Judicial Commission of New South Wales

SENTENCING BENCH BOOK

Update 53

February 2023

SUMMARY OF CONTENTS OVERLEAF

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 53

Update 53, February 2023

Update 53 amends the Bench Book to incorporate recent case law and legislative developments. The following chapters have been revised:

Fines

- [6-160] **Fines for Commonwealth offences** to update references to the value of a penalty unit in s 4AA *Crimes Act* 1914 (Cth) to $275.

Objective factors (cf s 21A(1))

- [10-010] **Proportionality** to add reference to *DH v R* [2022] NSWCCA 200 regarding assessing an offence's objective seriousness.
- [10-024] **Use of sentencing statistics** to clarify the commentary regarding *Peiris v R* [2014] NSWCCA 58.

Guilty plea

- [11-505] **Setting aside a guilty plea** to add reference to *White v R* [2022] NSWCCA 241 regarding withdrawing a plea before conviction.

Sexual offences against children

- [17-500] **Maintain unlawful sexual relationship with child: s 66EA** to add reference to *Towse v R* [2022] NSWCCA 252 regarding assessing the seriousness of a s 66EA *Crimes Act* 1900 offence.

Assault, wounding and related offences

- [50-080] **Wound or inflict grievous bodily harm with intent to do grievous bodily harm or resist arrest: s 33** to add reference to *Maybury v R* [2022] NSWCCA 233 regarding assessing injuries for a s 33(1)(a) *Crimes Act* wounding offence.

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FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 53

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Please discard previous Summary and Filing Instructions sheets.

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

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Fines

[6-100] Generally

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

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

The value of one penalty unit is prescribed in s 17 *Crimes (Sentencing Procedure) Act* and, currently, one penalty unit is equal to $110.

[6-110] Availability

Any offence

A fine can be imposed if it is specified as a penalty for the offence.

Indictable offences

A judge sentencing a person convicted on indictment may, in addition to or instead of any other punishment, impose a fine up to 1,000 penalty units: s 15(2) *Crimes (Sentencing Procedure) Act* 1999. Section 15 does not apply where another provision empowers the imposition of a fine for the offence: s 15(1). Fines may be imposed in addition to or instead of any other penalty that may be imposed for the offence: s 15(3). Therefore, fines may be imposed under s 15 in addition to, or instead of, any of the following dispositions:

- imprisonment
- intensive correction order (ICO)
- community correction order (CCO).

A fine cannot be imposed in addition to a conditional release order (CRO) in respect of the same offence: s 9(3) *Crimes (Sentencing Procedure) Act*.

Certain indictable offences may be heard summarily under the *Criminal Procedure Act* 1986. The maximum fine that a magistrate hearing such matters may impose is set out in s 267(3) *Criminal Procedure Act* (maximum penalties for Table 1 Offences), being 100 penalty units or the maximum fine provided by law for the offence, whichever is the smaller fine. Section 268 *Criminal Procedure Act* sets out the maximum penalties for Table 2 offences.

The maximum amount of a fine is generally the amount prescribed for the offence. Where a person is convicted of an offence at common law or indictment, the penalty is at large. The fine imposed should not be excessive: *Smith v The Queen* (1991) 25 NSWLR 1 per Kirby P at 13–18, and Mahoney JA at 24.

Discretion

Section 21(3) *Crimes (Sentencing Procedure) Act* provides:

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

Thus, unless the amount of the fine is mandatory, any fine may be less than that specified for the offence in the legislation.

Consideration of an accused's means to pay

There are restrictions imposed on the court in exercising the discretion to impose a fine. Section 6 *Fines Act* 1996 provides that:

> In the exercise by a court of a discretion to fix the amount of any fine, the court is required to consider:
>
> (a) such information regarding the means of the accused as is reasonably and practicably available to the court for consideration, and
>
> (b) such other matters as, in the opinion of the court, are relevant to that fixing of the amount.

Section 6 is materially similar to s 16C(1) *Crimes Act* 1914 (Cth) and the approach taken at common law: see *Flego v Lanham* (1983) 32 SASR 361 at 365–367. The expression "is required to" in s 6 indicates that the court must have regard to the issue, that is, it is a mandatory consideration: *Retsos v R* [2006] NSWCCA 85 at [14]. The judge erred in *Retsos v R* because there was no credible evidence which established that the applicant had the capacity to pay fines totalling $80,000. It has been held in the context of applying s 16C(1) to Commonwealth offences that although the means of an offender to pay is a mandatory consideration it is not a decisive factor: *Jahandideh v R* [2014] NSWCCA 178 at [16]–[17].

Other considerations that are relevant in determining the amount of a fine include the seriousness of the offence, its prevalence and deterrence: *Jahandideh v R* at [16]–[17]; *Darter v Diden* (2006) 94 SASR 505 at [20]; *Smith v The Queen* (1991) 25 NSWLR 1 at 17–18. In some cases, consideration of the financial circumstances of an offender may increase, rather than decrease, a fine in order for it to be a deterrent: *Jahandideh v R* at [17].

Time to pay

Section 5 *Fines Act* provides a period of 28 days to pay the fine and a person may apply to the court registrar for additional time to pay. However, a court with special reasons may direct payment before 28 days: s 7(3) of the Act.

Accumulation of fines

Where there is more than one offence, there is no statutory limit on the aggregate of fines which may be imposed.

Corporations

Where a penalty for an offence committed by a body corporate is a term of custody only, the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission or the District Court, may instead impose a fine up to 2,000 penalty units, and any other court may impose a fine up to 100 penalty units: s 16 *Crimes (Sentencing Procedure) Act*.

Other general considerations

When imposing more than one fine or a fine with another sentence, the court should consider the totality of the conduct and the total sentence imposed: *Sgroi v The Queen* (1989) 40 A Crim R 197. See also **Applications of the totality principle** at [8-210].

It is not inappropriate to order the payment of a fine simply because it will be paid by another person in circumstances where that "would create obligations and concern" to the offender: *R v Repacholi* (1990) 52 A Crim R 49 at 63.

A fine may be appropriate in addition to a term of imprisonment where the offender has benefited financially from the crime: *R v Rahme* (1989) 43 A Crim R 81.

Although there is a jurisdictional limit for the Local Court in terms of the maximum fine that may be imposed, where such a penalty is being considered, the court should "impose a penalty reflecting the objective seriousness of the offence … taking care not to exceed the maximum jurisdictional limit": *Roads and Maritime Services v L & M Scott Haulage Pty Ltd* [2013] NSWCCA 107 at [20]; *R v Doan* (2000) 50 NSWLR 115 at [35].

[6-120] Summary of procedure

The following is a summary of the procedure for the payment of fines imposed by courts under s 5(1) *Fines Act* 1996.

(a) **Payment details**

A fine imposed by a court is payable within 28 days after it is imposed.

(b) **Notification of fine**

The person on whom the fine is imposed is to be notified of the fine, the arrangements for payment and the action that may be taken under this Act to enforce the fine.

(c) **Time to pay**

A court registrar may allow further time to pay the fine on the application of the person.

(d) **Enforcement order**

If payment of the fine is not made by the due date, a court fine enforcement order may be made against the person. If the person does not pay the amount (including enforcement costs) within 28 days, enforcement action authorised by the Act may be taken (see Part 4 *Fines Act*).

(e) **Withdrawal of enforcement order**

A court fine enforcement order may be withdrawn if an error has been made.

[6-130] Fine(s) imposed with other orders

Where more than one order is imposed for a single offence, a separate order must be given for each as per the form of order for each disposition. The fine is separate: *R v McGovern* [1975] 1 NSWLR 642.

Often a maximum penalty provision for an offence stipulates that a fine or a period of imprisonment, "or both", can be imposed. The use of the word "both" entitles the court to make more than one order.

Section 9(3) *Crimes (Sentencing Procedure) Act* 1999 explicitly provides that a fine and a conditional release order (CRO) cannot be imposed in relation to the offender in respect of the same offence. A CRO with a conviction may be made as an alternative to imposing a fine: s 9(3)(b).

[6-140] Default provisions

The fine enforcement procedure under the *Fines Act* 1996 is set out in Pt 4. A summary of the procedure appears in s 58(1):

(a) Service of fine enforcement order

Notice of the fine enforcement order is served on the fine defaulter and the fine defaulter is notified that if payment is not made enforcement action will be taken (see Div 2).

(b) Driver licence or vehicle registration suspension or cancellation

If the fine is not paid within the period specified, the Roads and Maritime Services suspends any driver licence, and may cancel any vehicle registration, of the fine defaulter. If the driver licence of the fine defaulter is suspended and the fine remains unpaid for 6 months, the Roads and Maritime Services cancels that driver licence (see Div 3).

(c) Civil enforcement

If the fine defaulter does not have a driver licence or a registered vehicle or the fine remains unpaid after 6 months, civil action is taken to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter (see Div 4).

(d) Order requiring community service

If civil enforcement action is not successful, an order requiring community service is served on the fine defaulter (see Div 5).

(e) Imprisonment if failure to comply with order requiring community service

If the fine defaulter does not comply with the order requiring community service, a warrant of commitment is issued to a police officer for the imprisonment of the fine defaulter (except in the case of children). [The Commissioner of Corrective Services may determine that the fine defaulter's period of imprisonment be served under an intensive correction order (see s 89)].

(f) Fines payable by corporations

The procedures for fine enforcement (other than orders requiring community service and imprisonment) apply to fines payable by corporations (see Div 7).

(g) Fine mitigation

A fine defaulter may seek further time to pay and the Commissioner of Fines Administration may write off unpaid fines or make a work and development order in respect of the fine defaulter for the purposes of satisfying all or part of the fine. Applications for review may be made to the Hardship Review Board (see Div 8).

For the purposes of para (e) above, s 90 *Fines Act* provides the formula for calculating the period of imprisonment to be served based on the relevant outstanding fine. At the time of writing, the relevant amount is calculated at $120 per day, but must not be for less than one day or more than 3 months: s 90(1). The fine is satisfied when the defaulter duly serves the total period of imprisonment under the warrant: s 91; or else pays the relevant outstanding fine: s 96. Note also that there are special restrictions relating to children and those under 21 years of age: s 92.

The *Fines Further Amendment Act* 2008 amended the *Fines Act* in response to, inter alia, NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing*

Option, Interim Report, 2006, which recommended the creation of a trial "work and development order" scheme to divert vulnerable people from a fine enforcement process: see Pt 4, Div 8 (effective 10 July 2009).

The system known as Centrepay, whereby persons in receipt of Centrelink payments may elect to have a fine enforcement order paid through direct debits from their Centrelink payments, is given legislative status: s 100(3A). However, Centrepay is only available once the fine has progressed to the enforcement stage. The *Fines Act* is amended to allow the Commissioner of Fines Administration (previously the State Debt Recovery Office) to issue a fine enforcement order where a determination is made to make an order under s 100 or a work and development order: ss 14(1A), 42(1AA). In either case, the Commissioner must postpone the enforcement costs payable and waive those costs if such orders are complied with: cl 6(2) *Fines Regulation* 2015.

The registrar of a court that has imposed a fine, or to which a fine is payable, may now refer a matter to the Commissioner where a person is eligible for the Centrepay scheme, or where the person is seeking a work and development order, even if the person has not defaulted on the fine: s 13 *Fines Act*. The Commissioner's power to write off unpaid fines was extended by the amending Act so that part, or the whole, of an unpaid fine may be written off: see ss 101(1A), 101(1B), 101(3), 101(4) *Fines Act*.

It is an offence for a person to drive if his or her licence has been suspended or cancelled as a result of a fine default under s 66 *Fines Act*: s 54(5) *Road Transport Act* 2013.

[6-150] Financial payment in lieu of fines

A court cannot require some other financial payment to be made in lieu of a fine, such as a donation to a charity: *Griffiths v Hutchison* (unrep, 1/2/91, NSWSC) per McInerney J.

See further compensation orders in **Victims and victim impact statements** at [12-860].

[6-160] Fines for Commonwealth offences

Availability

Fines are noted in the Acts as numbers of penalty units. The value of one penalty unit is prescribed in s 4AA *Crimes Act* 1914 (Cth) (currently $275). A fine can be imposed if a fine is specified as a penalty for the offence or pursuant to s 4B(2) *Crimes Act* 1914:

> Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:
>
> Term of Imprisonment x 5
>
> where:
>
> *Term of Imprisonment* is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

For example, where the maximum term of imprisonment for an offence is 6 months then the maximum pecuniary penalty available would be 30 penalty units. The fine is calculated as follows: 30 x 275 = $8,250. As to corporations, see s 4B(3).

Section 4AA(3) *Crimes Act* provides that on 1 July 2018 and every third 1 July thereafter (an indexation day) the penalty unit amount is to be replaced by an amount worked out using the prescribed formula (the indexation factor for the indexation day multiplied by the dollar amount immediately before the indexation day).

Relevant definitions for the indexation formula are contained in s 4AA(4). When the penalty unit amount is increased in accordance with s 4AA(3), the increased amount applies only to offences committed on or after the indexation day: s 4AA(8).

Amount

The maximum amount of a fine that can be imposed is the maximum fine specified for the particular offence, or the amount specified in s 4B. Penalties attracting a maximum term of life imprisonment may also attract a pecuniary penalty of up to 2000 penalty units: s 4B(2A).

Constraints

Matters to be taken into account

Whether the offender is given a custodial sentence or some other disposition such as a fine, there are matters which must be taken into account under s 16A *Crimes Act* 1914.

Consideration of defendant's means to pay

The court must take into consideration the defendant's means to pay: s 16C *Crimes Act* 1914. That requirement does not dictate that the defendant's financial circumstances will determine the fine imposed: *Jahandideh v R* [2014] NSWCCA 178 at [15]. See **Fines** at [16-030].

Enforcement and recovery

Section 15A *Crimes Act* 1914 picks up State law in relation to the enforcement and recovery of fines imposed on Commonwealth offenders. For the NSW laws, see above.

As condition of recognizance

A recognizance can be imposed in relation to a release pursuant to s 20(1)(a) or (b) *Crimes Act* 1914.

[6-170] Children's Court

Where the Children's Court finds a person guilty of an offence it may impose a fine, being the lesser of the maximum fine prescribed by law for the offence or 10 penalty units: s 33(1)(c) *Children (Criminal Proceedings) Act* 1987. As to the type of offence, see s 32. Orders made under s 33(1) are dependent on guilt, not conviction, and in determining the appropriate disposition the court must take into account any plea of guilty.

***Good behaviour bond*:** A fine may be imposed with a good behaviour bond: s 33(1)(d).

***Disqualification*:** The power to order disqualification from driving is not limited by s 33: s 33(5)(a).

***Forfeiture*:** The power to order forfeiture is not limited by s 33: s 33(5)(b). Similar ancillary orders relating to drugs and implements may be made.

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Objective factors (cf s 21A(1))

[10-000] Maximum penalty

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

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

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

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

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

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

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

Increase in statutory maximum

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

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

Decrease in the maximum penalty

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

Maximum penalties and the jurisdiction of the Local Court

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

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

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

[10-005] Cases that attract the maximum

The maximum penalty for an offence is reserved for worst cases. Past High Court authorities, such as *Ibbs v The Queen* (1987) 163 CLR 447 at 451–452 and *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 478, described cases that attract the maximum penalty as cases as falling into the "worst category". Courts should avoid using the expression "worst category": *The Queen v Kilic* (2016) 259 CLR 256 at [19]–[20]. The expression may not be understood by lay people where a court finds that an offence is serious but does not fall into the "worst category".

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

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

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

[10-010] Proportionality

Common law

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

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

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

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

At common law, the term "objective circumstances" was used to describe the circumstances of the crime: see for example, *R v McNaughton* (2006) 66 NSWLR 566 at [15] (quoted below). The gravity of the offence was assessed by reference to its objective seriousness. In *R v Dodd*, the court (Gleeson CJ, Lee CJ at CL and Hunt J) referred to *R v Geddes* (1936) 36 SR (NSW) 554 at 556, where Jordan CJ spoke of the need for a reasonable proportionality between a sentence and the circumstances of the crime. This is achieved by having regard to the "gravity of the offence viewed objectively" because "without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place". Elaborating on this, the court in *R v Dodd* said at 354:

> Each crime, as *Veen (No 2)* (1988) 164 CLR 465 at 472 … stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum

> sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary: see, for example, the passage from the judgment of Street CJ in *Todd* [1982] 2 NSWLR 517 quoted in *Mill* (1988) 166 CLR 59 at 64 …

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

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

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

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

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

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

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

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

Objective seriousness findings

The High Court held in *Muldrock v The Queen* (2011) 244 CLR 120 at [27] that "objective seriousness" of a standard non-parole period offence as referred to in s 54A(2) *Crimes (Sentencing Procedure) Act* is to be determined wholly by reference to the offending without reference to matters personal to the offender or class of offenders. But a court is *not* required to assess whether a standard non-parole offence falls in the middle range of objective seriousness: at [25]. There is no "need to classify the objective seriousness of the offending": at [29].

See Special Bulletin 5 as to the position following the enactment of the *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act* 2013. In

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

Requirement to assess objective seriousness remains post-Muldrock

Although the court is not required to assess the objective gravity of a standard non-parole period offence by reference to notional offences in the mid-range of objective seriousness (see s 54A(6)), proper attention should still be paid to the objective seriousness of the particular offence under consideration: *R v Campbell* [2014] NSWCCA 102 at [27]. An assessment of the objective seriousness of an offence is a critical component of the sentencing process and a mere recitation of the facts of an offence will not satisfy the requirements of that process: *R v Van Ryn* [2016] NSWCCA 1 at [133], [134]; *R v Cage* [2006] NSWCCA 304 at [17]. Whilst a sentencing judge is required to identify all the factors relevant to an offence's objective seriousness, a failure to assess where it falls on some hypothetical arithmetical or geometrical continuum of seriousness does not indicate error: *DH v R* [2022] NSWCCA 200 at [33]; [56]; [58]–[60].

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

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

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

Poor treatment of a deceased person's body can be taken into account in homicide cases for the purpose of assessing the seriousness of the offence: *R v Yeo* [2003] NSWSC 315 at [36]; *Knight v R* [2006] NSWCCA 292 at [28]. Examples of aggravating post-offence conduct in murder and manslaughter cases include: infliction of further injury knowing the victim is already dead (*R v Hull* (1969) 90 WN (Pt 1)(NSW) 488 at 492); callous and disrespectful treatment of the body (*Colledge v State of Western Australia* [2007] WASCA 211 at [10] and [15], where the body was left for weeks before being buried with lime to hasten its decomposition); concealing the body (*R v Lowe* [1997] 2 VR 465 at 490, where a deceased child was hidden in a storm-water drain); dumping the body in a remote spot (*R v Von Einem* (1985) 38 SASR 207 at 218); disposing of the deceased's possessions in different locations "to blur the trail" (*Bell v R* [2003] WASCA 216 at [16] and [25]); and incinerating the body

(*R v Schultz* (1997) 68 SASR 377 at 384). In *DPP v England*, the sentencing judge erred by reasoning that acts after death could not amount to aggravating circumstances as the crime of murder was complete upon death: *DPP v England* at [14], [35]. It is not "double-counting" to have regard to post-offence conduct as adding an aggravating dimension to the crime, as well as indicating a lack of remorse: *DPP v England* at [37]; *Bell v R* at [25].

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

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

[10-020] Consistency

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

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

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

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

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

In seeking consistency, while care must be taken, courts (including first instance judges) must have regard to what has been done in other cases: *Hili v The Queen*

(2010) 242 CLR 520 at [53]; *Barbaro v The Queen* (2014) 253 CLR 58 at [40]–[41]; *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1; *R v Nguyen* [2010] NSWCCA 238 at [106]. In *Barbaro v The Queen*, the majority of the High Court said at [41]:

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

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

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

> (1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.
>
> (2) The consistency that is sought is consistency in the application of the relevant legal principles.
>
> (3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts.
>
> (4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.
>
> (5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.
>
> (6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so.
>
> (7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle.

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

The plurality observed that intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as "yardsticks" that may serve to illustrate (although not define) the possible range

available: *The Queen v Pham* at [29]. Further, a court must have regard to such a decision unless the objective or subjective circumstances of the case make it distinguishable, or if the court thinks the outcome is manifestly inadequate or excessive: *The Queen v Pham* at [29].

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

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

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

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

Nevertheless, viewing comparable cases in an overall and broad way can provide some measure of the types of sentences passed in similar (although not identical) circumstances: *R v Smith* [2016] NSWCCA 75 at [73]. In *R v Smith*, the CCA referred to

a first instance District Court decision and a decision of an intermediate appellate court as illustrations of how courts had approached the sentencing task in serious cases of dangerous driving causing death in the past: *R v Smith* at [70]–[71]. In *Hili v The Queen* at [64]–[65], the High Court also made reference to "one or two closely comparable cases" including the first instance decision of *R v Wheatley* (2007) 67 ATR 531.

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

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

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

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

In *King v R* [2015] NSWCCA 99, a murder case, the court held that reliance on four other sentencing judgments as a means of establishing some kind of benchmark against which the reasonableness of the sentence at hand was to be measured, was not particularly helpful. Murder, like manslaughter, is a protean offence and each case depends upon its own facts. Axiomatically, differences in facts and circumstances will often lead to differences in the resulting sentence: *King v R* at [80].

[10-024] Use of sentencing statistics

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

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

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

The Queen v Pham (2015) 256 CLR 550

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

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

Bell and Gageler JJ did not agree with the plurality on this point and held that even if the Court of Appeal misused the table of 32 cases to determine the objective seriousness of the offence it does not demonstrate that presentation of this type of material is impermissible: *The Queen v Pham* at [45]. *Hili v The Queen* and *Barbaro v The Queen* are concerned not only with the consistent application of sentencing principles but also

with reasonable consistency in sentencing outcomes: *The Queen v Pham* at [42], [46]. In *Hili v The Queen*, the court said it is not useful to use statistical material which only refers to the lengths of sentences passed because it says nothing about why sentences were fixed: *The Queen v Pham* at [46].

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

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

CCA statements concerning the use of statistics

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

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

The limited use that should be made of Judicial Commission statistics has been recognised previously: *Ross v R* [2012] NSWCCA 161 at [19]. Statistics do no more than establish the range of sentences imposed, without establishing that the range is the correct range or that the upper or lower limits are the correct upper or lower limits: *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [303]; *Holohan v R* [2012] NSWCCA 105 at [51]. A failure by a court to consider Judicial Commission statistics does not in itself amount to error in the sentencing process: *Lawson v R* [2012] NSWCCA 56 at [13]. Sentencing statistics are a blunt instrument when seeking to establish manifest excess in a sentencing appeal: *Windle v R* [2011] NSWCCA 277 at [62] and an opaque tool for providing insight into a sentencing range in a sentencing appeal: *R v Nikolovska* [2010] NSWCCA 169 at [70]. For many offences, culpability varies over so wide a range that the statistics are of limited utility for a particular case and undue weight should not be given to them: *Fogg v R* [2011] NSWCCA 1 at [59].

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

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

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

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

In *Tweedie v R* [2015] NSWCCA 71 at [45], the court held that the Judicial Commission sentencing statistics, which contained only five cases of the same fraud offence sentenced in the District Court, were of no use at all. Further, there was no utility in comparing the sentences imposed in that case with those imposed in the Local Court where the jurisdictional limit is 20% of the maximum penalty available in the District Court.

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

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

In *Peiris v R*, the court held that the sentencing judge's reliance on sentencing statistics was erroneous. If comparison is to be made for the purposes of establishing a yardstick in a case where the offence can be tried summarily and on indictment, then it should be made with all the data including that obtained from the local and higher courts: *Peiris v R* at [90].

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

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

Aggregate sentences and JIRS statistics

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

Additionally, in *Knight v R*, the applicant was seeking to compare his aggregate non-parole period (for four offences of supply) with the non-parole periods displayed in the statistics — which were non-parole periods referable either to a single s 25(1) offence or a s 25(1) offence which was the principal offence in a multiple offence sentencing exercise where all sentences were ordered to be concurrent: *Knight v R* at [11].

Selecting the statistical variable "multiple offences" was of no real utility where an offender is sentenced for multiple counts of the same offence because "multiple

offences" does not limit the database to multiple instances of the same offence. It includes instances where there was one or more offences of *any type*: *Knight v R* at [7]. *Knight v R* was referred to by Bell and Gageler JJ in *The Queen v Pham* at [49].

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

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

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

[10-026] Enhancements to JIRS statistics

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

The enhancements also facilitate compliance by sentencing courts with proposition (7) in *The Queen v Pham* (2015) 256 CLR 550 at [28] and the principle outlined by the plurality of that case that "intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as 'yardsticks' that may serve to illustrate (although not define) the possible range of sentences available": *The Queen v Pham* at [29].

The JIRS statistics now provides the following additional information:

- registry file number
- a link to a summary of the CCA judgment, the judgment (whether it is a Crown appeal or severity appeal) and where there is a CCA judgment a link to the first instance remarks if they are available

- offence date
- sentence date (either at first instance or the re-sentencing date on appeal)
- the offender's characteristics listed in summary form including: the number of offences (one/any additional offences); whether a Form 1 was taken into account; the offender's prior record, plea, age and the penalty that was imposed
- the precise overall or effective sentence and the overall non-parole period.

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

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

[10-027] Recent changes to JIRS statistics

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

The "View" menu, which provided the "Median" and the "80% Range" options, has been removed from the sentencing statistics viewer for all NSW courts. Constructive feedback from users suggested that those features lacked utility and could be potentially open to misinterpretation. See also the statements concerning the use of medians in sentencing in *Wong v The Queen* (2001) 207 CLR 584 at [66] and *Harper v R* [2017] NSWCCA 159 at [34]. In the latter case, the applicant's submission relied upon an underlying premise that the median represents the sentences impose for the middle range offences. In the absence of providing anything about the facts of the cases, the premise was not accepted.

[10-030] Isolated incidents and offences not charged

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

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

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

Approach to sentencing

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

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

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

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

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

In *Giles v R* [2009] NSWCCA 308 (also referred to in *Einfeld v R* [2010] NSWCCA 87 at [145]), the court re-considered the issue of whether uncharged matters can be taken into account not just to rebut a claim that the incidents were isolated, but also to increase the objective seriousness of the offences charged. The applicant's commission of numerous additional offences similar to those charged was relevant to his state of

mind in committing the offences charged: per Basten JA at [67]. The fact that the charged offences constituted part of an ongoing course of conduct placed them in the higher range of objective seriousness: per Basten JA at [68]. Although Basten JA's reasoning was persuasive, the issue should await determination in an appropriate case: per Johnson J at [102]. There is no basis for qualifying the settled law on the subject: per RS Hulme J at [86].

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

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

[10-040] Premeditation and planning

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

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

The armed robbery guideline in *R v Henry* (above) at [162] refers to the circumstance of a "a limited degree of planning" (see **Robbery** at [20-250]). Planning is also referred to as a factor in the break, enter and steal guideline (see **Break and enter offences** at [17-020] and cases at [17-070]). For fraud offences a distinction has been drawn between offences where there has been planning with a degree of sophistication and those committed on impulse: see *R v Araya* [2005] NSWCCA 283 at [96]; *R v Tadrosse* (2005) 65 NSWLR 740; *Golubovic v R* [2010] NSWCCA 39 at [23]. In such cases, general deterrence is an important factor in sentencing: *R v Pont* (2000) 121 A Crim R 302 at [43].

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

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

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

[10-050] Degree of participation

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

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

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

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

[10-060] Breach of trust

Where an offence involves a breach of trust, the court regards it as a significant aggravating factor. For a breach of trust to exist there must be a special relationship between the victim and offender at the time of offending: *Suleman v R* [2009] NSWCCA 70 at [26]. It is a common feature of many fraud and child sexual assault offences. In the most serious examples these offences are often associated with planning or premeditation and may also involve a course of criminality or periodic criminality that may extend over a lengthy period of time. Generally, persons who occupy a position of trust or authority can expect to be treated severely by the criminal law: *R v Overall* (unrep, 16/12/93, NSWCCA); *R v Hoerler* [2004] NSWCCA 184; *R v Martin* [2005] NSWCCA 190.

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

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

[10-070] Impact on the victim

At common law, the impact of an offence on the victim has always been taken into account. It is a matter relevant to assessing the objective seriousness of the offence. A sentencing judge is entitled to have regard to the harm done to the victim as a consequence of the commission of the crime: *Siganto v The Queen* (1998) 194 CLR 656 at [29]. The court can only have regard to the consequences of an offence that were intended or could reasonably have been foreseen, and the application of s 3A(g) ("harm

done to the victim and community”) and s 21A(2)(g) (“the injury, emotional harm, loss or damage caused by the offence is substantial”) in a given case are limited by the common law rule: *Josefski v R* [2010] NSWCCA 41 at [38]. All other things being equal, the greater the harm, the more serious the circumstances of the offence. Care needs to be taken, however, that in giving consideration to the harmful consequences of an offence, the *De Simoni* principle is not infringed: *De Simoni v The Queen* (1981) 147 CLR 383.

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

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

Age of victim

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

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

[10-080] Possibility of summary disposal

In some circumstances the Supreme or District Court can take into account the fact that the offence or offences before the court could have been disposed of in the Local Court: *R v Palmer* [2005] NSWCCA 349 at [14]–[15]; *Bonwick v R* [2010] NSWCCA 177 at [43]–[45]; *Peiris v R* [2014] NSWCCA 58 at [85]. While it is a matter that may be relevant it is not always the case that a lost chance to be dealt with summarily will be a matter of mitigation: *R v Doan* (2000) 50 NSWLR 115 at [42].

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

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

> [12] It is doubtful whether there is “a rule of law”; if there is, it should be applied, not “taken into account”. However, what was meant was that there is a factor to be taken into account with varying significance in different contexts. Again, the particular nature of the significance is not articulated, except to suggest that it concerns the subjective circumstances of the offender.
>
> [13] To approach the matter on the basis of a presumptive fetter on the exercise of the court’s sentencing discretion implies a power to review the exercise of prosecutorial

> discretion in the selection of jurisdiction. As noted in the joint reasons in *Magaming v The Queen* [(2013) 252 CLR 381 at [20]], "[i]t is well established that it is for the prosecuting authorities, not the courts, to decide who is to be prosecuted and for what offences." To which one might add, and in what court. The court should impose the appropriate sentence for the offence as proved, within the limits of the sentencing court's jurisdiction and discretion.

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

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

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

The court should give consideration as to whether a reduced maximum penalty would apply in the Local Court: *McCullough v R* at [22]–[23]. See penalties set out for specific offences in s 268(2) *Criminal Procedure Act*. Section 268(1A) also provides for a general jurisdictional limit for the Local Court of two years imprisonment. The extent of the criminality is also an important consideration in having regard to the Local Court penalty: *Bonwick v R* at [43]. The principle does not apply if the offence is too serious to be dealt with in the Local Court even though the magistrate may technically have had jurisdiction: *R v Royal* [2003] NSWCCA 275 at [38]; *R v Hanslow* [2004] NSWCCA 163 at [21]. In *Peiris v R* at [84]–[85] after accepting that the principle applied, the judge had regard to the sentencing patterns and statistics of the Local Court for indecent assault. The court did not prohibit such an approach but held that the manner the statistics had been interpreted and used by the judge disclosed a material error: *Peiris v R* at [89].

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

> As explained in *Baines v R*, there has been little explanation in the caselaw as to precisely *how* the possibility that the matter could have been dealt with in the Local Court should

> be taken into account. If, as in the present case, the sentencing judge is satisfied that a term of imprisonment exceeding 2 years is required, the fact that the prosecutor might have taken a different view would not appear to be a relevant consideration.

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

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

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

[10-085] Relevance of less punitive offences

There is no common law principle that a court is required to take into account, as a matter in mitigation, a lesser offence (with a lower maximum penalty) that the prosecution could have proceeded upon: *Elias v The Queen* (2013) 248 CLR 483 at [5], [25]; *Pantazis v The Queen* [2012] VSCA 160 at [43] overruled. The so-called *Liang* principle (*R v Liang and Li* (unrep, 27/7/95, VCA), which permitted such a course, is said to be premised on the idea that the prosecution's selection of the charge should not constrain a court's sentencing discretion and require it to impose a heavier sentence than what is appropriate: *Elias v The Queen* at [26]. It is wrong to suggest that the court is constrained by the maximum penalty: *Elias v The Queen* at [27]. It is one of many factors that the sentencing court takes into account in the exercise of the sentencing discretion designed to attain individualised justice: *Elias v The Queen* at [27]. The *Liang* approach, of reducing a sentence for an offence to take account of a lesser maximum penalty for a different offence, "does not promote consistency" in sentencing for an offence and is inconsistent with the separation of the prosecutorial and judicial functions: *Elias v The Queen* at [29], [33], [34].

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

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Guilty plea

[11-500] Introduction

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

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

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

A "sentencing discount" is a reduction in the otherwise appropriate sentence by a quantifiable amount due to a specific policy consideration — in the case of a guilty plea — a utilitarian benefit: *R v Borkowski* [2009] NSWCCA 102. It is applied after the otherwise appropriate sentence has been determined: at [32]–[33].

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

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

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

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

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

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

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

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

The purpose of s 192(2) is to ensure that, to the knowledge of the court, an accused adequately understands the charge they are pleading to: at [53]. To ensure that an unrepresented accused understands the charges and unequivocally plead to those charges, the court must state the substance of each offence to them and take separate pleas for each: at [59].

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

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

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

[11-505] Setting aside a guilty plea

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

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

An accused seeking to withdraw a guilty plea after conviction must demonstrate a miscarriage of justice has occurred: *R v Boag* (unrep, 1/6/94, NSWCCA); *White v R* [2022] NSWCCA 241 at [58]. The authorities emphasise that the issue is one of the integrity of the plea by reference to the circumstances in which it was entered: *Mao v DPP* [2016] NSWSC 946 at [60] citing *R v Sagiv* (unrep, 30/5/96, NSWCCA); *R v Van* [2002] NSWCCA 148 at [48]–[50] and *Wong v DPP* [2005] NSWSC 129 at [16]; *Brown Brothers v Pittwater Council* (2015) 90 NSWLR 717 at [156]–[163] extensively reviews the case law.

An accused seeking to withdraw a guilty plea before conviction must demonstrate whether the interests of justice require it: *White v R* at [59]–[61], [68]–[69]; *Maxwell v The Queen* (1996) 184 CLR 501 at 531. The "interests of justice" test is broader than the "miscarriage of justice" test and may focus on matters beyond the integrity of the plea, although this will often remain the inquiry's focal point: *White v R* at [65]. Bell CJ, Button and N Adams JJ in *White v R* at [65] set out the following non-exhaustive list of factors affecting the interests of justice [case references and citations omitted].

- the circumstances in which the plea was given;
- the nature and formality of the plea;

- the importance of the role of trial by jury;
- the time between entry of the plea and the application for its withdrawal;
- any prejudice to the Crown from the plea's withdrawal;
- the complexity of the charged offence's elements;
- whether the accused knew all of the relevant facts intended to be relied upon by the Crown;
- the nature and extent of legal advice to the accused before entering the plea;
- the seriousness of the alleged offending and likely penalty;
- the accused's subjective circumstances;
- any intellectual or cognitive impairment suffered by the accused;
- any reason to suppose that the accused was not thoroughly aware of what they were doing;
- any extraneous factors bearing on the plea when made, including threats, fraud or other impropriety;
- any imprudent and inappropriate advice given to the accused affecting their plea;
- the accused's explanation for seeking to withdraw the plea;
- any consequences to victims, witnesses or third parties that might arise from the plea's withdrawal; and
- whether there is a real question about the accused's guilt.

See also Johnson J's summary of the principles in appellate decisions governing an application to withdraw a plea of guilty in *R v Wilkinson (No 4)* [2009] NSWSC 323 at [41]–[48].

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

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

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

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

A guilty plea is a factor to be taken into account in mitigation of a sentence under s 21A(3)(k) of the Act. An offer to plead guilty to a different offence, where the offer is not accepted and the offender is subsequently found guilty of that offence, or a reasonably equivalent offence, is a mitigating factor under s 21A(3)(n). See **Section 21A — aggravating and mitigating factors** at [11-000].

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

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

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

The scheme does not apply to:

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

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

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

Mandatory discounts

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

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

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

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

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

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

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

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

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

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

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

Discounts when plea offer to different offences refused when made

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

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

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

A “negotiations document” is defined in s 25B to include a case conference certificate. In *Ke v R* [2021] NSWCCA 177, the court concluded it was unfair that the applicant’s sentence was discounted by 10%, and not 25%, following her guilty plea in the District Court to an offence of dealing with the proceeds of crime being reckless to

that fact (*Crimes Act* 1900, s 193B(3)). She had offered to plead guilty to that offence before being committed for trial but it had been rejected. Nor was it recorded in the case conference certificate filed on committal as required by s 75 *Criminal Procedure Act* 1986. Bellew J (Adamson J agreeing; see also Brereton JA at [63] to similar effect) held that the phrase "an offer recorded in a negotiations document" in s 25E(2)(a) should be construed as meaning "an offer which was recorded *or which was required to be recorded* in a negotiations document" (emphasis added): at [339]. His Honour said, at [338], that accepting any other interpretation would:

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

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

Not allowing or reducing the discount

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

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

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

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

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

(a) the fact of the guilty plea,

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

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

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

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

Guideline for guilty plea discount

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

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

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

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

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

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

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

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

The R v Borkowski principles

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

1. The discount for the utilitarian value of the pleas will be determined largely by the timing of the plea so that the earlier the plea the greater discount: *Thomson* at [154]; *Forbes* [2005] NSWCCA 377 at [116].
2. Some allowance may be made in determining the discount where the trial would be particularly complicated or lengthy: *Thomson* at [154].
3. The utilitarian discount does not reflect any other consideration arising from the plea, such as saving witnesses from giving evidence but this is relevant to remorse: *Thomson* at [119] to [123]; nor is it affected by post-offending conduct: *Perry* [2006] NSWCCA 351.
4. The utilitarian discount does not take into account the strength of the prosecution case: *Sutton* [2004] NSWCCA 225.
5. There is to be no component in the discount for remorse nor is there to be a separate quantified discount for remorse: *MAK and MSK* [2006] NSWCCA 381; *Kite* [2009] NSWCCA 12 or for the "Ellis discount"; *Lewins* [2007] NSWCCA 189; *S* [2008] NSWCCA 186 [Principle 5 no longer applies: see below].
6. Where there are multiple offences and pleas at different times, the utilitarian value of the plea should be separately considered for each offence: *SY* [2003] NSWCCA 291.
7. There may be offences that are so serious that no discount should be given: *Thomson* at [158]; *Kalache* [2000] NSWCCA 2; where the protection of the public requires a longer sentence: *El-Andouri* [2004] NSWCCA 178.
8. Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced: *Stambolis* [2006] NSWCCA 56; *Giac* [2008] NSWCCA 280.
9. The utilitarian value of a delayed plea is less and consequently the discount is reduced even where there has been a plea bargain: *Dib* [2003] NSWCCA 117; *Ahmad* [2006] NSWCCA 177; or where the offender is waiting to see what charges are ultimately brought by the Crown: *Sullivan and Skillin* [2009] (*sic* [2008]) NSWCCA 296; or the offender has delayed the plea to obtain some forensic advantage: *Stambolis* [2006] NSWCCA 56; *Saad* [2007] NSWCCA 98, such as having matters put on a Form 1: *Chiekh and Hoete* (*sic* Cheikh) [2004] NSWCCA 448.
10. An offer of a plea that is rejected by the Crown but is consistent with a jury verdict after trial can result in a discount even though there is no utilitarian value: *Oinonen* [1999] NSWCCA 310; *Johnson* [2003] NSWCCA 129.
11. The discount can result in a different type of sentence but the resulting sentence should not again be reduced by reason of the discount: *Lo* [2003] NSWCCA 313.
12. The amount of the discount does not depend upon the administrative arrangements or any practice in a particular court or by a particular judge for the management of trials or otherwise.

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

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

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

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

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

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

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

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

Transparency

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

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

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

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

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

Aggregate sentences

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

Willingness to facilitate the course of justice

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

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

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

In *R v Sharma* (2002) 54 NSWLR 300 the court held that the reasoning of the majority in *Cameron v The Queen* concerning the application of general sentencing

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

> The mandatory language of s 22 must be followed whether or not by doing so the court can be seen to "discriminate", in the sense that word was used in the joint judgment in *Cameron* … The court must take the plea into account even if there is *no* subjective intention to facilitate the administration of justice. However, viewed objectively, there will always be *actual*, as distinct from *intended*, facilitation of the administration of justice by reason of "the fact" of the plea. The use of the word "must" and the reference to "the fact" of the plea, strongly suggest that the Parliament was not concerned only with subjective elements. The *actual* facilitation of the administration of justice was to be regarded as relevant by sentencing judges.

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

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

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

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

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

[11-530] Combining the plea with other factors

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

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

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

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

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para

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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] Maintain unlawful sexual relationship with child: s 66EA

Section 66EA(1) *Crimes Act* 1900, in its current form — for offences committed on or after 1 December 2018 — provides an adult who maintains an unlawful sexual relationship with a child is liable to life imprisonment. An "unlawful sexual relationship" is a relationship in which an adult engages in two or more unlawful sexual acts with or towards a child over any period: s 66EA(2). At least one of those acts must have occurred in NSW: s 66EA(3). "Unlawful sexual act" is defined in s 66EA(15) as any act that constitutes, or would constitute, one of the sexual offences listed therein.

For offences committed before 1 December 2018, s 66EA(1) provided that a person who, on three or more occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a "sexual offence", is liable to imprisonment for 25 years. "Sexual offence" is defined to include, inter alia, the offences encompassed by ss 61I–61O *Crimes Act* 1900. McClellan CJ at CL said of the offence in *R v Langbein* [2008] NSWCCA 38 at [115]:

> The offence of persistent sexual abuse contrary to s 66EA carries a maximum prison term of 25 years. It is a more serious offence than the offences which comprise the individual acts.

Different considerations apply when sentencing for a s 66EA offence committed before 1 December 2018, and from 1 December 2018, because of the different wording of each provision and maximum penalty. However, the case law below may provide some guidance when sentencing for an offence committed in either time period.

Fact finding following a guilty verdict

It had been held that if a jury returns a guilty verdict to a s 66EA offence committed before 1 December 2018, the judge must consider which of the foundational offences are established beyond reasonable doubt so as to sentence in accordance with the verdict: *ARS v R* [2011] NSWCCA 266 at [230]. This is consistent with the duty of the judge to determine the facts relevant on sentence: *ARS v R* at [233] citing *R v Isaacs* (1997) 41 NSWLR 374 at 378; *Cheung v The Queen* (2001) 209 CLR 1 at [4]–[8], [161]–[166]. This approach was questioned in *Chiro v The Queen* (2017) 260 CLR 425, where the High Court analysed a materially similar South Australian provision to s 66EA and held that *Cheung v The Queen* did not concern a persistent abuse offence and is not authority for the proposition that questions should not be asked of a jury (as to which of the acts the Crown had proved). Kiefel CJ, Keane and Nettle JJ at [52] said:

> … where a jury returns a verdict of guilty of a charge of persistent sexual exploitation of a child contrary to s 50(1) and the judge does not or cannot get the jury then to identify which of the alleged acts of sexual exploitation the jury found to be proved, the offender will have to be sentenced on the basis most favourable to the offender.

Bell J agreed, at [67], that "the exercise of discretion following the return of a verdict of guilty will usually favour asking the jury to identify those acts which it finds proved". It was not open for the sentencing judge to sentence the appellant on the basis he had committed all the acts charged as such an approach was contrary to the *De Simoni* principle: at [72]. See also the plurality at [44].

However, in *R v RB* [2022] NSWCCA 142, which related to a s 66EA offence committed after 1 December 2018, the court did not apply *Chiro v The Queen* on the basis s 66EA(5)(c) provides that the members of the jury are not required to agree on which unlawful acts constitute the unlawful sexual relationship. Accordingly, the jury must be taken to have made no findings as to which unlawful sexual acts constituted the offence, and a trial judge is required to determine the facts of offending applying the principles established in *The Queen v Olbrich* (1999) 199 CLR 270, *Cheung v The Queen* and *R v Isaacs*: at [43]–[45], [70] (also see [71]–[77] for a further discussion of the sentencing exercise after a jury's guilty verdict).

Assessing the seriousness of an offence

When sentencing an offender for a s 66EA offence committed on or after 1 December 2018, a consideration of the conduct constituting the unlawful sexual acts towards

the child is integral to the assessment of objective seriousness: *GP (a pseudonym) v R* [2021] NSWCCA 180 at [65]. The offence potentially embraces a wide range of circumstances: *Towse v R* [2022] NSWCCA 252 at [13]. A number of factors bear upon an assessment of the objective seriousness of a s 66EA offence as observed in *Burr v R* [2020] NSWCCA 282 (see non-exhaustive list at [106]) and these factors are also relevant when sentencing for a s 66EA offence committed on or after 1 December 2018: *GP (a pseudonym) v R* at [64]; see also *Towse v R* at [26]. Regard should also be had to the maximum penalty of 25 years imprisonment for a s 66EA offence committed before 1 December 2018, and life imprisonment for an offence on or after 1 December 2018.

It is not logical to approach the sentencing task by considering what sentences the individual offences (or unlawful sexual acts for an offence committed on or after 1 December 2018) would have attracted had they been charged as isolated offences: *R v Fitzgerald* (2004) 59 NSWLR 493. There is nothing to suggest Parliament intended sentencing for a course of conduct that had crystallised into a s 66EA conviction to be more harsh than sentencing for the same course of conduct had it crystallised into convictions for a number of representative offences: *R v Manners* [2004] NSWCCA 181 at [21]. Section 66EA is capable of applying to a wide range of conduct constituting sexual offences against children: *R v Manners* at [34].

Where the offences constituting the s 66EA charge are three or more representative charges (that is, they are not isolated incidents but part of a course of conduct), s 66EA does not permit a departure from the common law approach taken to sentencing for representative counts: *ARS v R* at [226]. The court can still sentence on the basis the offences were not isolated incidents but the uncharged offences cannot be used to increase the punishment: *R v Fitzgerald* (2004) 59 NSWLR 493 at [13]; *ARS v R* at [226].

See *Hitchen v R* [2010] NSWCCA 77 for a case where the court accepted the sentencing judge's finding that the criminality of a s 66EA offence committed before 1 December 2018 was found to be in the worst category (as that concept was understood prior to *The Queen v Kilic* (2016) 259 CLR 256; see [10-005] **Cases that attract the maximum**); see also *Hitchen v R* at [11]–[14].

[17-505] Aggravated sexual assault: s 61J

The offence of aggravated sexual assault under s 61J *Crimes Act* 1900 carries a maximum penalty of 20 years with a standard non-parole period of 10 years. The effect of s 61J(2) is to create an offence with a circumstance of aggravation where the victim was:

- under the age of 16 years: s 61J(2)(d)
- under the authority of the offender: s 61J(2)(e).

See for example, *Fisher v R* [2008] NSWCCA 129 (13-year-old victim) and *R v BWS* [2007] NSWCCA 59 (16-year-old victim). In *Rylands v R* [2008] NSWCCA 106, the victim was aged 15 years and 9 months. The offence comprised an act of cunnilingus. The court noted that crimes of this nature are regarded with great seriousness and that general deterrence and retribution require earnest consideration: at [98].

[17-510] Aggravated indecent assault: s 61M

As to the approach to sentencing for indecent assault committed many years earlier, see **Sentencing for offences committed many years earlier** at [17-410] and *PWB v R* [2011] NSWCCA 84.

RS Hulme J said in *BT v R* [2010] NSWCCA 267 at [41]:

> Sentencing for offences under s 61M is difficult because of the absurd relativity between the 7 years maximum term and the very high standard non-parole period of 5 years for a case in the mid-range of objective seriousness. If the proportions envisaged by s 44 of the *Crimes (Sentencing Procedure) Act* were adhered to, such a non-parole period would be appropriate for a head sentence of 6 years and 8 months, a sentence that in accordance with long-standing sentencing principles would be imposed only for an offence falling very close to a worst case of an offence under s 61M.

Prior to *BT v R* the court had described the ratio of the standard non-parole period to maximum penalty for indecent assault as "somewhat curious and inconsistent": *R v Dagwell* [2006] NSWCCA 98 per Howie J at [38].

The *Crimes Amendment (Sexual Offences) Act* 2008 amended s 61M *Crimes Act* 1900 to increase the maximum penalty for an aggravated indecent assault against a child aged under 16 years from 7 to 10 years imprisonment (effective 1 January 2009): s 61M(2).

An offender who commits an aggravated indecent assault against a victim who is under the authority of the offender is liable to 7 years imprisonment: s 61M(1).

Although it is difficult to reconcile, the court must give attention to the standard non-parole period: *Corby v R* [2010] NSWCCA 146 at [71].

The prescription of a standard non-parole period for indecent assault does not displace the principle that the court is to have regard to the fact that the offence could have been disposed of in the Local Court: *Bonwick v R* [2010] NSWCCA 177 at [47]. Davies J said at [48]: "It will have a greater influence in the sentencing as both the objective criminality falls below the mid-range, and as the subjective criminality of the offender assumes more significance".

Worst cases

In *R v Campbell* [2005] NSWCCA 125 at [31], the court held that the sentencing judge was correct in finding that the criminality of the offences committed by the applicant was within the worst category of the range of possible offences for aggravated indecent assault under s 61M(1).

See generally the discussion at [10-005] **Cases that attract the maximum**.

Section 61M(2)

It is of considerable significance when assessing the objective seriousness of indecent assaults against children to consider the actual character of the assault, including the degree of physical contact involved: *R v PGM* [2008] NSWCCA 172 at [31], applying *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]

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 respect of injuries for offences under s 33, subss (1)(a) and (2)(a) relate to wounding and subss (1)(b) and (2)(b) relate to grievous bodily harm.

In *Maybury v R* [2022] NSWCCA 233, the sentencing judge did not err in assessing a s 33(1)(a) offence's objective seriousness by finding the injuries amounted to grievous bodily harm. When sentencing for such an offence, the correct approach involves:

(i) identifying and taking into account the wounding as well as those injuries related to or closely connected with the actions causing them so as to properly inform a determination of the nature and extent of those wounds and their consequences (*Bourke v R* [2010] NSWCCA 22 at [53]; *Adams v R* [2011] NSWCCA 47; *Cao v R* [2020] NSWCCA 223); and

(ii) considering the extent of the grievous bodily harm, if any, in order to properly evaluate the intention to inflict grievous bodily harm element of the offence (*Bourke v R* at [72]): *Maybury v R* at [115].

In this case, the offender was not tried for a s 33(1)(b) offence.

In *R v Williams* [2004] NSWCCA 246, the fact the injury consisted of a single superficial stab wound was taken into account in holding that the lengthy sentence imposed at first instance was not warranted. The wound was not life threatening and did not cause any lasting physical damage: *R v Williams* at [54].

The extent of the injuries may bring an offence into the very serious category. In *R v Mitchell* [2007] NSWCCA 296, the victim suffered a serious brain injury and was reduced to a vegetative state after a brutal attack. Howie J said at [27]:

> A very important aspect of an offence under s 33 is the result of the offender's conduct. The nature of the injury caused to the victim will to a very significant degree determine the seriousness of the offence and the appropriate sentence. This is not to underestimate the intent component of the offence, after all that is the element that makes the offender liable to a maximum penalty of 25 years as opposed to 7 years for a s 35 offence. But

> there is less scope for variation in the nature of the intention to do grievous bodily harm when determining the seriousness of a particular instance of the offence than there is for variation in the nature of the injury inflicted. …

In *R v Kirkland* [2005] NSWCCA 130 and *R v Bobak* [2005] NSWCCA 320 (two offenders jointly involved in maliciously inflict grievous bodily harm with intent), the victim was attacked with a hammer and left with extremely serious physical and mental injuries. Both cases were characterised as at the very upper end of the range of seriousness, while falling short of a worst case: *R v Kirkland* at [36]; *R v Bobak* at [32]. Similarly, in *R v Nolan* [2017] NSWCCA 91, an assault leaving an infant with horrific injuries and permanent brain damage was characterised as being in the "high range" (at [73]) but did not warrant the maximum penalty because of the offender's favourable subjective case (at [67]–[68]).

In *R v Hookey* [2018] NSWCCA 147, an unprovoked road rage case, where the offender alighted his car and stabbed the victim three times with a knife, with no provocation, the court found the objective circumstances of the case were extremely serious and the victim's injuries so serious, only luck prevented his death. Although, in the particular circumstances of that case, the court was satisfied the sentence imposed at first instance was manifestly inadequate, the residual discretion not to intervene was exercised. Rothman J said "if it were not for the subjective circumstances, I could not imagine, given the need for general and specific deterrence in particular, that a sentence lower than 8 years would be appropriate: at [64].

The objective gravity of an offence under s 33 "is not determined merely by considering the injuries": *Vragovic v R* [2007] NSWCCA 46 at [32]. In that case, the circumstances of the offence, including the fact that the victim was a 57-year-old female, attacked with a metal club in her home, and that the assault was premeditated and involved repeated blows, justified the sentencing judge's characterisation of the offence as "near the top of the range of seriousness": *Vragovic v R* at [32]–[34]. Nor must a judge be satisfied beyond reasonable doubt as to precisely how the injury was sustained because it may not be possible for the court to determine the precise mechanism by which the offender injured the victim: *R v Nolan* at [72].

Even where the injuries fall into the lower end of the range of grievous bodily harm, the circumstances in which they were inflicted may still warrant the characterisation of the offence as serious: *R v Testalamuta* [2007] NSWCCA 258 at [31].

An offence may be aggravated by the infliction of an injury that exceeds the minimum necessary to qualify as grievous bodily harm: *R v Chisari* [2006] NSWCCA 19 at [22]; *R v Jenkins* [2006] NSWCCA 412 at [13]; *R v Zoef* [2005] NSWCCA 268 at [123]. Any injury in excess of the bare requirements of grievous bodily harm can be taken into account as a matter of aggravation: *Heron v R* [2006] NSWCCA 215 at [49]. A sentencing judge should not speculate as to what might have occurred had the victim not received medical assistance: *Heron v R* at [49].

Intention

The mental element of an offence under s 33 is the intention that the harm inflicted be grievous bodily harm, differentiating the offence from the less serious offence under s 35: *R v Wiki* (unrep, 13/9/1993, NSWCCA). The degree of harm intended in a particular case may make the absence of premeditation less significant: *R v Zamagias* [2002] NSWCCA 17 at [13]–[14].

The degree of harm intended or foreseen by the offender, as evidenced by the offender's conduct, was considered in *R v Mitchell* [2007] NSWCCA 296. The victim was reduced to a vegetative state following a brutal and sustained attack as he lay unconscious on the ground. Howie J said at [35]:

> The Judge took into account as a mitigating factor that the respondents did not intend the degree of harm that was caused to the victim. That consideration would be understandable in a case where the injury far outweighed what might have been envisaged as the consequence of the behaviour causing it. Such a consideration might be relevant in the case of, for example, a single punch to the face that results in the victim falling to the ground and suffering very grievous injuries as a consequence. But in this case the respondents indulged in … a brutal and sustained attack upon a defenceless person by kicking or stomping on his head and body while he was lying on the ground. The fact that the respondents might not have foreseen that the consequence of such serious conduct was to have left the victim in a vegetative state is of little, if any, weight in my opinion.

Degree of violence

The degree of violence used or the ferocity of the attack is a material consideration on sentence: *R v Zhang* [2004] NSWCCA 358 at [18]. The consequences to the victim are not the only important factor and the acts of the offender which led to those consequences should also be considered: *R v Kirkland* [2005] NSWCCA 130 at [33].

Cases that attract the maximum

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

In *R v Baquayee* [2003] NSWCCA 401, the court held that the combination of the use of a handgun (an aggravating feature) and the severity of the wounds placed the crime in the worst case category. The sentencing judge should have considered imposing the maximum sentence: *R v Baquayee* at [12].

In *R v Stokes and Difford* (1990) 51 A Crim R 25, it was held that the repeated attack on a fine defaulter by prison inmates, rendering the victim a quadriplegic, fell within the worst case category: *R v Stokes and Difford* at 34.

De Simoni considerations

In *R v Pillay* [2006] NSWCCA 402, the offender was acquitted of attempted murder (s 27) and convicted of maliciously wound with intent to inflict grievous bodily harm. The sentencing judge erred in taking into account, as aggravating factors, the pre-meditation and planning of the offence whereby the offender had forced the victim to write a false suicide note. Such factors implicitly ascribed an intention to murder and breached the principle in *De Simoni*: at [16].

In *Maybury v R*, the offender was convicted of a s 33(1)(a) wounding offence and the sentencing judge did not breach the principle in *De Simoni* in assessing the offence's objective seriousness by finding the victim's injuries inflicted in one violent attack amounted to grievous bodily harm. All of the injuries sustained properly informed the nature and extent of the wounds and their consequences, and the intention to inflict grievous bodily harm element of the offence: at [115]–[116], [123]–[124].

Double counting

The actual or threatened use of violence cannot be considered as an aggravating factor of an offence under s 33 as the infliction of actual violence is an element of the offence of malicious wounding: *R v Cramp* [2004] NSWCCA 264 at [53]–[58]; *R v LNT* [2005] NSWCCA 307 at [28]. In *R v Hookey* [2018] NSWCCA 147 the judge erroneously found the "use of a weapon" was an element of the offence under s 33(1)(a). However, if it is taken into account in determining the objective seriousness of the offence, it cannot be counted again as an aggravating feature under *Crimes (Sentencing Procedure) Act* 1999, s 21A(2)(c): *R v Hookey* at [44], [67].

[50-085] Assault causing death: s 25A

Section 25A(1) creates an offence of assault causing death. A person is guilty of such an offence if:

(a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and

(b) the assault is not authorised or excused by law, and

(c) the assault causes the death of the other person.

The maximum penalty for the offence is 20 years imprisonment.

Assault causing death while intoxicated

Section 25A(2) sets out the aggravated form of the s 25A(1) offence. A person aged 18 or above who commits an offence under s 25A(1) when intoxicated commits an offence under s 25A(2).

The maximum penalty for an offence under s 25A(2) is 25 years imprisonment.

Section 25B(1) sets a mandatory minimum sentence of imprisonment of not less than 8 years and further provides that any non-parole period is also required to be not less than 8 years. Section 25B(2) provides that "… nothing in section 21 (or any other provision) of the *Crimes (Sentencing Procedure) Act 1999* or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period)".

Section 25A(3) provides that an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault. Section 25A(4) further provides that it is not necessary for the Crown to prove that the death was reasonably foreseeable for the purposes of the basic or aggravated offence.

[50-090] Use weapon/threaten injury to resist lawful apprehension: s 33B

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].

* "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.
>
> …
>
> … 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.

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