensive weapon to prevent lawful apprehension cannot be considered an aggravating factor of an offence under s 33B(1)(a) as this is an essential element of that offence: *R v Franks* [2005] NSWCCA 196 at [26]–[27]; s 21A(2) *Crimes (Sentencing Procedure) Act* 1999.

Harm

In *R v Mostyn* [2004] NSWCCA 97, it was an aggravating factor that, as a result of the offence, the victim (a police officer) suffered from a Post Trauma Distress Disorder that left him permanently disabled so far as his police duties were concerned: *R v Mostyn* at [186].

Use of particular weapons

The brandishing of a firearm constitutes a serious form of the offence, even if the firearm is incapable of being discharged: *R v Mostyn* [2004] NSWCCA 97 at [187]. In *Curtis v R* [2007] NSWCCA 11, it was noted that the brandishing of knives was sufficient to constitute the offence. The offender's use of a knife to kill a police dog aggravated the offence and took it into the higher levels of objective seriousness: *Curtis v R* at [66]–[67].

Using a syringe to threaten a store's employees attempting to apprehend a shoplifter was characterised as "serious criminal responsibility" in *R v Carter* (unrep, 29/10/97, NSWCCA).

In *R v Sharpe* [2006] NSWCCA 255, it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of an offence under s 33B: *R v Sharpe* at [49]–[50].

De Simoni considerations

It is a breach of the principle in *De Simoni* to take into account that grievous bodily harm was occasioned for an offence under s 33B: *R v Kumar* [2003] NSWCCA 254 at [11].

[50-100] Choking, suffocating and strangulation: s 37

Section 37 provides for three separate choking offences. It is an offence under s 37(1A) *Crimes Act* 1900 to intentionally choke, suffocate or strangle a person without consent. The maximum penalty is 5 years imprisonment.

Under s 37(1) it is an offence if a person:

- intentionally chokes, suffocates or strangles another person so as to render them unconscious, insensible or incapable of resistance; and
- is reckless as to rendering the other person unconscious, insensible or incapable of resistance.

The maximum penalty is 10 years imprisonment.

Under s 37(2), an offence is aggravated by the fact that the choking, suffocating or strangling is done by the offender with the intention of enabling themselves to commit, or assisting another person to commit, another indictable offence (meaning an indictable offence other than an offence against s 37: s 37(3)).

The maximum penalty is 25 years imprisonment.

[50-110] Administer intoxicating substance: s 38

Section 38 *Crimes Act* 1900 sets out an offence of administering an intoxicating substance with intent to commit an indictable offence. Before 28 March 2008, the offence was expressed in terms of administering "any chloroform, laudanum or other stupefying or over-powering drug or thing". The substitution of "intoxicating substance" (defined in s 4(1) to include alcohol, a narcotic drug or any other substance that affects a person's senses or understanding) is not expected to significantly affect the sentencing principles applicable to this offence. The maximum penalty remains at 25 years imprisonment.

In *R v Reyes* [2005] NSWCCA 218 Grove J said at [81] that "a gauge to the seriousness with which Parliament has regarded offences of this type can be found in the prescription of a maximum term of twenty five years imprisonment" and emphasised the importance of general deterrence in sentences for offences under s 38. Beazley JA said in *Samadi v R* (2008) 192 A Crim R 251 at [160] that the legislature and the courts do not think drink or food spiking is a "soft crime" and "[t]hose who are convicted of such offence should expect to be dealt with by the courts on the basis that it is a very serious crime."

A conviction for an offence under s 38 is often accompanied by a conviction for the indictable offence which motivated the commission of the s 38 offence. However, courts have emphasised the need to impose a salutary penalty for an offence under s 38 in its own right: *R v Lawson* [2005] NSWCCA 346 at [31]; *R v Dawson* [2000] NSWCCA 399 at [54]; *Samadi v R* at [160]. In *R v TA* (2003) 57 NSWLR 444 at [34], the court rejected the submission that there should be only slight accumulation of sentences:

> … committing sexual offences whilst the victim has been drugged adds a significant degree of culpability to the administration of the drug intending to commit the offence. … Furthermore, the deterrent effect of a slight accumulation, as proposed by the applicant, would be significantly eroded. Having administered the stupefying drug, the offender would then suffer little more punishment by moving to the next step and actually committing the intended or other sexual assaults. I consider that the distinction between the offences is real and punishment for both should reflect the considerable additional criminality involved in fulfilling the intention with which the drug is given.

An offence under s 38 is aggravated if the administration of the substance was "potentially injurious of itself": *R v TA* at [34]; see also *R v Bulut* [2004] NSWCCA 325 at [15].

[50-120] Assaults etc against law enforcement officers and frontline emergency and health workers

Pt 3 Div 8A *Crimes Act* 1900 sets out offences for actions against law enforcement officers and frontline emergency and health workers.

Offence	Victim	Penalty (Max)
Hinder/resist, or incite another to hinder/resist, in execution/course of duty:	• police officer (s 60(1AA)); • law enforcement officer (s 60A(1AA); • frontline emergency worker (s 60AD(1)); • frontline health worker (s 60AE(1)).	20 pu and/or 1 yr
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty:	• police officer (s 60(1)); • law enforcement officer (s 60A(1)); • frontline emergency worker (s 60AD(2)); • frontline health worker (s 60AE(2)).	5 yrs
Assault, throw missile at, stalk, harass or intimidate, in execution/course of duty *during public disorder*:*	• police officer (s 60(1A)); • law enforcement officer (s 60A(1A)); • frontline emergency worker (s 60AD(3)); • frontline health worker (s 60AE(3)).	7 yrs
Assault causing actual bodily harm in execution/course of duty:	• police officer (s 60(2)); • law enforcement officer (s 60A(2)); • frontline emergency worker (s 60AD(4)); • frontline health worker (s 60AE(4)).	7 yrs
Assault causing actual bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(2A)); • law enforcement officer (s 60A(2A)); • frontline emergency worker (s 60AD(5)); • frontline health worker (s 60AE(5)).	9 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty:	• police officer (s 60(3)); • law enforcement officer (s 60A(3)); • frontline emergency worker (s 60AD(6)); • frontline health worker (s 60AE(6)).	12 yrs
Recklessly wound/cause grievous bodily harm in execution/course of duty *during public disorder*:*	• police officer (s 60(3A)); • law enforcement officer (s 60A(3A)); • frontline emergency worker (s 60AD(7)); • frontline health worker (s 60AE(7)).	14 yrs

For these offences, an action is taken to be carried out against the specified victim in the execution/course of their duty, even if they are not on duty at the time, if it is carried out—

- as a consequence of, or in retaliation for, actions undertaken by the victim in the execution/course of their duty, or
- because the victim is a police officer, law enforcement officer or frontline emergency/health worker: see ss 60(4), 60A(4), 60AD(8), 60AE(8), respectively.

Assaults against police officers have long been treated as serious offences requiring condign punishment: *R v Crump* (unrep, 7/2/1975, NSWCCA). General and specific deterrence are important considerations in sentencing for such offences: *R v Myers* (unrep, 13/2/90, NSWCCA); *R v Edigarov* [2001] NSWCCA 436 at [42].

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* "Public disorder" is defined in s 4 as a riot or other civil disturbance that gives rise to a serious risk to public safety, whether at a single location or resulting from a series of incidents in the same or different locations, including at a correctional centre or juvenile detention centre.

Standard non-parole periods

Under ss 54A–54D *Crimes (Sentencing Procedure) Act* 1999, the standard non-parole period of three years for s 60(2) offences and five years for s 60(3) apply to offences committed on or after 1 February 2003: see *Winn v R* [2007] NSWCCA 44; and *Kafovalu v R* [2007] NSWCCA 141. In *Kafovalu* it was held that the sentencing judge did not err in treating an offence under s 60(2) involving a single but heavy blow to the officer's head as one falling within the mid-range of objective seriousness.

For detailed discussion of the sentencing considerations applicable to standard non-parole periods, see **Standard non-parole period offences — Pt 4 Div 1A** at [7-890]ff.

Application for guideline judgment

In 2002, the Attorney General unsuccessfully sought a guideline judgment in relation to offences under s 60(1): *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515 at [64]. However, Spigelman CJ emphasised the importance of deterrence as a consideration in sentencing offenders for assault against police officers at [22] and [26]:

> Offences involving assault of police officers in the execution of their duty are serious offences requiring a significant element of deterrence in the sentences to be imposed. The community is dependent to a substantial extent upon the courage of police officers for protection of lives, personal security and property. The Courts must support the police in the proper execution of their duties and must be seen to be supporting the police, and their authority in maintaining law and order, by the imposition of appropriate sentences in cases where assaults are committed against police.
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> …
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> … significant risks are run by police officers throughout the State in the normal execution of their duties. The authority of the police, in the performance of their duties, must be supported by the courts. In cases involving assaults against police there is a need to give full weight to the objective of general deterrence and, accordingly, sentences at the high end of the scale, pertinent in the light of all the circumstances, are generally appropriate in such cases.

The court pointed out that these principles applied to sentencing in both the Local and District Courts: at [27]. The court also recognised that offences under s 60(1) encompass a wide range of behaviour, and that whether a custodial sentence is required will depend on the nature of the assault: at [38]–[39].

Serious cases under s 60(2)

In *Bolamatu v R* [2003] NSWCCA 58, the offender ran over a police officer while leaving the scene in a car. The police officer had stood in front of the car holding out her arm to signify "stop". The officer suffered grave injuries. It was held that this was "as reprehensible as [an offence under s 60(2)] can be, and therefore could be seen as demanding something like the maximum possible sentence": *Bolamatu v R* at [10].

De Simoni considerations

In *R v Pickett* [2004] NSWCCA 389, the offender pleaded guilty to assault occasioning actual bodily harm to a police officer (s 60(2)) after being originally charged with using an offensive weapon, namely a motor vehicle, with intent to avoid lawful apprehension (s 33B(1)). So long as the sentencing judge did not find that the motor vehicle was used

with the intention of avoiding lawful apprehension there would be no infringement of the *De Simoni* principle: at [14]. A finding that the offender had acted intentionally or deliberately did not necessarily entail a conclusion that he was guilty of the more serious offence under s 33B. There was no infringement of *De Simoni*. It was open to find there was an intention to commit the assault without taking the further step of concluding that there was also an intention in doing so to avoid lawful apprehension: *R v Pickett* at [16].

In *R v Newton* [2004] NSWCCA 47, the offender was charged with various offences including use of an offensive weapon to avoid lawful apprehension (s 33B) and assault police in execution of duty (s 58). The fact the offender was, around the time of the assault, armed with and brandishing knives was relevant to the objective gravity of the offence and did not infringe the *De Simoni* principle: *R v Newton* at [22]–[23]; cf *R v Simpson* [2001] NSWCCA 239 at [15]–[18].

[50-125] Assaults etc against persons who aid law enforcement officers, and other offences

A person who assaults a person who comes to the aid of a law enforcement officer who is being assaulted in the course of their duty is liable to 5 years imprisonment: s 60AB. It is also an offence to hinder or obstruct a person who comes to the aid of a law enforcement officer who is being hindered or obstructed in the course of their duty, punishable by 1 year imprisonment and/or 20pu: s 60AC.

Section 60B(1) sets out offences for assault etc against a person in a domestic relationship with a law enforcement officer. It is also an offence under s 60C to obtain personal information about law enforcement officers in certain circumstances. A maximum penalty of 5 years imprisonment applies to offences under these provisions.

[50-130] Particular types of personal violence

Domestic violence

For a discussion of the general sentencing approach to domestic violence, see **Domestic violence offences** at [63-500]ff.

The High Court has recognised that current sentencing practices for offences involving domestic violence have departed from past practices due to changes in societal attitudes to domestic relations: *The Queen v Kilic* (2016) 259 CLR 256 at [21]. Rigorous and demanding consequences for the perpetrators of domestic violence are necessary to protect partners, family members and the wider community: *Cherry v R* [2017] NSWCCA 150 at [78].

General deterrence, personal deterrence and denunciation are particularly important in cases of domestic violence: *DPP v Darcy-Shillingsworth* [2017] NSWCCA 224 at [82]–[84]; *Hurst v R* [2017] NSWCCA 114 at [166]; *Vragovic v R* [2007] NSWCCA 46 at [33]; *R v Hamid* (2006) 164 A Crim R 179 at [68]. The importance of these principles was reiterated in *R v JD* [2018] NSWCCA 233, where the offending was committed by the respondent against his wife and daughter over a six year period: at [80]–[81], [102].

The imposition of suspended sentences for three assault and wounding offences was found in *DPP v Darcy-Shillingsworth* at [85] not to reflect the community's interest in general deterrence in domestic violence cases. The criminal law must "play its part

in the endeavour to quell and redress violence of this nature … even when committed by a man with much to be said for his otherwise good character": *DPP v Darcy-Shillingsworth* at [108].

A prior relationship between the offender and the victim does not mitigate an offence of personal violence: *Raczkowski v R* [2008] NSWCCA 152 at [46]. An offence committed during a domestic relationship necessarily entails the abuse of a relationship of trust: *The Queen v Kilic* at [28]. A sentencing judge should not enter into a determination of the merits of matrimonial disputes: *R v Kotevski* (unrep, 3/4/98, NSWCCA). Distress at the breakdown of a relationship is no excuse for violence: *Walker v R* [2006] NSWCCA 347 at [7]. Nor should an indication of forgiveness on the victim's part be used to reduce an otherwise appropriate penalty, given that victims of domestic violence "may be actively pressured to forgive their assailants or compelled for other reasons to show a preparedness to forgive them": *Shaw v R* [2008] NSWCCA 58 at [27]; *R v Quach* [2002] NSWCCA 173 at [28]: *R v Rowe* (1996) 89 A Crim R 467 at 472–473; *R v Fahda* [1999] NSWCCA 267 at [26]; *R v Berry* [2000] NSWCCA 451 at [32]. However, in *Shaw v R*, the victim's forgiveness and expression of ongoing support was given some weight on re-sentence because, in the particular circumstances of that case, it was an indication of the offender's favourable prospects of rehabilitation: *Shaw v R* at [45].

In *Hurst v R*, the underlying themes of the violent attacks on the victim, which included gratuitous cruelty, control, and an intention to humiliate and demean her, were said to demonstrate the very worst aspects of domestic violence and to indicate a very high level of moral culpability: *Hurst v R* at [162]–[164].

It is an aggravating factor if an offence is committed in breach of an Apprehended Domestic Violence Order (ADVO): *Kennedy v R* [2008] NSWCCA 21 at [8]; *R v Macadam-Kellie* [2001] NSWCCA 170 at [37]–[38]; *R v Rumbel* (unrep, 15/12/94, NSWCCA). Breaching an ADVO is distinct from a breach of conditional liberty simpliciter because it involves breaching an order specifically designed to protect the victim from further attacks: *Cherry v R*, above, at [80].

Section 12 *Crimes (Domestic and Personal Violence) Act* 2007 provides for the recording of "domestic violence offences" on a person's criminal record when a person pleads guilty to or is found guilty of such an offence: s 12(2). If the court directs that an offence be recorded as a domestic violence offence, the prosecution may apply for further offences on the person's record to be so classified: s 12(3). In the Second Reading Speech to the Bill, it was said that having a conviction for domestic violence "would leave a permanent stain on a person's record and would be readily identifiable by a sentencing court or a court making a bail determination".

A domestic violence offence is committed against a person with whom the offender has a domestic relationship. It is either a personal violence offence or an offence that arises substantially from the same circumstances as those from which a personal violence offence has arisen or is committed with the intention to coerce or control the victim or to cause that person to be intimidated or fearful (or both): s 11. A "domestic relationship" is defined in s 5. The definition of "personal violence offence" in s 4 includes all assault and wounding offences referred to in the list at [50-000] **Introduction and statutory framework**, except for the offences against s 25A *Crimes Act* 1900.

In addition, on convicting an offender of a domestic violence offence, a court must make an ADVO for the victim's protection unless satisfied an order is "not required": s 39 *Crimes (Domestic and Personal Violence) Act* 2007.

Child abuse

In *R v Smith* [2005] NSWCCA 286 Latham J said at [54]:

> Even when offences against children are committed as a result of momentary lapses of control (which was not the case here) this Court has stressed that appropriately severe sentences have an important deterrent function:
>
> > "Young children cannot protect themselves from the acts of adults. They cannot lodge complaints about criminal behaviour perpetrated upon them. They are entirely reliant upon their parents … to care for them and protect them. [Where] that protective trust [is] abused … the only protection which society can give to young children is the protection afforded by the courts: *R v Pitcher* 19/2/96 NSWCCA unreported."

Similar comments were made in *R v O'Kane* (unrep, 9/3/95, NSWCCA), a case involving seven counts of maliciously inflicting grievous bodily harm by the offender on his infant son:

> It is important that all in the community understand that children cannot be ill-treated, let alone be the victims of the malicious infliction of serious bodily harm. Personal problems on the part of adults do not excuse such conduct.

Prison officers

Personal and general deterrence are important considerations in sentencing for offences of violence against prison officers: *R v Davis* (unrep, 4/2/94, NSWCCA).

The vast power differential arising when a prison officer assaults an inmate is relevant to assessing the objective seriousness of the offence, particularly as it relates to matters of aggravation. Prison officers have authority over inmates who are entitled to assume such officers will not abuse that position of authority: *Waterfall v R* [2019] NSWCCA 281 at [34]–[37]. In that case, an appeal against a sentence of 5 years, 9 months imprisonment with a non-parole period of 3 years, 9 months was dismissed. The court concluded that while the sentence was substantial, it appropriately reflected the gravity of the offence: at [52]–[53].

Inmates

General deterrence is also important in cases of very serious violence in a prison and sentences for such offences must demonstrate that violence and disorder between prisoners is not tolerated. Prisoners are sentenced to be deprived of their liberty, not suffer brutality at the hands of other prisoners. It is material to the seriousness of an offence that an inmate is vulnerable because their movements are restricted: *Tohifalou v R* [2018] NSWCCA 283 at [40]–[41].

"Gang" assaults

In *R v Duncan* [2004] NSWCCA 431, Wood CJ at CL said at [218]:

> Young offenders who elect to respond to any form of confrontation between different groups, need to understand, with crystal clarity, that sentences of imprisonment await those who cause the confrontation to be elevated to one involving extreme violence. Particularly is that so if they band together, in a brutal and cowardly pack attack with weapons, on a single unarmed and defenceless victim.

[50-140] Common aggravating factors under s 21A and the common law

Certain objective aggravating factors frequently arise in the context of personal violence offences. These factors — which arise either at common law and/or under s 21A *Crimes (Sentencing Procedure) Act* 1999 — are discussed here. For a further discussion of aggravating and mitigating factors, see **Objective factors** at [10-000] and **Section 21A factors** at [11-000].

Weapons

The actual or threatened use of a weapon will generally aggravate a personal violence offence: s 21A(2)(c) *Crimes (Sentencing Procedure) Act* 1999 — provided it does not constitute an inherent element of the offence.

While it is rare for an offence under s 33 not to involve the use of a weapon, the use of a weapon is not an essential element of that offence. Where a weapon has been used in the commission of an offence under s 33 it should be taken into account as an aggravating factor: *R v Chisari* [2006] NSWCCA 19 at [31]; *R v Deng* [2007] NSWCCA 216 at [7], [63]; *R v Dickinson* [2004] NSWCCA 457 at [23]–[24]; *Nowak v R* [2008] NSWCCA 89 at [17].

In *R v Sharpe* [2006] NSWCCA 255 (threaten use of weapon to resist arrest, s 33B(2)), it was held that it would be impermissible to have additional regard to the threatened use of a weapon as an aggravating factor given that the threat to use an offensive weapon is an element of the s 33B(2) offence: *R v Sharpe* at [49].

Many objects not inherently answering the description "weapon" (for example, motor vehicles: *R v Barton* [2001] NSWCCA 63; *R v Kumar* [2003] NSWCCA 254), are nonetheless capable of being so regarded by virtue of their use as a weapon: *R v Smith* [2005] NSWCCA 286 at [38].

Knives etc

The Court of Criminal Appeal has frequently observed that the use of a knife is a feature which specially aggravates the seriousness of an offence: *R v Dickinson* [2004] NSWCCA 457 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]. The presence of a knife in an emotionally charged situation increases the danger of the situation and the penalty which is liable to be imposed: *R v Hampton* [1999] NSWCCA 341 at [10]. Any assault involving the use of a knife must be regarded as calling for a significant sentence, for the purposes of both specific and general deterrence: *R v Watt* (unrep, 2/4/97, NSWCCA). The degree of seriousness in the use of a knife is not proportionate to its size: *R v Doorey* [2000] NSWCCA 456 at [27].

In the case of a machete or meat cleaver, the abhorrence which the community holds in relation to the use of knives is compounded, having regard to the terrible wounds which can be inflicted with such weapons: *R v Zhang* [2004] NSWCCA 358 at [29]. A machete is to be considered a very dangerous weapon: *R v Drew* [2000] NSWCCA 384 at [15]. The use of a weapon such as a screwdriver is on par with the use of a knife: *R v Greiss* [1999] NSWCCA 230 at [13].

Firearms

In an offence under s 33, it is difficult to contemplate a more serious aggravating feature than the use of a handgun: *R v Baquayee* [2003] NSWCCA 401 at [12]. Where a firearm is used to inflict grievous injury, the sentence imposed should involve a substantial

component to reflect general deterrence: *R v Zoef* [2005] NSWCCA 268 at [124]. The courts must give a clear message to persons who are minded to use firearms to resolve disputes that they will be dealt with severely: *R v Micallef* (unrep, 14/9/93, NSWCCA). An offence that involves pointing a loaded firearm at anyone is particularly serious when done in circumstances of aggression or as an exercise of domination: *R v Do* [2005] NSWCCA 183 at [25].

Syringes

Sentences for offences involving the use of syringes should deter anyone from adopting this "easy and terrifying method of imposing their will on others": *R v Hodge* (unrep, 2/11/93, NSWCCA); cited in the s 33B case of *R v Ston*e (1995) 85 A Crim R 436 at 438. Sentences should also recognise the fear instilled in victims by an offender who produces a syringe apparently filled with blood: *R v Carter* (unrep, 29/10/97, NSWCCA).

Glassing, broken bottles etc

An attack using a glass is serious: *R v Bradford* (unrep, NSWCCA, 14/2/95). So too, is the use of broken glass, which is a weapon capable of inflicting a life-threatening injury: *R v Zamagias* [2002] NSWCCA 17 at [14]. In a case where the victim was struck in the face with a glass during a hotel fight, and the victim's injuries were not long-term, it was doubted that the use of a glass should be equated in seriousness with the use of a knife or revolver: *R v Heron* [2006] NSWCCA 215 at [54]. In *Sayin v R* [2008] NSWCCA 307, cited with approval in *R v Miria* [2009] NSWCCA 68 at [17], Howie J stated at [47]:

> … "glassing", is becoming so prevalent in licensed premises that there are moves on foot to stem the opportunity for the offence to be committed by earlier closing times and the use of plastic containers. The courts clearly must impose very severe penalties for such offenders, but of course within the limits afforded by the prescribed maximum penalty.

Premeditated or planned offence/contract violence

The degree of premeditation or planning is a relevant factor when assessing the objective seriousness of an offence: *R v King* [2004] NSWCCA 444 at [174]; *Vragovic v R* [2007] NSWCCA 46 at [32] (both s 33 cases). Section 21A(2)(n) provides as an aggravating factor the fact that the "offence was part of a planned or organised criminal activity". The converse is a mitigating factor: s 21A(3)(b).

Unprovoked offence

The fact that an offence is unprovoked and unjustified is a matter to be taken into account when assessing its objective seriousness: *R v Matzick* [2007] NSWCCA 92 at [23]; *R v Reid* [2005] NSWCCA 309 at [25]; *R v Mackey* [2006] NSWCCA 254 at [14] (all s 33 cases). Members of the public have a fundamental right to go about their business without fear of being attacked: *R v Woods* (unrep, 9/10/1990, NSWCCA); *Vaeila v R* [2010] NSWCCA 113 at [22]; *Mansour v R; Hughes v R* [2013] NSWCCA 35 at [43]; *R v Tuuta* [2014] NSWCCA 40 at [52]; *Kocyigit v R* [2018] NSWCCA 279 at [36].

Offence committed in company

It is an aggravating factor where the offence is committed in company: *R v Maher* [2005] NSWCCA 16 at [34]; s 21A(2)(e) *Crimes (Sentencing Procedure) Act* 1999.

The exception is where this factor is an element of the offence, for example, offences under ss 59(2), 35(1), 35(3) and 33B(2). Furthermore, it would be erroneous to take into account as an aggravating factor the commission of an offence in company where that factor would warrant a conviction for a more serious offence: *R v Tran* [2005] NSWCCA 35 at [17].

Vulnerable victim

Section 21A(2)(l) provides as an aggravating factor the fact "that the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant)". The fact that the victim was a security officer is an aggravating factor pursuant to s 21A(2)(l): *R v Do* [2005] NSWCCA 183.

In *Nowak v R* [2008] NSWCCA 89, the judge erred in finding that it was an aggravating factor that the victim was "vulnerable in the extreme" on the basis that the victim was unarmed when struck by a man wielding a bottle. It was observed, "All victims are, to some extent at least, vulnerable. But that is not the sense in which the expression is to be understood in the present context": at [28]. Reference was made in that case to *R v Tadrosse* (2005) 65 NSWLR 740, where it was said that s 21A(2)(l) "is concerned with the weakness of a particular class of victim and not with the threat posed by a particular class of offender": at [26].

The fact that the victim was unarmed would not generally constitute an aggravating factor under s 21A(2)(l), although such vulnerability may arise from defencelessness or helplessness: *Morris v R* [2007] NSWCCA 127 at [15]. However, there may be greater scope for a finding of vulnerability at common law on the basis that the common law survives the introduction of s 21A (s 21A(1)(c)); see *R v Porter* [2008] NSWCCA 145 at [87]. In *R v Esho* [2001] NSWCCA 415 the court held that the fact that the applicant, who was armed with a knife, knew that the victim was defenceless, was a factor that aggravated the offence: *R v Esho* at [142].

Commission of offence in victim's home

The commission of the offence in the security of the victim's home aggravates an offence: *R v Pearson* [2002] NSWCCA 429 at [90]; *R v Achurch* [2004] NSWCCA 180 at [33]; *R v Brett* [2004] NSWCCA 372 at [46]; *R v Hookey* [2004] NSWCCA 223 at [18]; s 21A(2)(eb) *Crimes (Sentencing Procedure) Act* 1999. See further the discussion in **Section 21A factors "in addition to" any Act or rule of law** at [11-105].

Gratuitous cruelty

Section 21A(2)(f) provides that an offence is aggravated if it involves gratuitous cruelty. Gratuitous cruelty requires more than an offence being committed without justification and causing great pain: *McCullough v R* [2009] NSWCCA 94 at [30]. For offences that are by their nature violent, there needs to be something more than the offender merely having no justification for causing the victim pain: *McCullough v R* at [30]. For instance, the factor may be present in a case of malicious wounding due to the nature and purpose of the wounding, for example, it involved torture: *McCullough v R* at [31].

The 3½-year-old victim in *R v Olsen* [2005] NSWCCA 243 was found to have 57 injuries, including intra-retinal haemorrhages and flexion extension injuries to the

neck indicating that he had been severely shaken. The child was also suffering from dehydration. The injuries inflicted included bite marks and indicated that there had been a large number of forcible impacts with the child's body. It was held that the sentencing judge correctly found that the offence involved gratuitous cruelty: at [17].

Punching and kicking a pregnant woman in the abdomen causing her foetus to miscarry constitutes gratuitous cruelty: *R v King* [2004] NSWCCA 444 at [139].

In *R v Smith* [2005] NSWCCA 286 it was held that the throwing of hot water onto a child did not constitute gratuitous cruelty. Latham J said at [37] that gratuitous cruelty:

> … is less likely to be present where an intentional act gives rise to injuries which were contemplated by the offender as possible, but no more, as opposed to offences involving deliberate, calculated torture or where the type and degree of harm inflicted is part of the offender's desire to degrade and humiliate the victim. Of course, it is not possible to neatly define the categories of offences in which gratuitous cruelty will feature. However, it was open to his Honour to regard this offence as lacking that factor, particularly where his Honour had found the Respondent reckless as to the harm caused by his actions.

Substantial harm

Section 21A(2)(g) *Crimes (Sentencing Procedure) Act* 1999 provides as an aggravating factor that "the injury, emotional harm, loss or damage caused by the offence was substantial." The converse is a mitigating factor under s 21A(3)(a).

Since inflicting of grievous bodily harm is an element of offences under both s 35(1)–(2) and s 33(1)(b) and (2)(b), the bare fact that grievous bodily harm was caused cannot be treated as an aggravating factor of itself: *R v Zoef* [2005] NSWCCA 268 at [123]; *R v Cramp* [2004] NSWCCA 264 at [65] (s 33 cases); *R v Heron* [2006] NSWCCA 215 at [49]; *Nowak v R* [2008] NSWCCA 89 at [19]–[26] (s 35). However, where the extent of the victim's injury significantly exceeds the minimum necessary to qualify as grievous bodily harm, the injury may constitute an aggravating factor: *R v Zoef*, above, at [123] (where the victim suffered permanent paralysis); *R v Chisari* [2006] NSWCCA 19 at [22] (where the victim was required to undergo surgery, had ongoing medical problems and was unable to work).

In *R v Heron* [2006] NSWCCA 215, it was held that the sentencing judge also erred in having regard to the potential effect of the injury by speculating as to what might have happened had first aid not been provided. The potential of the injury was not a matter which could be properly taken into account for the purposes of s 21A(2)(g). What might have occurred had timely first aid not been provided is an irrelevant consideration when applying s 21A(2)(g): at [49].

[50-150] Intoxication

Personal violence offences are on occasion accompanied by some level of intoxication on the part of the offender. An offender's intoxication may constitute an aggravating factor, or it may have no impact on the sentencing exercise.

Section 21A(5AA) *Crimes (Sentencing Procedure) Act* 1999 abolished the common law as it applies to the relevance of an offender's intoxication at the time of the offence. It provides that in determining the appropriate sentence for an offence, the self-induced intoxication of the offender at the time the offence was committed is not to be taken into

account as a mitigating factor. Section 21A(6) provides that self-induced intoxication has the same meaning as it has in Pt 11A *Crimes Act* 1900. Section 21A(5AA) applies to the determination of a sentence for an offence whenever committed unless, before the commencement date (31 January 2014), the court has convicted the person being sentenced of the offence, or a court has accepted a plea of guilty and the plea has not been withdrawn.

Before the introduction of s 21A(5AA) an offender's intoxication, whether by alcohol or drugs, could explain an offence but ordinarily did not mitigate the penalty: *Bourke v R* (2010) 199 A Crim R 38 at [26]. An acting out of character exception was acknowledged but rarely applied: *Hasan v The Queen* (2010) 31 VR 28 at [21], applied in *GWM v R* [2012] NSWCCA 240 at [82] and *ZZ v R* [2013] NSWCCA 83 at [110]. Section 21A(5AA) abolishes the out of character exception. It also abolishes that part of *R v Fernando* (1992) 76 A Crim R 58 that the High Court approved in *Bugmy v The Queen* (2013) 249 CLR 571 at [38], [40]. French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said at [38]: "The propositions stated in *Fernando* are largely directed to the significance of the circumstance that the offender was intoxicated at the time of the offence".

Intoxication may be an aggravating factor because of the recklessness with which the offender became intoxicated or if it involves the voluntary ingestion of alcohol by a person with a history of alcohol-related violence: *R v Fletcher-Jones* (1994) 75 A Crim R 381 at 387; *Gordon*, above, at 467; *Coleman*, above at 327; *R v Hawkins* (1993) 67 A Crim R 64 at 67; *R v Jerrard* (1991) 56 A Crim R 297 at 301. The commission of an offence while intoxicated may also warrant greater emphasis being placed on general deterrence: *R v Mitchell* [2007] NSWCCA 296 at [29].

[50-160] Common mitigating factors

Certain objective mitigating factors which may arise with relative frequency in the context of personal violence offences are discussed here. For detailed discussion of mitigating factors, see **Objective factors** at [10-000] and **Section 21A factors** at [11-000].

Injury or harm not substantial

The fact that the victim's injuries healed or were not substantial may be taken into account in the offender's favour: *R v Shauer* [2000] NSWCCA 91 at [13]; s 21A(3)(a) *Crimes (Sentencing Procedure) Act* 1999.

Provocation

Section 21A(3)(c) *Crimes (Sentencing Procedure) Act* 1999 provides that it is a mitigating factor where the offender was provoked by the victim into committing the offence. In *R v Ferguson* [1999] NSWCCA 214 at [29], Smart AJ stated: "It is of the essence of provocation that the acts of others cause offenders to lose their self control and embark upon criminal conduct often of the utmost gravity".

Provocation can reduce the objective criminality appreciably: *R v Ferguson*, above, at [29]; see for example, *R v Fragoso* (unrep, 24/2/94, NSWCCA). In *R v Ryan* [2006] NSWCCA 394, the fact that the offence of maliciously inflict grievous bodily harm (s 35) was triggered by what both offenders reasonably thought had been a sexual

assault on one of their partners was held to be a mitigating factor under s 21A(3)(c): at [28]. On the other hand, it was held in *R v Mitchell* [2007] NSWCCA 296 at [30] that a vicious attack in retribution for alleged prior sexual abuse was "of limited mitigating value".

The extent to which provocation constitutes a mitigating factor depends on the relationship and proportion between the provocative conduct and the offence. In *R v Buddle* [2005] NSWCCA 82, Wood CJ at CL said at [11]:

> While the presence of provocation was an important aspect in assessing the applicant's objective criminality, and while it provided a motive for what might otherwise have been an incident of unexplained or random violence, it did not excuse his conduct. It is not the case that the victim of a crime can take the law into his own hands and exact physical revenge. Both personal and general deterrence therefore had a role to play in sentencing the applicant.

In some cases the offender's conduct will be so disproportionate to the provocation that it will be open to find that there was no mitigation: *R v Mendez* [2002] NSWCCA 415 at [16]. In *Shaw v R* [2008] NSWCCA 58 at [26], it was held that "relationship tension and general tension" in the context of domestic violence offences did not constitute provocative conduct such as to amount to mitigation.

[The next page is 30001]

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]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act* 1999 provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Once a specific error of the kind identified in *House v The King* (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: *Kentwell v The Queen* (2014) 252 CLR 601 at [42] citing Spigelman CJ in *Baxter v R* [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: *Baxter v R*. It is not necessary to determine whether the error had an actual effect on the sentence, only that it had the capacity to do so: *Newman (a pseudonym) v R* [2019] NSWCCA 157 at [11]–[13]; *Tomlinson v R* [2022] NSWCCA 16 at [200]. In this context use of the term "material" to distinguish between errors impacting on the sentencing discretion and those that do not should be avoided: *Newman (a pseudonym) v R* at [11]; *Ibrahim v R* [2022] NSWCCA 134 at [24].

The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: *Kentwell v The Queen* at [42]; *Thammavongsa v R* [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made at the end of the process required under s 6(3) to check that the sentence arrived at by the appellate court does not exceed the original sentence: *Thammavongsa v R* at [5]–[6].

Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: *Kentwell v The Queen* at [42].

In *Lehn v R* (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the sentencing exercise, the court is required under s 6(3) to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: *Lehn v R* at [68]. The High Court in *Kentwell v The Queen* at [42] held that the CCA's task on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome, but to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: *Lehn v R* at [77] quoting *Kentwell v The Queen*. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: *Lehn v R* at [78].

Where error may not require re-exercise of sentencing discretion

There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: *Lehn v R* (2016) 93 NSWLR 205 at [72]. For example, where

an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: *Lehn v R* at [72]. In *Greenyer v R* [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court. A similar arithmetical error was found to affect the non-parole period in *Li v R (Cth)* [2021] NSWCCA 100 and was corrected without the court proceeding to re-sentence: at [58]; [66]; [71].

The sentencing error in *Lehn v R* of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: at [65], [118], [128], [140].

Is a lesser sentence warranted

The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: *Kentwell v The Queen* at [43]. If the court concludes either that the same, or a greater, sentence should be imposed, it is not required to re-sentence: *Kentwell v The Queen* at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: *Kentwell v The Queen* at [43] citing *Neal v The Queen* (1982) 149 CLR 305 at 308.

The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease as it lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: *Thammavongsa v R* at [3], [16].

Reception of evidence following finding of error

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: *Betts v The Queen* (2016) 258 CLR 420 at [2], [11]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: *Kentwell v The Queen* at [43] citing *Douar v R* [2005] NSWCCA 455 at [124] and *Baxter v R* at [19] with approval. In *Douar v R* at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: *R v Deng* [2007] NSWCCA 216 at [43]; *R v Fordham* (unrep, 2/12/97, NSWCCA).

The appellant cannot run a "new and different case": *Betts v The Queen* at [2]. It is not the case that once error is demonstrated, the appellate court may receive *any* evidence capable of bearing on its determination of the appropriate sentence: *Betts v The Queen* at [8], [12]–[13] approving *R v Deng* [2007] NSWCCA 216 at [28]. The conduct of an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by *House v The King* (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: *Betts v The Queen* at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: *Betts v The Queen* at [14].

In *Betts v The Queen*, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: at [57]–[59].

The power to remit under ss 12(2) and 6(3)

Section 12(2) *Criminal Appeal Act* 1912 provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made".

The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: *Betts v The Queen* at [17]. The issue was unnecessary to determine in *Betts v The Queen* at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): *Betts v The Queen* at [17].

The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in *O'Neil-Shaw v R* [2010] NSWCCA 42: *Betts v The Queen* at [19].

It was held in *O'Neil-Shaw v R* at [56] that s 6(3) should not be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: *O'Neil-Shaw v R* at [32]. Remittal under s 12(2) *Criminal Appeal Act* is the more appropriate course since this permits a judge to determine the question of sentence upon the evidence adduced in the second hearing: *O'Neil-Shaw v R* at [57].

The meaning of "sentence" in s 6(3)

An aggregate sentence imposed under s 53A *Crimes (Sentencing Procedure) Act* 1999 is a "sentence" within s 6(3): *JM v R* [2014] NSWCCA 297 at [40]; see also **[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]. For proceedings commenced on or after 18 October 2022, s 21B(4) of the *Crimes (Sentencing Procedure) Act*1999 provides that, when varying or substituting a sentence, a court must do so in accordance with the sentencing patterns and practices at the time of the original sentencing.

Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: *R v JW* (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in *R v Parkinson* [2010] NSWCCA 89 at [49]–[51].

For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see **Power to reduce penalties for assistance to authorities** at [12-240].

[70-115] Judge may furnish report on appeal

Section 11 *Criminal Appeal Act* 1912 provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case.

A s 11 report should only be provided in exceptional circumstances: *R v Sloane* [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way: *Vos v R* [2006] NSWCCA 234 at [26]; *R v Sloane* at [9]. The relevant and permissible functions of a report are set out in *R v Sloane* at [10]–[12]; see also *Zhang v R* [2018] NSWCCA 82 at [37]–[39].

[70-120] Severity appeals to the District Court

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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